

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DEANNA ALEXANDER, Appellant,

vs.

Secretary, DEPARTMENT OF HEALTH SERVICES, Respondent.

Case 27
No. 70734
PA(mch)-3

Decision No. 33327

Appearances:

Deanna Alexander, on her own behalf.

Lara M. Herman, Attorney, Office of Legal Counsel, Wisconsin Department of Health Services, P. O. Box 7850, Madison, Wisconsin 53707-7850, appearing on behalf of the Department of Health Services.

ORDER GRANTING MOTION TO DISMISS

This matter, which arises from the action of terminating Appellant's employment, is before the Wisconsin Employment Relations Commission on Respondent's motion to dismiss the appeal for lack of subject matter jurisdiction. The Respondent and Appellant filed written arguments, the last of which was received on June 24, 2011.

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 §227.47(1), Stats.

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

Dec. No. 33327

FINDINGS OF FACT

1. At all relevant times, Respondent Department of Health Services (DHS) has administered certain public assistance programs in Milwaukee County through the DHS Milwaukee Enrollment Services (Miles) unit.

2. Supervisors in the Miles unit are DHS employees. However, at least some of the other employees in the Miles unit are employees of Milwaukee County.

3. Appellant Deanna Alexander was hired effective December 27, 2010, as a County Economic Support Specialist in the Miles unit and she was required to serve a six-month probationary period ending June 26, 2011. Appellant's position was included in a bargaining unit. Her employer was Milwaukee County, but DHS oversaw her position and issued the hiring letter.

4. By letter dated February 8, 2011, Respondent notified the Appellant that her employment was being terminated on the same day for allegedly violating certain work rules. The termination letter advised Appellant that "[i]f you believe this action was not taken for just cause, you may appeal directly to the Wisconsin Employment Relations Commission" within 30 calendar days.

5. DHS terminated Appellant's employment while she was serving an initial probation.

6. Appellant filed an appeal with the Commission on March 9, 2011.

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 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

ORDER¹

This matter is dismissed for lack of subject matter jurisdiction.

Given under our hands and seal at the City of Madison, Wisconsin, this 2nd day of August, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

¹ Upon the 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 Health Services (Alexander)

**MEMORANDUM ACCOMPANYING
ORDER GRANTING MOTION TO DISMISS**

This appeal arises from the decision to terminate the Appellant's employment. The Department of Health Services, the Respondent in this matter, moves to dismiss for lack of subject matter jurisdiction. DHS argues that Appellant's status as a probationary employee means she lacks the "permanent status in class" necessary to appeal a discharge decision.

As explained in *STERN v. WERC*, 2006 WI APP 193, 296 Wis.2d 306, 722 N.W.2d 594, subject matter jurisdiction of the Commission, as an administrative agency, relates to the authority expressly conferred (or fairly implied) by statute. Just as in *STERN*, Appellant Alexander seeks to invoke §§230.44(1) and 230.45(1), Stats., as the basis for the Commission to exercise review of the decision to terminate.²

The Commission typically reviews State civil service discharge decisions pursuant to our authority under §230.44(1)(c), Stats.: "*If an employee has permanent status in class . . . the employee may appeal a . . . discharge . . . to the commission, if the appeal alleges that the decision was not based on just cause.*" (Emphasis added.) It has been clear since no later than *BOARD OF REGENTS v. WISCONSIN PERS. COMM.*, 103 Wis. 2d 545, 556, 309 N.W.2d 366 (Ct. APP. 1981), that this paragraph does not extend to State of Wisconsin employees serving their original period of probation. DOC (HORTMAN), DEC. No. 31037 (WERC, 8/2004).

For the six months commencing with the original hire, a State employee on probation may be "dismissed at any time." (§230.28(1), Stats.) Performance evaluations during those six months "may not infringe upon the authority of the appointing authority to retain or dismiss employees during the probationary period." (§230.37(1), Stats.) An employee dismissed during this period never acquires "the rights and privileges attained upon successful completion of a probationary period required upon an appointment", (§ER 1.02, Wis. Adm. Code), and does not have the "permanent status in class" necessary to file an appeal under §230.44(1)(c), Stats. While serving a period of initial probation, they do not qualify as an "employee with permanent status in class" so there is no provision limiting the termination of the employment to circumstances of "just cause." (§230.34(1)(a), Stats.)

² The Appellant has the burden of establishing that the Commission has subject matter jurisdiction over her appeal. *LAWRY v. DP*, CASE NO. 79-26-PC (PERS. COMM., 7/31/1979).

What differentiates Ms. Alexander's appeal from other cases of probationary termination that have been addressed since the BOARD OF REGENTS decision is that she was employed by Milwaukee County rather than the State. Nevertheless, she was employed in a work unit that is administered by the State's Department of Health Services and the Commission has authority under §230.44(1)(h), Stats., to review a "decision of the department of health services relating to a Milwaukee County employee under s. 49.826(3)(b)." Jurisdiction under paragraph (h) is in addition to any subject matter jurisdiction the Commission may assert under paragraph (c) in the same subsection.

However, appeals under paragraph (h) are subject to §49.826(3)(b), Stats., which includes the following subdivisions:

1. The department [of health services] shall have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, and adjust grievances with respect to, and state supervisory employees may supervise, county employees performing services under this section for the [Milwaukee County enrollment services] unit.
2. For the purposes under subd.1., the department shall use the same process and procedures under ch. 230 that are used for the classified service of the state civil service system, including specifically the use of probationary periods under s. 230.28.

Because DHS is required to "use the same process and procedures" that exist for imposing initial probation on employees in the State's civil service system, a new employee of Milwaukee County in the MilES unit must be placed on an initial probation of six months. Subdivisions 49.826(3)(b)1. and 2., Stats., require that during the mandated period, Milwaukee County employees in the unit may be dismissed at any time just as employees of the State may be dismissed. Ms. Alexander's employment was terminated within three months of her hire (and during her initial probation), so she never attained the permanent status in class that would obligate DHS to have just cause for discharge. This means that §230.44(1)(h), Stats., fails to provide the Commission with subject matter jurisdiction over Ms. Alexander's appeal.

It is unfortunate that the Respondent inaccurately informed the Appellant she could appeal the termination of her employment "directly to the Wisconsin Employment Relations Commission." However, erroneous advice cannot somehow confer subject matter jurisdiction on the Commission. DEPARTMENT OF CORRECTIONS (GARCIA), DEC. NO. 32890 (WERC, 10/2009). "[I]t is elementary that waiver, consent or estoppel may not be used to defend an improper exercise of subject matter jurisdiction." BIALK V. CITY OF OAK CREEK, 98 WIS.2D 469, 473, 297 N.W.2D 43, 45 (CT. APP., 1980).

In her written statement opposing dismissal, Appellant argues that she does not believe the legislature intended for dismissal of probationary employees to occur “for any reason, by any method, without non-falsified explanation, or without due process under law, policy, and contractual agreement.” The Commission’s authority to review personnel decisions relating to Milwaukee County employees is limited by §49.826(3)(b), Stats., and new employees hired in the Miles unit must pass probation before their discharge may be appealed to the Commission *irrespective of the reason an appellant believes the termination decision to have been improper*. DOC (KRISKA), DEC. NO. 31957 (WERC, 12/2006).

Because we have dismissed this appeal due to the Appellant’s probationary status, we need not address the jurisdictional implications of her position purportedly being in a collective bargaining unit.

Appellant has not met her burden to establish the Commission has subject matter jurisdiction over her appeal of Respondent’s termination decision. Accordingly, her appeal is dismissed.

Dated at Madison, Wisconsin, this 2nd day of August, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

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