

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**ELMER P. KARL**, Appellant,

v.

**Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS**, Respondent.

Case 68  
No. 67064  
PA(grp)-9

**Decision No. 32297**

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**Appearances:**

**Lawrence Bensky**, Attorney, 10 East Doty Street, Suite 800, Madison, Wisconsin 53703, appearing on behalf of Elmer P. Karl.

**H. Elizabeth Kennebeck**, Assistant Legal Counsel, P. O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the Department of Corrections.

**ORDER DENYING MOTION TO DISMISS**

This matter, which was filed with the Wisconsin Employment Relations Commission (the Commission) based on the Commission's role as the final step in the grievance procedure for unrepresented employees, is the subject of Respondent's motion to dismiss for lack of subject matter jurisdiction. The final date for submitting written arguments was November 12, 2007.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

**FINDINGS OF FACT**<sup>1</sup>

1. Prior to April 2007, Elmer Karl held permanent status in class as a Corrections Field Supervisor, a classification that is not covered by a collective bargaining agreement.

2. By letter dated April 12, 2007, DOC disciplined Mr. Karl by demoting him, effective April 15, 2007. The letter contains a lengthy description of specific alleged misconduct which Karl contends is confidential information. DOC sent a copy of the letter of discipline to Local 2748 of the Wisconsin State Employees Union.

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<sup>1</sup> These findings are made solely for the purpose of ruling on the pending motion.

3. Karl filed a non-contractual grievance with the DOC on May 9, 2007, contending: "Detailed confidential information of a disciplinary action taken against a Non-represented state employee should not have been disclosed to WSEU Local 2748 as I was a Corrections Field Supervisor, a Non-represented employee at the time of the discipline." DOC did not respond to the grievance.

4. Karl initiated the final step of the grievance procedure by filing a letter of appeal to the Commission on June 14, 2007, in which he seeks restoration to a Corrections Field Supervisor position or appropriate comparable position, destruction of all copies of the April 12, 2007 letter of discipline, and reimbursement for fees and costs.

5. Karl also filed a separate appeal with the WERC (No. 66967) contending there was no just cause for the imposition of discipline. That matter is currently scheduled for hearing in February 2008.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

#### CONCLUSIONS OF LAW

1. The Appellant has the burden of establishing that the Commission has subject matter jurisdiction over his appeal.

2. The Appellant has sustained that burden.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

#### ORDER

Respondent's motion to dismiss is denied. The parties will be contacted for the purpose of scheduling a telephone conference relating to further proceedings.

Given under our hands and seal at the City of Madison, Wisconsin, this 19<sup>th</sup> day of December, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

**Department of Corrections (Karl)**

**MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS**

Respondent contends that the subject matter of Mr. Karl's grievance falls outside the scope of Commission's authority in our role as the final step in the State's grievance procedure for employees not covered by a bargaining agreement.

The Commission's authority to hear non-contractual grievances is founded on Sec. 230.45(1)(c), Stats., which provides that the Commission shall "[s]erve as final step arbiter in the state employee grievance procedure established under s. 230.04(14)." According to the latter provision, the Office of State Employment Relations (OSER) "shall establish, by rule, the scope and minimum requirements of a state employee grievance procedure relating to conditions of employment."

The administrative rules promulgated by the Director of OSER, found in Ch. ER 46, Wis. Adm. Code, establish limitations on the scope of the grievance procedure. The rules, in Sec. ER 46.03(1), Wis. Adm. Code, reiterate the requirement that the grievance must relate to conditions of employment:

Under this chapter, an employee may grieve issues which affect his or her conditions of employment, including any matter on which the employee alleges that coercion or retaliation has been practiced against the employee except as provided in sub. (2).

In Sec. ER 46.07(1), Wis. Adm. Code, the Director has established additional limitations on the type of grievances that can be pursued to the final step before the Commission:

If the grievant is dissatisfied with the decision received from the appointing authority . . . at the third step . . . the decision may be grieved to the commission only if it alleges that the employer abused its discretion in applying subch. II of ch. 230, Stats., or the rules of the administrator promulgated under that subchapter, subchs. I and II of ch. 230, Stats., or the rules of the director promulgated under those subchapters, or written agency rules, policies, or procedures . . . .

