

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**BERLYE S. MIDDLETON**, Appellant,

v.

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

Case 118  
No. 69783  
PA(adv)-184

**Decision No. 33116**

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**Appearances**

**Stephen L. Weld**, Attorney, Weld, Riley, Prens & Ricci, S.C., 3624 Oakwood Hills Pkwy., P.O. Box 1030, Eau Claire, Wisconsin, 54702-1030, appearing on behalf of the Appellant.

**Jonathan Nitti**, Attorney, 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 June 11, 2010.<sup>1</sup> Solely for the purpose of ruling on this motion in a manner that conforms with the requirements of Sec. 227.47(1), Stats., the Commission has rendered the following Findings of Fact that are based upon what appears to be uncontested matters as well as a liberal construction of the information set forth in the Appellant's submissions.

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<sup>1</sup> The Commission was copied on two subsequent letters from Appellant's counsel, dated July 9 and July 27, 2010, but both letters related a second disciplinary action taken against the Appellant. That action is not the subject of this appeal.

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

**FINDINGS OF FACT**

1. Berlye S. Middleton, the Appellant, was employed by Respondent as a Corrections Program Supervisor at the Chippewa Valley Correctional Treatment Facility (Chippewa Valley) at the time of the events set forth in these findings.

2. Respondent prepared a letter of reprimand addressed to Mr. Middleton and signed by Warden Pamela J. Wallace, dated March 11, 2010, relating to an alleged incident on January 20, 2010.

3. The March 11 letter of reprimand stated in part:

If you believe this action was not taken for just cause, you may file a written appeal with the Wisconsin Employment Relations Commission . . . as provided in Wisconsin Statutes – 230.44(1)(c).

4. Appellant's counsel sent via email a letter of appeal on behalf of Appellant, which was received by the Commission no later than April 12, 2010. The letter of appeal stated in part:

Pursuant to § 230.44, Wisconsin Statutes, we are, on behalf of Berlye Middleton, appealing the attached written reprimand issued to Mr. Middleton by Warden Wallace at the Chippewa Valley Correctional Treatment Facility. That decision was issued without just cause. The Facility failed to follow its own progressive disciplinary policies and is retaliating against its only black employee for his prior criticism of management.

Attached to the letter of appeal was a copy of Warden Wallace's March 11 letter of reprimand.

5. Respondent prepared a letter addressed to Mr. Middleton and signed by Warden Wallace, dated April 16, 2010. The letter stated in part:

I am in receipt of a copy of your appeal filed with the Wisconsin Employment Relations Commission (WERC) relating to your written reprimand dated March 11, 2010. The final paragraph in the written 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. I have enclosed an amended written reprimand.

Due to the error contained in the written reprimand, your appeal will be processed as a timely filed first step grievance per 430.080 Grievance Submittal and Response Time of the Wisconsin Human Resources Handbook. Enclosed is a copy of Chapter 430 of the Wisconsin Human Resources Handbook, Grievance Procedures for Non-represented Classified Employees.

6. The “amended written reprimand” referenced in the April 16 letter mirrors the March 11 letter of reprimand, except that the paragraph in the March 11 letter apprising Appellant of his appeal rights (quoted in Finding 3 above) was replaced by the following paragraph in the amended reprimand:

If you feel that this action was not taken for just cause, you may appeal the decision through the grievance procedure under section ER 46.06, Wis. Adm. Code.

7. Also enclosed with the April 16 letter signed by Warden Wallace was a form signed by the Warden entitled, “NONREPRESENTED EMPLOYEE GRIEVANCE REPORT”, which stated in part: “Grievance denied. No procedural error. Progressive discipline was followed.”

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 8<sup>th</sup> day of September, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Commissioner Paul Gordon did not participate in the consideration of this matter.

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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 (Middleton)**

**MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS**

This matter is a State civil service appeal that seeks to invoke the Commission's authority under Sec. 230.45(1), Stats. The issue before the Commission is whether it has subject matter jurisdiction over Mr. Middleton's appeal of Respondent's amended letter of reprimand, dated April 16, 2010.<sup>3</sup>

The basis of Mr. Middleton's appeal is set forth in his April 12, 2010, letter of appeal and his June 1, 2010, response to Respondent's motion to dismiss. His April 12 letter of appeal alleges that Chippewa Valley issued the written reprimand 1) without just cause, 2) without following its progressive disciplinary policies, and 3) in retaliation against its only black employee for his prior criticism of management. Appellant's June 1, 2010, response to Respondent's motion to dismiss, moreover, claims that 1) Respondent must remove the letter of reprimand from his personnel file, because after issuing the April 16 amended letter of reprimand, Warden Wallace failed to meet with the grievant, as required by Sec. 430.080 of the Wisconsin Human Resources Handbook; and 2) Appellant is entitled to recover the attorney fees he incurred as a result of Respondent's incorrect advice that he could appeal the reprimand to the WERC.

When analyzing the issue of subject matter jurisdiction, the Commission first distinguishes the action subject to this appeal, a written reprimand, from the three reasons noted in the April 12 letter of appeal for which the Appellant asserts the reprimand was issued inappropriately. If the Commission lacks subject matter jurisdiction to review the reprimand, then it necessarily lacks jurisdiction to review the reasons for which the reprimand was asserted to be inappropriate, whether those reasons were identified in his April 12 letter of appeal or in his June 1 response to the motion to dismiss.<sup>4</sup>

The dispositive issue before the Commission is whether it has authority to review a written reprimand. It does not. The Commission previously addressed and resolved that issue based on analogous facts in DOC (GARCIA), DEC. NO. 32890 (WERC, 10/09). GARCIA, like the present appeal, involved a written reprimand issued by Respondent DOC; an inaccurate notice in the letter of reprimand of Mr. Garcia's right to appeal under Sec. 230.44(1)(c),

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<sup>3</sup> The conduct on which the original March 11 reprimand was based is identical to that referenced in the April 16 amended reprimand.

<sup>4</sup> In his June 1 response to the motion, Appellant also suggests that Respondent's April 16 decision as part of the non-contractual grievance procedure was incorrect. That contention relates to a personnel action (denying the grievance without meeting with the grievant) that is not the subject of the present appeal.

Stats.; his appeal of the written reprimand; and Respondent's subsequent notice to the Appellant that it had provided erroneous information regarding Mr. Garcia's appeal rights and that his appeal therefore would be processed as a first-step, non-represented employee grievance under Ch. ER 46, Wis. Adm. Code. Because GARCIA is factually on all fours with the present appeal, the Commission need not reiterate, and instead incorporates by reference, the reasoning set forth in that decision and concludes it lacks subject matter jurisdiction over Mr. Middleton's appeal.

Appellant's request for attorneys fees arises from the (incorrect) statement in the letter of reprimand that he could appeal the reprimand to the Commission. Under the circumstances set forth in Sec. 227.483, Stats., the Commission may award "costs and reasonable attorneys fees that are directly attributable to responding to [a] frivolous petition, claim, or defense." The conduct underlying the Appellant's fee request was an inaccurate notice that preceded the appeal, rather than a "petition, claim, or defense" as those terms are used in Sec. 227.483, Stats. Appellant's request does not relate to the type of conduct covered by the statute, so there is no need to reach the question of whether the other aspects of Sec. 227.483, Stats., are satisfied, or whether the determination of Respondent's jurisdictional objection pre-empts consideration of the fee request.

Accordingly, Mr. Middleton's appeal must be, and is, dismissed.

Dated at Madison, Wisconsin this 8<sup>th</sup> day of September, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner