

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THOMAS BIASI & MIKE SMITH, Grievants,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM, Respondent.

Case 58
No. 69862
PA(grp)-13

Decision No. 33276

Appearances:

Thomas Biasi and Mike Smith, appearing on their own behalf.

Paige Reed, Senior System Legal Counsel, 1848 Van Hise Hall, 1220 Linden Drive, Madison, Wisconsin 53706, appearing on behalf of the University of Wisconsin System.

ORDER GRANTING MOTION TO DISMISS

This matter is before the Wisconsin Employment Relations Commission at the fourth step of the non-contractual grievance procedure. Respondent has moved to dismiss and identified five distinct grounds for dismissal. The final date for submitting written arguments was January 31, 2011.

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

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

FINDINGS OF FACT

1. Grievants are both employed at the University of Wisconsin – Stout as Buildings/Grounds Supervisors. Their classification is assigned to pay range 81-4.

No. 33276

2. Section 4.03(2)(b)2. of Wisconsin's 2009-2011 Compensation Plan provides, in part:

If all of the following conditions apply . . . the supervisor must be paid overtime compensation . . . :

- a. The supervisor's position is assigned to pay range 81-04
- b. The supervisor is directed to work hours in addition to his/her normal work hours and such additional work hours result in overtime hours;
- c. The purpose of the additional work hours is to supervise employees who also are directed to work additional hours;
- d. The additional work hours of the employees supervised generate overtime compensation for that workweek or work period; and
- e. The additional work hours of both the supervisor and employees supervised are generated by the same cause or situation.

3. In early November 2009, Grievants discovered a 2007 email between a former Buildings/Grounds Supervisor and the Director of Human Resources at UW-Stout. They concluded they should receive overtime compensation for the time they spent making and receiving work-related telephone calls outside their normal work hours on a cell phone provided by their employer. They attempted to resolve the issue informally with their immediate supervisor and the three mutually agreed to delay the matter. The efforts for informal resolution were unsuccessful.

4. Grievants filed a first, second and third-step grievance.

5. On May 18, 2010, Grievants filed a fourth-step grievance with the Commission. The grievance provided, in part:

We were told at the time of hire . . . that we were exempt from overtime and believed this to be true until discovering that, under certain circumstances, we were eligible for overtime according to the OSER [Office of State Employment Relations] Compensation Plan. After discovery and for a short period, we had entered this overtime . . . on our bi-weekly time sheets and were compensated for all overtime hours without question. We were then told by our supervisor to stop submitting these hours on our time sheets. . . .

It is our opinion that:

1. Responding to an emergency call received on a UW-Stout cell phone from a UW-Stout on-duty employee in distress, 24 hours per day, seven days per week, is supervisory work per the OSER Glossary definition of Supervisor/Supervisory.

2. Locating the appropriate subordinate employee to respond to an emergency repair of UW-Stout equipment is supervisory work per the OSER Glossary definition of Supervisor/Supervisory.
3. Assigning a suitably skilled employee, who is available after hours at night or on weekends, is supervisory work per the OSER Glossary definition of Supervisor/Supervisory.
4. Assigning work that places that subordinate employee in overtime status is supervisory work per the OSER Glossary definition of Supervisor/Supervisory.
5. Waiting for callback responses from telephone messages left for subordinates, which prevents us from continuing our normal off-duty lifestyle and activity, is supervisory work per the OSER Glossary definition of Supervisor/Supervisory.
6. Waiting for situation reports from subordinates at the onset and at the conclusion of repairs as well as ensuring that, after diagnosis, the respondent has the skill level to safely and successfully complete the specific repair is supervisory work per the OSER Glossary definition of Supervisor/Supervisory.
7. Follow up telephone calls with the initial requestor regarding status of subordinate response times and related/completed repair is supervisory work per the OSER Glossary definition of Supervisor/Supervisory.
8. University of Wisconsin-Stout intended our actions associated with the 24/7 maintenance telephone to be supervisory. . . .