DOC contends that Karl's grievance does not relate to an action that references conditions of employment and that he has failed to allege that DOC abused its discretion in applying the statutes, administrative rules "or written agency rules, policies, or procedures."

**A. Conditions of employment**

Even though "conditions of employment" is not a phrase that is expressly defined in Ch. 230, Stats., or in the corresponding rules, those rules identify an important context for interpretation. Pursuant to Sec. ER 46.01(1), Wis. Adm. Code, "it is the policy of the state

and responsibility of the director to ensure that an established written grievance procedure relating to conditions of employment is available to state employees who are not covered by a collective bargaining agreement under [the State Employment Labor Relations Act (SELRA)] for the disposition of employee grievances.”

This language makes it clear that when considering what is or is not a condition of employment for purposes of the non-contractual grievance procedure, the Commission should rely on how the phrase has been interpreted under SELRA. There it is used in Sec. 111.91(1)(a), Stats.,<sup>2</sup> as part of the description of mandatory subjects of bargaining and in Sec. 111.93(3),<sup>3</sup> relating to the effect of a bargaining agreement. Case law has clarified that conditions of employment does not include the right to appeal the discharge of a probationary employee<sup>4</sup> or “matters which affect the separate and distinct interests of bargaining units or unions, such as the interest in not losing work to another unit or union.”<sup>5</sup>

We see no reason to consider the topic of the distribution of letters of discipline to be outside the parameters of “conditions of employment.” It is not among the prohibited subjects of bargaining that are listed in Sec. 111.91(2), Stats., nor within the scope of those “management rights” described in Sec. 111.90, Stats. Respondent has failed to supply any analysis that would support an opposite conclusion.

**B. Allegation that DOC abused its discretion in applying the statutes, administrative rules “or written agency rules, policies, or procedures”**

In describing the nature of his claim, Karl contends that “respondent disclosed confidential information about Mr. Karl in violation of its rules”:

[T]he appeal clearly, if implicitly, alleges that the disclosure of confidential information violated a rule. Indeed, it includes with the appeal a copy of the

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<sup>2</sup>The paragraph reads:

Except as provided in pars. (b) to (e), matters subject to collective bargaining to the point of impasse are wage rates, consistent with sub. (2), the assignment and reassignment of classifications to pay ranges, determination of an incumbent’s pay status resulting from position reallocation or reclassification, and pay adjustments upon temporary assignment of classified employees to duties of a higher classification or downward reallocations of a classified employee’s position; fringe benefits consistent with sub. (2); hours and conditions of employment.

<sup>3</sup> The paragraph reads:

Except as provided . . . , if a collective bargaining agreement exists . . . the provisions of that agreement shall supersede the provisions of . . . statutes . . . related to wages, fringe benefits, hours and conditions of employment . . . .

<sup>4</sup> BOARD OF REGENTS V. WISCONSIN PERSONNEL COMMISSION, 103 Wis.2d 545, 558, 309 N.W.2d 366 (1981).

<sup>5</sup> WERC V. WISCONSIN BUILDING TRADES NEGOTIATING COMMITTEE, 2003 WI APP 178, ¶ 28, 266 Wis.2d 512, 530, 669 N.W.2d 499.

April 12, 2007 disciplinary letter that it alleges was improperly disclosed. The disciplinary letter alleges that Mr. Karl violated DOC Work Rule #5, “unauthorized disclosure of confidential information or records.” Construing the appeal liberally – or, for that matter, in any other way – it alleges that the respondent violated one of its own rules.

We agree that this is sufficient to withstand Respondent’s motion to dismiss. It is closely comparable to the allegations raised in *GALLENBECK V. WISCONSIN LOTTERY*, CASE NOS. 92-0116, 0119-PC (PERS. COMM. 6/24/1992). In that matter, the Commission denied the employer’s motion to dismiss where Ms. Gallenbeck contended that her supervisor made two statements that violated the agency’s work rule relating to “Personal Actions and Appearance,” finding that she had alleged an abuse of discretion in applying the agency’s own work rule.

Given all of the above and based upon the information that has been supplied, the grievance falls within the scope of the Commission’s authority relative to the non-contractual grievance procedure, and the Respondent’s motion to dismiss must be denied.

Dated at Madison, Wisconsin, this 19<sup>th</sup> day of December, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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