

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PATRICIA JANUS, Appellant,

vs.

Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 148
No. 71668
PA(adv)-225

Decision No. 33919-A

Appearances:

Troy Bauch, AFSCME Council 24, 8033 Excelsior Drive, Suite C, Madison, Wisconsin, 53717, appearing on behalf of Appellant Patricia Janus.

Bert St. Louis, Office of State Employment Relations, P.O. Box 7855, Madison, Wisconsin, 53707-7855, appearing on behalf of the Department of Corrections.

ORDER GRANTING MOTION TO DISMISS

This matter, which arises from a disciplinary action, 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 argument was filed on September 28, 2012.

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 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. Appellant Patricia Janus is employed by Respondent Department of Corrections as a correctional officer at Green Bay Correctional Institution. Immediately prior to February 27, 2012, and as a function of her high level of seniority, Appellant was assigned to the institution's property room which was one of only a few assignments with weekends and holidays off.

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2. By letter dated February 27, Respondent disciplined Appellant for allegedly violating a work rule. The discipline took the form of permanently reassigning Appellant from the property room to a less desirable post with a less desirable schedule.

3. Appellant grieved the action.

4. Janus appealed the matter to the Commission on June 29, 2012, contending the employer acted without just cause.

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

CONCLUSION OF LAW

The Commission lacks subject matter jurisdiction over the appeal.

Based on the above and foregoing Findings of Fact and Conclusion 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 2nd day of November, 2012.

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 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.

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MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

The question is whether the Commission has subject matter jurisdiction to review a decision to reassign Appellant, an employee with substantial seniority, to a less desirable post. It is undisputed that Respondent imposed the reassignment as a form of discipline. The reassignment letter cited a work rule, noted that future violations would result in progressive discipline, and identified a procedure for obtaining review: “If you believe this action was not taken for just cause, you may appeal through the grievance procedure, according to ch. ER 46, Wis. Admin. Code and s. 230.44, Wis Stats.”

In her letter of appeal, Janus asserted that the Department of Corrections (DOC) had “acted without Just Cause, [and] violated the Grievant[’s] Due Process in denying her the ability to appeal the disciplinary action.” In response to DOC’s jurisdictional objection, Appellant argues “that the commission has jurisdictional authority under 230.44(1)(d).” Her argument also cites definitions of “abuse of authority” and “disciplinary action” found in Sec. 230.80, Stats.

Paragraph (d) in Sec. 230.44, Stats., grants authority to the Commission to hear an appeal of a “personnel action after certification which is related to the hiring process in the classified service.” The key phrase in the context of the present appeal is that such a case must arise from the “hiring process.” Appellant has 25 years of seniority with DOC and there is no reason to believe that she was recently hired as a correctional officer. The reassignment in question was imposed as a form of discipline and not as an element of the hiring process encompassed by paragraph (d). Board of Regents v. Wisconsin Pers. Comm., 103 Wis. 2d 545, 559, 309 N.W.2d 366 (Ct. App. 1981) (“The hiring process cannot be reasonably construed to embrace the acquisition of permanent status in class.”); Asche v. DOC, Case No. 90-0159-PC (Pers. Comm. 5/21/1997) (reassignment of the appellant from the security unit at the University of Wisconsin Hospital and Clinics to the Oakhill Correctional Institution is not a personnel action related to the hiring process).

Our decision in Thiel v. DOT, Dec. No. 31725-A (WERC, 12/2009) provides substantial support for the result reached in this matter. There, the appellant served as the agency’s general counsel and was “reassigned” from his Attorney-Management position in the classified service to an Attorney-Supervisor position at a lower level in the organization chart but with no reduction in pay. Another staff attorney was temporarily assigned the general counsel duties until the agency completed a civil service selection process to fill it on a permanent basis. Thiel appealed the reassignment, asking the Commission to review it under Sec. 230.44(1)(d), Stats., as well as citing paragraph (c) in the same subsection and contending the reassignment was a disciplinary action taken without just cause. As to the paragraph (d) theory, the Commission held that “the action of removing Thiel from the responsibilities of Chief Counsel for the agency was not a personnel action after certification which is related to the hiring process.”

Paragraph (c) in Sec. 230.44(1), Stats., grants the Commission the authority to review certain disciplinary actions that are taken without just cause. Jurisdiction is limited by the express language of the statute to “demotion, layoff, suspension, discharge or reduction in base pay.” Other forms of discipline are excluded. Garcia v. DOC, Dec. No. 32890 (WERC, 10/2009) (a written reprimand is not expressly identified as an appealable action or fairly implied). “Reassignment” is not on the list, so even if Appellant Janus had sought to assert jurisdiction under paragraph (c), that argument would fail. Henderson v. DHSS, Case No. 85-0045-PC (Pers. Comm. 8/15/1985) (a reassignment to a different shift is not an appealable disciplinary action). While Appellant asserts the impact of the reassignment is “just slightly less than discharge,” the statute refers to specific forms of discipline rather than making all “severe” discipline subject to review.

In her brief, the Appellant also refers to the definitions of “abuse of authority” and “disciplinary action” found in Sec. 230.80, Stats. Those provisions are part of the “whistleblower law” found in Subch. III, Ch. 230, and have no application to Sec. 230.44, Stats., which is found in Subch. II of that chapter.

For the above reasons, the Commission lacks authority to review this appeal and it must be dismissed.

Dated at Madison, Wisconsin, this 2nd day of November, 2012.

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