Grievants also submitted a copy of relevant provisions of the 2009-2011 Compensation Plan and of the definition of “Supervisor/Supervisory” found in the Glossary of Human Resource Terms as Used by the Office of State Employment Relations. They described the relief they sought as:

Back pay for all uncompensated overtime hours worked at 1.5 times our regular salary that was in effect at the time of occurrences from November 2007 to date.

6. After a prehearing conference in this matter, the Grievants modified their requested relief to:

Determine if Thomas Biasi and Mike Smith were supervising subordinates in overtime status via electronic communications as it relates [to] the OSER Compensation Plan, Section A, 4.03(2)(b)(2) that was in effect at the time of occurrences from November 2007 to date.

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

CONCLUSIONS OF LAW

1. The Grievants have the burden of establishing that the Commission has subject matter jurisdiction over their fourth-step grievance pursuant to Sec. 230.45(1)(c), Stats., and that the matter is otherwise properly before the Commission.

2. Based on the uncontested facts drawn from a liberal reading of Grievants' written submissions, the Grievants have failed to sustain their burden as to the Commission's jurisdiction.

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

ORDER¹

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

Given under our hands and seal at the City of Madison, Wisconsin, this 6th day of April, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann, Chair

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.

University of Wisconsin System (Biasi & Smith)

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

The Respondent has identified five grounds for its motion to dismiss Grievants' fourth-step non-contractual grievance. Grievants seek to invoke Sec. 230.45(1)(c), Stats., which provides that the Commission shall "[s]erve as final step arbiter in the state employee grievance procedure established under s. 230.04(14)." Respondent contends the Commission lacks subject matter jurisdiction over the subject of Grievants' grievance, that the ruling sought by the Grievants is contrary to public policy, that the underlying issue is not grievable, that Grievants failed to plead an abuse of discretion, and that their first-step grievance was untimely.

Subject matter jurisdiction

Respondent contends this grievance is "directly tied to the issue of wages . . . in the form of back wages and future overtime pay", matters that fall outside the scope of the non-contractual grievance procedure. Section 230.04(14), Stats., provides that "[t]he director [of the Office of State Employment Relations] shall establish, by rule, the scope and minimum requirements of a state employee grievance procedure relating to conditions of employment." Section ER 46.03(2), Wis. Adm. Code, provides that "An employee may not use this chapter to grieve: (k) Any matter related to wages, hours of work, and fringe benefits."

Grievants initially asserted that Respondent University of Wisconsin is incorrectly interpreting Sec. 4.03(2)(b)2. of the State's Compensation Plan by not awarding them overtime for the hours they spend responding, by telephone, to emergency calls relating to their responsibilities as Buildings/Grounds Supervisors.² After they filed their appeal to the Commission, the parties stipulated to a modification of the grievance. The revised grievance now asks the Commission to:

Determine if Thomas Biasi and Mike Smith were supervising subordinates in overtime status via electronic communications as it relates [to]the OSER Compensation Plan, Section A, 4.03(2)(b)(2) that was in effect at the time of occurrences from November 2007 to date.

The most recent version of the Grievants' grievance must be viewed in the context of *LOOMIS v. WIS. PERSONNEL COMM.*, 179 WIS.2D 25, 505 N.W.2D 462 (CT. APP. 1993). Mr. Loomis was a maintenance supervisor in the physical plant at the University of Wisconsin Center – Washington County who grieved the fact that he was required to carry a pager, stay within signal range of the pager, and report to work within one hour under certain circumstances, yet was denied compensation for those responsibilities. The Personnel Commission, then responsible for applying Sec. 230.45(1)(c), Stats., concluded that the grievance alleged matters related to wages and hours of work and dismissed the matter citing

² Respondent asserts that Grievants must report to the worksite, rather than interact by telephone, in order to satisfy the Compensation Plan provision relating to overtime.

