

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KATHERINE DISTERHAFT, Appellant

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Respondent

Case 16
No. 69183
PA(adv)-173

Decision No. 32962

Appearances:

Katherine Disterhaft, appearing on her own behalf.

Kathleen Strasbaugh, Attorney, Wisconsin Department of Natural Resources, Bureau of Legal Services, P.O. Box 7921, 101 South Webster Street, Madison, Wisconsin, 53707-7921, appearing on behalf of the Respondent.

ORDER DISMISSING APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION

This matter is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss the appeal due to lack of subject matter jurisdiction. The final date for submitting written arguments was November 9, 2009. Solely for the purpose of ruling on the motion and as reflected in the Findings of Fact, the Commission has liberally construed any information set forth in the Appellant's submissions. The format of the Commission's decision is prescribed, in part, by Sec. 227.47(1), Stats.

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

FINDINGS OF FACT

1. Prior to the personnel action that is the subject of this appeal, the Appellant served in two limited term appointments with the Department of Natural Resources (Respondent or DNR).
2. No later than September 10, 2009, Respondent terminated that employment.
3. On September 10, 2009, the Commission received, via facsimile, an appeal of Respondent's action.

No. 32962

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

CONCLUSIONS OF LAW

1. Appellant has the burden of establishing that the Commission has subject matter jurisdiction over her appeal.
2. Based on the uncontested facts drawn from a liberal reading of Appellant's written submissions, Appellant has failed to sustain that burden.
3. The Commission lacks subject matter jurisdiction over this appeal.

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

ORDER¹

Respondent's motion is granted and this appeal is dismissed for lack of subject matter jurisdiction.

Given under our hands and seal at the City of Madison, Wisconsin, this 10th day of February, 2010.

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

¹ 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 Natural Resources (Disterhaft)

MEMORANDUM ACCOMPANYING ORDER DISMISSING APPEAL

Respondent has moved the Commission to dismiss the appeal for lack of subject matter jurisdiction. The issue is whether the Commission has subject matter jurisdiction to decide an appeal contesting the actions leading up to the termination of Ms. Disterhaft's limited term appointment as well as to the termination itself.

The Appellant carries the burden of establishing that the Commission has subject matter jurisdiction over her appeal. WISCONSIN DEPARTMENT OF CORRECTIONS (GARCIA), DEC. No. 32890 (WERC 10/26/2009). To meet that burden, Appellant must show that her appeal falls within the scope of the Commission's jurisdiction as established by the legislature when it enacted Sec. 230.44(1), Stats., and 230.45(1), Stats. Section 230.45(1)(a), Stats., authorizes the Commission to hear and decide appeals that arise under Sec. 230.44(1), Stats. The Commission does not have the authority to exceed the jurisdictional limits placed on it by statute.

Although not cited by the Appellant, the Commission's jurisdiction to consider appeals related to termination is found in Sec. 230.44(1)(c), Stats.:

(c) Demotion, layoff, suspension or discharge. If an employee has *permanent status in class*, or an employee has served with the state as an assistant district attorney for a continuous period of 12 months or more, 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. (Emphasis added.)

By the statute's express terms, the Commission's jurisdiction to hear appeals related to termination is restricted to those employees with permanent status in class. Although this language is clear, Sec. 230.26(4), Stats., the law that provides for limited term appointments, further clarifies that limited term employees do not carry permanent status:

[Employees serving limited term appointments] *may not be considered permanent employees and do not qualify for tenure*, vacation, paid holidays, sick leave, performance awards, or the right to compete in promotional examinations. (Emphasis added).

In addition to the clear and unambiguous statutory language excluding those serving limited term appointments from the permanent classified State workforce, the Commission and its predecessor, the Personnel Commission, have long held that they do not have jurisdiction over appeals related to hiring and firing of employees serving limited term appointments. TERZICH V. DOT, CASE NO. 77-31 (PERS. COMM. 11/1/1978); DEPARTMENT OF HEALTH AND FAMILY SERVICES (BEDYNEK-STUMM), DEC. NO. 31099-A (WERC 1/11/05).

It is undisputed that Ms. Disterhaft worked for Respondent as a limited term employee and did not carry permanent status in class. Therefore the Commission lacks jurisdiction to review Respondent's decision to terminate her.

Ms. Disterhaft states that the “main reason” for her appeal is to challenge the actions taken by the Respondent leading up to her termination. These procedures are not described in much detail by either party. However, this lack of detail is of no consequence in deciding the motion to dismiss. The Commission lacks jurisdiction to review the actions regardless of their nature. Ms. Disterhaft cites no statutory authority that would even arguably establish the Commission’s jurisdiction to review the pre-termination actions and the Commission finds that such authority does not exist.²

Given the absence of any information to the contrary, the Commission must conclude that Ms. Disterhaft served in limited term appointments with the Respondent. There are no other provisions in either Sec. 230.44(1) Stats., or Sec. 230.45(1) Stats., that arguably relate to the subject of this appeal. As such, the Commission lacks subject matter jurisdiction to hear this appeal as it concerns Ms. Disterhaft’s termination from employment as a limited term employee as well as to the Respondent’s pre-termination actions.

The appeal must be dismissed for lack of subject matter jurisdiction.

Dated at Madison, Wisconsin this 10th day of February, 2010.

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 In her letter of appeal, Ms. Disterhaft cites to “section 430.030” to establish the Commission’s jurisdiction over her appeal. This appears to be a cite to the Wisconsin State Employee Handbook which contains chapter 430 allowing non-represented permanent and project employees the right to internally grieve certain employment actions. The Handbook does not confer jurisdiction upon the Commission to hear this appeal. The grievance procedure is only available to non-represented permanent and project employees. Also, Sec. 430.040 of the Handbook’s grievance procedure specifically excludes grievances related to “termination of limited term employees.” Chapter 430 of the Handbook can be found at <http://oser.state.wi.us/docview.asp?docid=1484>. Further, Sec. ER 46.02(2), Wis. Adm. Code, the regulation that allows certain employees to grieve certain employment actions, does not permit limited term employees to file grievances.

Ms. Disterhaft also cites Sec. 230.215, Stats., which provides for the establishment of flexible-time employment schedules and permanent part-time employment. However, this statute does not independently confer jurisdiction upon the Commission.

