

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**ALFREDO Q. GARCIA**, Appellant,

v.

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

Case 112  
No. 69110  
PA(adv)-171

**Decision No. 32890**

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**Appearances:**

**Alfredo Q. Garcia**, appearing on his own behalf.

**Terri A. Rees**, Paralegal, Department of Corrections, P.O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the Department of Corrections.

**ORDER GRANTING MOTION TO DISMISS**

This matter, which arises from the imposition of discipline, is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss the appeal for lack of subject matter jurisdiction. The final date for submitting written arguments was October 9, 2009.

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

**FINDINGS OF FACT**

1. Alfredo Q. Garcia, the Appellant, was employed by Respondent as a Supervising Youth Counselor in the Division of Juvenile Corrections, Southern Oaks Girls School, at the time of the events set forth in these findings.

2. Respondent prepared a letter of reprimand addressed to Mr. Garcia, dated July 27, 2009. The letter described alleged conduct for which he was receiving the written reprimand and provided, in part:

If you believe this action was not taken for just cause, you may appeal to the Wisconsin Employment Relations Commission as provided in 230.44(1)(c), Wis. Stats.

3. In an email<sup>1</sup> from the Appellant received by the Commission no later than August 10, 2009, the Appellant stated, in part, "I wish to appeal a disciplinary letter of reprimand from my superintendent."

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<sup>1</sup> Solely for the purpose of deciding the Respondent's motion to dismiss, the Commission assumes that receipt of the email constituted filing an appeal.

4. Respondent prepared a letter to Appellant, dated September 3, 2009, which states, in part:

The final paragraph in the letter of reprimand contained erroneous information in that your appeal rights as a non-represented employee would be to file a non-represented employee grievance pursuant to Ch. ER 46, Wis. Adm. Code. Due to the error contained in the letter of reprimand, we have forwarded your appeal to the SOGS Human Resources Department who will process your appeal as a first step non-represented employee grievance.

Appellant later acknowledged that a grievance hearing had been scheduled.

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 not sustained that burden.

3. The Commission lacks subject matter jurisdiction over this matter.

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

**ORDER**<sup>2</sup>

This matter is dismissed for lack of subject matter jurisdiction.

Given under our hands and seal at the City of Madison, Wisconsin, this 26<sup>th</sup> day of October, 2009.

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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<sup>2</sup> 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 (Garcia)

**MEMORANDUM ACCOMPANYING  
ORDER GRANTING MOTION TO DISMISS**

The sole issue before the Commission is whether it has subject matter jurisdiction over Mr. Garcia's appeal.

Appellant has the burden of establishing the Commission's subject matter jurisdiction. *LAWRY V. DP, CASE NO. 79-26-PC (PERS. COMM. 7/31/79)*. The court of appeals has described the subject matter jurisdiction of administrative agencies as follows:

Subject matter jurisdiction, in general, is the power of a tribunal to treat a certain subject matter in general. . . . [T]he subject matter jurisdiction of administrative agencies – that is, their authority to hear certain subject matters in general – is conferred and specified by statute. *See State v. DILHR, 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977)* (powers of an administrative agency are limited to those expressly authorized or fairly implied by the statute under which it operates). . . . Statutes such as Wis. Stat. §§ 230.44(1) and 230.45(1), which establish the nature of the matters an administrative agency is authorized to hear, define subject matter jurisdiction . . .

*STERN V. WERC, 2006 WI APP 193, ¶ 24, 296 WIS. 2D 306, 324-325, 722 N.W.2D 594, 603 (FOOTNOTE OMITTED)*.

The Commission's authority to review various civil service personnel actions arises from Sec. 230.44 and .45, Stats. Section 230.45(1)(a), Stats., provides in relevant part that the Commission shall "[c]onduct hearings on appeals under s. 230.44." Section 230.44(1), Stats., expressly identifies the kinds of "actions appealable to the commission under s. 230.45(1)(a)" as "a demotion, layoff, suspension, discharge or reduction in base pay . . . if the appeal alleges that the decision was not based on just cause." Because a written reprimand is not expressly identified as an appealable action under Sec. 230.44(1), Stats., the Commission cannot hear the appeal of such an action, unless the statute "fairly implie[s]" its authority to do so. *STERN, 2006 WI APP 193, ¶ 24*.

