

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PETER STIEFVATER, Appellant,

v.

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

Case 91
No. 68299
PA(adv)-153

Decision No. 32678

Appearances:

Peter Stiefvater, appearing on his own behalf.

Andrea L. Olmanson, Assistant Legal Counsel, P. O. Box 7925, Madison, WI 53707-7925, appearing on behalf of the Department of Corrections.

ORDER DENYING MOTION FOR FEES AND COSTS

This matter, which arises from the imposition of discipline, is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's "Motion for a Determination of Frivolity and for an Award of Fees and Costs." The final date arguments were received relating to the motion was February 2, 2009. The facts set forth below are undisputed.

Having reviewed the submissions of the parties and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Sometime prior to April of 2008, Appellant attained permanent status in class with the Department of Corrections as a Correctional Sergeant. He was promoted on April 27, 2008 to a Supervising Officer 1 position but was required to successfully complete a one-year probationary period.

2. During that probationary period and by letter dated August 13, 2008, Appellant was informed that he was being removed from his position as Supervising Officer 1 due to a "failure to meet probationary standards." The removal was effective August 16 and he was restored to the position of Correctional Sergeant.

Dec. No. 32678

3. Appellant sent an email on Sunday, September 14, 2008 that he identified as a “Nonrepresented Employee Grievance.” Although a member of the Commission’s staff was copied on the email, the message was directed to two Department of Corrections employees¹ and a third DOC employee was also copied. The message included the following:

Although I have not received the documentation that I have requested regarding the investigation that was requested and conducted by the Administrators at Kettle Moraine Correctional Institution (KMCI) regarding Security Supervisors emails and since I’ve not been granted a time limit extension for filing a grievance, I am filing this grievance now to meet the time limits for non-represented employees grievances as outlined in Wisconsin Administrative Code 46.

Also since I am not sure if this grievance is to be filed directly with WERC per SEC 430.090, I am also [copying] WERC so that if it is that timeframe in filing will also be met.

Appellant contended that various aspects of the process followed by Respondent leading up to his probationary termination and restoration were improper.

4. By letter dated October 13, 2008 from a member of the Commission’s staff, the Appellant was provided 30 days to satisfy the fee requirement for pursuing a claim under Sec. 230.45(1)(c) as a non-contractual grievance. The letter read, in part:

The Commission is processing the [September 14] e-mail as both a direct appeal under 230.44(1)(c), Stats., and as the final step in the non-contractual grievance procedure. No filing fee is required for a 230.44(1)(c) [appeal], but a fee is required for a 230.45(1)(c) submission. This letter relates solely to your 230.45(1)(c), claim.

The Commission must receive within 30 calendar days from the date of this letter either the filing fee of \$50.00 or an executed hardship affidavit. Failure to meet this requirement will result in dismissal of this claim. (Emphasis in original.)

The Commission sent a copy of the letter to Respondent and enclosed a copy of the appeal documents.

¹ The email was initially directed to a Mary Nelson with a Department of Revenue address but it was forwarded to Mary Jo Nelson, the Human Resources Director at Kettle Moraine Correctional Institution.

5. Mary Jo Nelson, the Human Resources Director at KMCI also informed the Appellant on October 13 via email:

I have received the non-represented employee grievance that you submitted by email on September 14, 2008. This is not a grievable matter under Chapter ER 46.03. Therefore, this grievance is not accepted.

6. Respondent filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction with the Commission on October 28. Respondent also contended in the motion that even if the Commission had subject matter jurisdiction, “the grievance portion of Mr. Stiefvater’s e-mail to WERC is untimely.”

7. Appellant did not submit the \$50 filing fee or completed hardship affidavit in response to the Commission’s October 13 letter, so on November 20 a member of the Commission’s staff informed Appellant that his written response to Respondent’s motion to dismiss was due by December 9. Appellant did not file any response to the motion.

8. In an email dated December 17, a member of the Commission’s staff informed the Appellant:

By letter dated October 13, 2008, you were provided a period of 30 days to submit a \$50 filing fee (or hardship affidavit, if appropriate) if you wanted to pursue your non-contractual grievance claim. You did not respond. Respondent also filed a motion to dismiss the matter for lack of subject matter jurisdiction. In other words, Respondent contends that any claim under Sec. 230.44(1)(c), Stats., must be dismissed because the Commission lacks the statutory authority to even consider your appeal. Respondent stated that you lacked permanent status in class at the time your employment as a Supervising Officer 1 was terminated. By email on November 20, I provided you until December 9 to file a written response to the motion. The Commission has not received anything from you.

There is a recent Court of Appeals decision to the effect that a probationary termination and restoration to the employee’s former position does not fall within the scope of the Commission’s authority under Sec. 230.44(1)(c), Stats. Because there is no dispute that you lacked permanent status, it appears that the Respondent’s motion to dismiss is well-founded.

You should assume that the Commission will issue a summary order dismissing your appeal, based on the agreement of the parties that it lacks the authority to hear this matter, unless you file something in writing by December 29, 2008 that provides the Commission with a basis for concluding it has subject matter jurisdiction.

