

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PATRICIA WEBER, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF FINANCIAL INSTITUTIONS, Respondent.

Case 4
No. 69996
PA(adv)-188

Decision No. 33147

Case 5
No. 70064
PA(adv)-190

Decision No. 33148

Appearances:

Todd Hunter, Attorney, Todd Hunter Law Office, 115 West Main Street, 2nd Floor, Madison, Wisconsin 53703, appearing on behalf of Patricia Weber.

Christopher N. Green, General Counsel, State of Wisconsin, Department of Financial Institutions, P. O. Box 8861, Madison, Wisconsin 53708-8861, appearing on behalf of the Department of Financial Institutions.

ORDER GRANTING MOTIONS TO DISMISS

For the purpose of this Decision and Order, Case No. 69996 will be referred to as WEBER I and No. 70064 will be referred to as WEBER II.

These matters, which arise from the imposition of discipline, are before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motions to dismiss the appeals for lack of subject matter jurisdiction. The final date that written arguments were filed in WEBER I was September 13, 2010, and the final date in WEBER II was September 27, 2010.

No. 33147
No. 33148

Solely for the purpose of ruling on the motions 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 appear to be uncontested matters as well as a liberal construction of the information set forth in the Appellant's submissions.

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

FINDINGS OF FACT

1. Respondent sent Appellant a memo dated June 14, 2010, that provided, in part:

This letter is to advise you that I have tentatively decided to suspend you, without pay, for one (1) day. . . .

Prior to this decision being finalized you are being offered the opportunity to meet with me and your Administrator to discuss the tentative decision and to provide any information you may have to persuade us that the proposed disciplinary action is not warranted.

The pre-disciplinary meeting will be held on Thursday June 24th, 2010 at 9:30 AM

2. Appellant filed an appeal (WEBER I) with the Commission on July 9, 2010. The letter of appeal included the following:

This letter serves the purpose of an appeal to the Department of Financial Institutions['] disciplinary action issued against state employee Patricia Weber. Attached hereto is a copy of the Department's letter explaining the discipline issued June 14, 2010. As of the date of this letter the Department has not communicated with Ms. Weber that it has altered its position post her pre-disciplinary hearing of June 24, 2010.

The Department disciplined Ms. Weber without just cause in addition to violating her due process rights.

3. Respondent sent Appellant another memo dated July 8, 2010 that included the following:

This letter is to advise you that you are being suspended from work, without pay, for one day (8 hours). This disciplinary action is a result of the investigation that we have conducted

If you wish to appeal this action, the grievance procedure in Article 4 of the collective bargaining agreement covering your position is available for your use.

4. The Appellant filed a second appeal (WEBER II) with the Commission on August 4, 2010. The letter of appeal included the following:

On July 8, 2010, I sent a letter to the Wisconsin Employment Relations Commission appealing the disciplinary action issued against Patricia Weber, an employee with the Department of Financial Institutions.

That letter was based upon a memorandum of discipline issued against Ms. Weber dated June 14, 2010. To further secure Ms. Weber's appeal, [today's] letter is being sent appealing the memorandum of discipline issued July 8, 2010 (see enclosure). The purpose of this second letter is to foreclose any objection Respondent may provide explaining the initial appeal was not timely or premature.

5. At all relevant times, the Appellant's position has been covered by a collective bargaining agreement between the State of Wisconsin and the Wisconsin State Employees Union.

6. Two contractual grievances have been filed relating to the Respondent's actions.

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 her appeals.

2. Based on the uncontested facts drawn from a liberal reading of Appellant's written submissions, the Appellant has failed to sustain that burden.

3. The Commission lacks subject matter jurisdiction.

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

ORDER¹

Respondent's motions are granted and these matters are dismissed for lack of subject matter jurisdiction.

Given under our hands and seal at the City of Madison, Wisconsin this 12th day of October, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Terrance L. Craney /s/

Terrance L. Craney, 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 Financial Institutions (Weber I and II)

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

The Appellant seeks administrative review of two letters from her employing agency, the Department of Financial Institutions. Appellant characterizes both letters as disciplinary² and seeks to invoke the Commission's authority pursuant to Sec. 230.44, Stats., to review certain personnel actions relating to the State civil service. The only provision in that section even arguably applicable to these appeals is Sec. 230.44(1)(c), Stats., which provides:

(1) Appealable actions and steps. Except as provided in par. (e), the following are actions appealable to the commission under s. 230.45(1)(a):

. . .

(c) Demotion, layoff, suspension or discharge. 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.

Appellant argues that she has a constitutional guarantee to have the Commission review the two disciplinary actions "because the suspension triggers the requirement of just cause, which can only be applied in determining the loss of her property right through due process."

The Commission is an administrative agency, not a court of general jurisdiction. The Commission's authority derives entirely from statute. The statutes granting the Commission authority to review certain State civil service personnel transactions expressly limit that authority where the Appellant is within a collective bargaining unit and an agreement is in effect. Pursuant to Sec. 230.34, Stats.:

(1)(a) An employee with permanent status in class . . . may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.

. . .

(ar) [Paragraph (a) applies] to all employees with permanent status in class in the classified service . . . except that for employees specified in s. 111.81(7)(a) in a collective bargaining unit for which a representative is recognized or certified, . . . if a collective bargaining agreement is in effect covering employees in the collective bargaining unit, the determination of just cause and

² For purposes of this Decision and Order, the Commission has adopted the Appellant's characterization of the subject matter of both appeals.

all aspects of the appeal procedure shall be governed by the provisions of the collective bargaining agreement.

There is no dispute that the Appellant's position is in the classified civil service, that the Appellant is in a "collective bargaining unit for which a representative is recognized or certified", and that a "collective bargaining agreement is in effect" for that bargaining unit.

As noted, the statute specifies that "all aspects of the appeal procedure shall be governed by the provisions of the collective bargaining agreement." Appellant makes an unconditional assertion that "Wisconsin Statute 230.44 outlines the requirements for perfecting appeal rights under Wisconsin's statutory scheme for *all* state employees." In making her assertion, Appellant chooses to ignore the express language of Sec. 230.34(1), Stats., that requires a represented employee to obtain review of a disciplinary action by following the provisions of the collective bargaining agreement. We may not ignore a statutory provision. The two statutes do not conflict: they must simply be read together.

The Commission has consistently held that a represented employee must use the contractual grievance procedure to have a disciplinary action reviewed. Most recently in DHS (GABOWER), DEC. NO. 32898 (WERC, 11/2009), the Commission noted:

Appellant correctly concludes that to the extent there may ever be a determination of whether the Respondent would have had just cause to discharge the Appellant [who alleged that her resignation was coerced], any determination of whether the resignation was coerced would have to be made as provided in the bargaining agreement, not under paragraph (c) [of 230.44(1)].

Also see SWENSON V. DATCP, CASE NO. 83-0152-PC (PERS. COMM. 1/4/1984) (petition for rehearing denied, 2/17/1984) (no jurisdiction over an appeal from an involuntary demotion where the employee is within a collective bargaining unit); WALSH V. UW, CASE NO. 80-0109-PC (PERS. COMM. 7/28/1980) (no jurisdiction over the appeal of a discharged represented employee); LOTT V. DHSS & DP, CASE NO. 79-160-PC (PERS. COMM. 3/24/1980) (no authority to hear an appeal from a layoff decision where the appellant's position was covered by a labor agreement, even though the union had declined to represent the appellant in arbitration proceedings); and MUGERAUER V. DHSS, CASE NO. 87-0122-PC (PERS. COMM. 9/10/1987) (no jurisdiction over an appeal by a represented employee of a suspension where the contract, which otherwise would have expired, had been extended by mutual agreement).

Because the Appellant's appeal rights are determined by the provisions of her collective bargaining agreement, the Commission lacks subject matter jurisdiction over her appeals of two disciplinary actions.

Dated at Madison, Wisconsin this 12th day of October, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Terrance L. Craney /s/

Terrance L. Craney, Commissioner