In making this jurisdictional determination, the Commission is mindful that "[a]ny reasonable doubt as to the existence of an implied power of an administrative agency should be resolved against the exercise of such authority." *TATUM V. LIRC, 132 WIS. 2D 411, 421, 392 N.W.2D 840, 844 (CT. APP. 1986)*. Here, none of the actions directly appealable to the Commission, as expressly identified in Sec. 230.44(1), Stats., implies that the Commission has authority to hear appeals of written reprimands. To the contrary, an established canon of statutory construction, *expressio unius est exclusio alterius*, and prior Commission decisions applying this canon, instruct otherwise.

*Expressio Unius Est Exclusio Alterius*

Even assuming, for the sake of argument, that there was ambiguity in the statutory language, the Commission is

. . . guided by a well-established principle of statutory construction: *expressio unius est exclusio alterius* or, in other words, the express mention of one matter excludes other similar matters not mentioned.

PERRA V. MENOMONEE MUT. INS. CO., 2000 WI APP 215, ¶ 12, 239 WIS. 2D 26, 34, 619 N.W.2D 123, 127 (CITATION OMITTED). Section 230.44(1), Stats., enumerates specific, alternative disciplinary actions directly appealable to the Commission. Had the legislature wished to include written reprimands in this list of alternatives, it could have done so by express inclusion, or by replacing the list of specific alternatives with language general enough to include written reprimands.

Prior Commission Decisions

Prior Commission decisions have applied this canon of statutory construction to reach the same conclusion. In WISCONSIN DEPARTMENT OF REVENUE (JACKSON-WARD), DEC. NO. 32471 (WERC, 7/08), for example, the Commission reasoned:

Pursuant to Sec. 230.44(1)(c), Stats., the Commission has the authority to review various disciplinary actions imposed on State civil service employees who have permanent status in class and whose positions are not covered by a collective bargaining agreement. . . . Reprimands are not one of the types of discipline that are specifically listed within the paragraph, which indicates that the legislature intended for reprimands to be excluded. ANAND V. DHSS, CASE NO. 81-438-PC (PERS. COMM. 1/8/1982). As a consequence, the Commission lacks subject matter jurisdiction to review the written reprimand that DOR issued to Jackson-Ward on March 30, 2007. . . .

The Commission's reasoning in JACKSON-WARD applies with equal force here.

The fact that Respondent erroneously apprised Appellant he could "appeal to the Wisconsin Employment Relations Commission as provided in 230.44(1)(c)" cannot somehow confer subject matter jurisdiction on the Commission. SEE TENSFELDT V. HABERMAN, 2009 WI 77, ¶ 124, \_\_\_ WIS. 2D \_\_\_, 768 N.W.2D 641, 665 (noting that parties cannot create subject matter jurisdiction by waiver, consent or the application of estoppel); BIALK V. CITY OF OAK CREEK, 98 WIS. 2D 469, 473, 297 N.W.2D 43, 45 (CT. APP. 1980).

Appellant has not met his burden to establish the Commission's subject matter jurisdiction over his appeal of Respondent's letter of reprimand. Accordingly, his appeal is dismissed.<sup>3</sup>

Dated at Madison, Wisconsin, this 26<sup>th</sup> day of October, 2009.

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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<sup>3</sup> Because it now appears that the Respondent is providing review of the written reprimand via the grievance procedure established in Ch. ER 46, Wis. Adm. Code, we point out the following language in that chapter:

If the grievant is dissatisfied with the decision received from the appointing authority or designee at the third step . . . , the decision may be grieved to the commission . . . , *except that decisions involving the following personnel transactions may not be grieved to the commission:*

(a) *A written reprimand . . .*

Sec. ER 46.07(1)(a), Wis. Adm. Code (emphasis added). In *KOREMENOS V. DOC*, CASE NO. 01-0046-PC (PERS. COMM. 8/27/01), the appellant was seeking review of a written reprimand. In its discussion, the Commission noted: "Even if appellant had sought to appeal a 3d step non-contractual grievance decision to the Commission pursuant to §230.45(1)(c), Stats., such an appeal would be precluded by the language of §ER 46.07(1), Wis. Adm. Code."