9. On December 22, Respondent filed a “Motion for a Determination of Frivolity and for an Award of Fees and Costs”, citing Sec. 227.483, Stats. Respondent’s counsel filed

an affidavit indicating she spent approximately 3 hours and 25 minutes on the case up to that point, including 1 hour and 10 minutes on the motion for fees. The motion was dated December 17. Appellant was provided an opportunity to respond.

10. In correspondence dated January 7, Appellant indicated that he was withdrawing his appeal. Nevertheless, Respondent declined to withdraw the fee request.

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

CONCLUSIONS OF LAW

1. Respondent has the burden of establishing that this appeal is frivolous and that Respondent is entitled to an award of fees and costs under Sec. 227.483, Stats.

2. The Respondent has failed to sustain that burden.

3. Appellant did not timely submit a filing fee for pursuing a claim under Sec. 230.45(1)(c), Stats.

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

ORDER²

Respondent's motion for fees is denied. Appellant's claim under Sec. 230.44(1)(c), Stats., is dismissed at his request. Appellant's claim under Sec. 230.45(1)(c), Stats., is dismissed without prejudice for the reason specified in Sec. PC 3.02, Wis. Adm. Code.

Given under our hands and seal at the City of Madison, Wisconsin, this 18th day of February, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

² Upon issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

Department of Corrections (Stiefvater)

MEMORANDUM ACCOMPANYING ORDER
DENYING MOTION FOR FEES AND COSTS

The underlying dispute that generated this appeal was the action of the Department of Corrections (Respondent) to terminate Mr. Stiefvater's probationary employment as a Supervising Officer 1 and to restore him to his former position as Correctional Sergeant. The Appellant wishes to withdraw the appeal and have it dismissed at his request, but the Respondent is pursuing a motion for costs and fees under Sec. 227.483, Stats., arguing that claim was frivolously filed. Respondent requests an award of attorney fees for 3 hours and 25 minutes at the hourly wage of the staff attorney who handled the matter.

Pursuant to Sec. 227.483, Stats.:

(1) If a hearing examiner finds, at any time during the proceeding, that an administrative hearing commenced or continued by a petitioner or a claim or defense used by a party is frivolous, the hearing examiner shall award the successful party the costs and reasonable attorney fees that are directly attributable to responding to the frivolous petition, claim, or defense. . . .

(3) To find a petition for a hearing or a claim or defense to be frivolous under sub. (1), the hearing examiner must find at least one of the following:

(a) That the petition, claim or defense was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) That the party or the party's attorney knew, or should have known, that the petition, claim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

The appeal reached the Commission as a consequence of our authority to review certain personnel actions involving State civil service employees. Appellant submitted a grievance for non-represented employees to his employer, the Department of Corrections. He also sent a copy of the same document to a member of the Commission's staff because he was unsure whether it was to be filed directly with the WERC in light of the Commission's role as the final step in the grievance procedure for non-represented employees:³

Also since I am not sure if this grievance is to be filed directly with WERC per SEC 430.090, I am also [copying] WERC so that if it is that timeframe in filing will also be met.

Even though the Appellant had *only* denominated the document as a grievance, the Commission followed its normal practice of interpreting a filing from a pro se litigant broadly

³ Pursuant to Sec. 230.45(1)(c), Stats., the Commission is to "[s]erve as final step arbiter in the state employee grievance procedure established under s. 230.04(14)."

in terms of any potential jurisdiction. Consequently, *the Commission* also construed it as an appeal under Sec. 230.44(1)(c), Stats., which provides:

If an employee has permanent status in class . . . the employee may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.

There is a filing fee of \$50 for appeals of grievances to the Commission, but Appellant did not submit any payment with his filing on September 14. The Commission “may take no action to resolve an appeal for which the payment of a fee is required until the commission receives the fee. . .” except to issue a letter to the appellant that notifies him/her of the fee requirement and provides an additional 30 days to comply with it.⁴

The Commission issued a “no fee” letter to the Appellant on October 13. The same letter informed Appellant (and Respondent) that the Commission was also construing the appeal letter as a claim under Sec. 230.44(1)(c), Stats., which is not subject to a fee requirement. Two weeks later, despite no indication that Appellant would submit the fee in order to pursue the dispute at the final step in the grievance procedure under Sec. 230.45(1)(c), Stats., the Respondent filed a motion to dismiss for lack of subject matter jurisdiction, contending that the “termination from a period of promotional probation” was outside of the Commission’s subject matter jurisdiction and that the grievance did not reach the Commission timely.

Appellant never submitted the filing fee and never even responded to the Respondent’s jurisdictional objection until January 7, 2009. At that time, he filed a request to withdraw his appeal. Before the Commission could address the question of subject matter jurisdiction and before the Appellant filed his written request to withdraw, the Respondent filed its request for costs and fees under Sec. 227.483, Stats.⁵ For Respondent to prevail on its motion, the Commission would have to conclude either that Appellant filed/continued his appeal in bad faith “solely for purposes of harassing or maliciously injuring another,” or that Appellant knew or should have known that the appeal “was without any reasonable basis in law . . . and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.” Even then, the Respondent would only be entitled to costs and reasonable attorney fees that are directly attributable to responding to the frivolous claim.