Sec. ER 46.03(2)(k), Wis. Adm. Code. The Court of Appeals reversed, after observing that one aspect of the grievance related to a condition of employment, rather than wages or hours:

The basis of Loomis' grievance deals with the fact that his job requires him to carry a pager and to remain on call outside of his regular working hours throughout the entire year. Loomis complained that he was not informed of this job requirement until two months after he was hired. This portion of his grievance clearly relates to a "condition of employment" which the commission expressly has jurisdiction to consider under Wis. Adm. Code sec. ER 46.03(1) .

. . .

[G]iving the grievance the liberal construction it is entitled, we are certain that it alleges matters relating to a condition of employment. While the commission does not have jurisdiction to consider claims for relief involving wages, the commission does have jurisdiction to consider claims for relief involving conditions of employment, such as the job requirement complained of by Loomis in this case.

The Court of Appeals concluded that dismissal for lack of subject matter jurisdiction was "premature" and directed the Personnel Commission to conduct a hearing to determine 1) the nature of the relief being sought by Loomis; 2) whether it could grant him that relief; and 3) whether the relief was warranted. The Court held that as long as one aspect of Loomis' grievance was not wage-related, it was improper for the Commission to have lumped that aspect of the grievance with the portion that was wage-related.³

³ On remand to the Commission, Loomis identified his requested relief as either freedom from carrying the pager or compensatory time for whenever he was required to carry the pager outside his regularly scheduled hours. The Commission conducted an administrative hearing, and in *LOOMIS v. UW, CASE NO. 92-0035-PC (PERS. COMM. 2/15/1996)*, held that it lacked jurisdiction over either of Loomis' requests:

The earning of compensatory time relates to compensation (wages) and hours and, as a result, is excluded from the commission's authority to hear grievances at the fourth step by operation of §ER 46.03(2)(k), Wis. Adm. Code. . . .

Carrying the pager is one of appellant's assigned work responsibilities. Section ER 46.03(2)(j), Wis. Adm. Code, provides that an employee may not grieve a "condition of employment which is a right of the employer as defined in s. ER 46.04." . . . In *MILLER v. DHSS, CASE NO. 87-0029-PC (PERS. COMM. 2/8/1989)*, the Commission concluded as follows:

Appellant has also appealed the assignment of duties to and the removal of duties from her position. Such allocation of duties among the positions of an agency are considered a management prerogative within the meaning of §ER 46.04, Wis. Adm. Code, i.e. within the scope of management rights to utilize personnel to carry out the statutory mandate and goals of the agency (§ER 46.04(2)(a), Wis. Adm. Code) and to manage and direct the employees of the agency (§ER 46.04(2)(c), Wis. Adm. Code). The Commission does not, therefore, have jurisdiction to hear and decide this aspect of the appeal pursuant to §230.45(1)(c), Stats.

This reasoning is equally applicable here and the Commission concludes that it does not have subject matter jurisdiction over this appeal.

Mssrs. Biasi and Smith are asking the Commission to interpret the Compensation Plan and apply that interpretation to their own circumstances at UW-Stout. They are seeking a determination that they satisfy the “Limited Circumstances When Supervisors Must Receive Overtime Compensation” under the plan. If each of five conditions is met, Grievants must be paid overtime compensation. One condition is that the “purpose of the [Grievants’] additional work hours is to supervise employees who also are directed to work additional hours.” A second condition is that the additional work hours for the subordinate employees generate overtime compensation for the subordinates during that workweek or work period. In other words, the Grievants ask the Commission to determine that their time spent handling emergency calls meets all of the conditions requiring overtime compensation.

The Grievants’ claim cannot be distinguished from the portion of Mr. Loomis’ grievance that the Court of Appeals held was properly dismissed because it related to wages. As reflected in their modified request for relief, the present grievance is directly tied to the Grievants’ wages and would require the Commission to interpret and apply the Compensation Plan. In fact, it is difficult to imagine *any* aspect of the Compensation Plan that would be considered unrelated to wages.

The Commission lacks subject matter jurisdiction over the grievance so this matter must be dismissed. We do not address the remaining arguments raised in Respondent’s motion to dismiss.

Dated at Madison, Wisconsin, this 6th day of April, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann, Chair

Susan J. M. Bauman, Commissioner