⁴ Sec. PC 3.02(2), Wis. Adm. Code.

⁵ Respondent refers to REED V. HEISER FORD, ERD CASE NO. 200504107 (LIRC, 12/7/2007) as authority for the conclusion that a request under Sec. 227.483, Stats., will survive an appellant’s request to withdraw the underlying complaint. The ruling in REED includes a citation to a footnote in NORTHWEST WHOLESALE LUMBER V. ANDERSON, 191 WIS. 2D 278, 289, N. 7, 528 N.W.2D 502 (CT. APP. 1995), in which the Court of Appeals cited with approval the following language from COOTER & GELL V. HARTMARX CORP 496 U.S. 384 (1990) relating to a motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure: “If a litigant could purge his violation of Rule 11 merely by taking a dismissal, he [or she] would lose all incentive to ‘stop, think and investigate more carefully before serving and filing papers.’” Given our conclusion as to the merits of Respondent’s request for fees under Sec. 227.483, Stats., we simply assume, arguendo, that the fee request is still pending despite Appellant’s request to withdraw and despite the effect of Sec. PC 3.02, Wis. Adm. Code, referenced elsewhere in this ruling.

We do not believe that given the circumstances, the Appellant can be viewed as having even made a claim under Sec. 230.44(1)(c), Stats., i.e. as a direct appeal of one of a list of disciplinary actions that was taken without just cause. Mr. Stiefvater did not reference this statutory provision in his appeal materials and even after the Commission identified it for him,⁶ he never took any substantive action to pursue such a claim. His only action thereafter was to ask to withdraw his appeal. Therefore, none of Appellant's conduct relative to any Sec. 230.44(1)(c), Stats., claim could be construed as frivolous.

In contrast, there can be no question that Appellant intended for his email dated September 14 to be treated by the Commission as a grievance filed at the final step in the procedure for non-represented employees, pursuant to the Commission's jurisdiction under Sec. 230.45(1)(c), Stats.⁷ However, without even addressing the question of whether the claim satisfies either Sec. 227.483(3)(a) or (b), Stats., we find that the Respondent is not entitled to fees.

The Commission, rather than the appellant, is responsible for notifying the respondent of a new appeal by serving them with a copy. Sec. PC 3.04, Wis. Adm. Code. The Commission complied with this requirement by mailing Respondent a copy of the October 13 "no fee" letter to Mr. Stiefvater and enclosing a copy of the appeal documents. This mailing also provided both parties with the case number the Commission had assigned to the appeal. Shortly after October 13, Respondent was on notice that the final step grievance would be dismissed *unless* the Appellant paid the filing fee within 30 days: "Failure to meet [the filing fee] requirement [within 30 calendar days from the date of this letter] will result in dismissal of this claim." Appellant never did pay the fee, so dismissal was mandated by Sec. PC 3.02(6), Wis. Adm. Code. Respondent never had cause to file a motion to dismiss the grievance for an additional reason. As a result, Respondent did not act reasonably in filing a motion to dismiss the claim or, consequently, in pursuing a motion under Sec. 227.483 relative to Appellant's claim under Sec. 230.45(1)(c), Stats. There were no "*reasonable* attorney fees" generated by the grievance because Respondent's motions were premature and, consequently, unnecessary.

⁶ The vast majority of appellants who file cases with the Commission under Sec. 230.45, Stats., appear pro se. Appellants are frequently unfamiliar with the relevant statutes and associated administrative rules. The Commission's rules only require that appeals "be in writing" and "identify the appellant." Otherwise there are no technical requirements in terms of the form or content of an appeal. Sec. 3.03(1), Wis. Adm. Code. UW (KARRE) DEC. NO. 32655 (WERC, 1/2009) is another recent case in which the appeal document that was identified on its face as a grievance was nevertheless processed by the Commission under a provision other than Sec. 230.45(1)(c), Stats. Ms. Karre completed a "Nonrepresented Employee Grievance Report" and submitted it to the Commission in order to obtain review of her discharge. The Commission considered the submission to be an appeal under Sec. 230.44(1)(c), Stats., and consequently made no request for the fee that would be required to process the matter under Sec. 230.45(1)(c), Stats. Later, before the Commission ruled on a timeliness objection, Ms. Karre confirmed she was not pursuing the matter as a grievance and the timeliness issue was considered solely in the context of a direct appeal of a disciplinary action.

⁷ We read the appeal materials as a request by Appellant to invoke the Commission's jurisdiction under Sec. 230.45(1)(c), Stats., to the extent it was available to him.

The Respondent is not entitled to fees under Sec. 227.483, Stats., because the Appellant never pursued a claim under Sec. 230.44(1)(c), Stats., and because the Appellant failed to timely submit payment of the filing fee for a claim under Sec. 230.45(1)(c), Stats. Without the fee and without action by Respondent, the Commission was required to dismiss the Sec. 230.45(1)(c), Stats., claim. Therefore, the matter is dismissed.

Dated at Madison, Wisconsin, this 18th day of February, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner