

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DONALD RENFROW, Appellant,

v.

WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 167
No. 71811
PA(adv)-260

Decision No. 33984-A

Appearances:

Sean Heiser, AFSCME Field Representative, Wisconsin State Employees Union, Council #24, AFL-CIO, 8033 Excelsior Drive, Madison, Wisconsin, 53717, appearing on behalf of Donald Renfrow.

Douglas Thayer, Labor Relations Specialist – Chief, Bureau of Labor Relations, 101 East Wilson Street, Madison, Wisconsin, 53707-7855, appearing on behalf of the Department of Corrections.

ORDER GRANTING MOTION TO DISMISS

This matter 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 February 4, 2013.

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 Sec. 227.47(1), Stats.

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

Dec. No. 33984-A

FINDINGS OF FACT

1. Donald Renfrow, the Appellant, was employed by the Respondent as a Correctional Sergeant at the Thompson Correctional Center at the time of the events set forth in these findings.

2. The Respondent prepared a letter of reprimand addressed to Mr. Renfrow for an incident that had occurred on June 29, 2011. The letter of reprimand was dated October 25, 2011, and was placed in the Appellant's personnel file on that day.

3. The Appellant subsequently requested that the letter of reprimand be removed from his personnel file.

4. The Respondent refused to remove the letter of reprimand from the Appellant's personnel file.

5. The Appellant grieved this refusal to the Office of State Employment Relations (OSER), and, on October 25, 2012, appealed OSER's step-three denial of the grievance to the Commission.

6. On December 7, 2012, the hearing examiner assigned to this appeal sent an email to Appellant's representative, Sean Heiser, which stated in part:

[T]he WERC is processing the above-captioned appeal as one filed under Sec. 230.44(1)(c), Stats., and there is no filing fee for such an appeal. We have assumed that the Appellant, Mr. Renfrow, is not seeking to pursue the matter as part of the grievance process as described in Sec. 230.45(1)(c), Stats. If this assumption is incorrect, Sean, please advise promptly, because there is a \$50 filing fee that applies to such cases.

7. On December 10, 2012, Mr. Heiser responded to the WERC hearing examiner by stating in part, "The appeal as filed is appealed as one filed under Sec. 230.44(1)(c), Stats."

8. No \$50 filing fee applicable to appeals under Sec. 230.45(1)(c), Stats., was paid.

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

CONCLUSION OF LAW

1. The Appellant has not sustained his burden of establishing that the Commission has subject matter jurisdiction over his appeal.

Based on the foregoing Findings of Fact and Conclusion 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 11th day of April, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

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.

Renfrow v. Department of Corrections

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

The sole issue before the Commission is whether it has subject matter jurisdiction over Mr. Renfrow's appeal. The Appellant has the burden of establishing the Commission's subject matter jurisdiction. Lawry v. DP, Case No. 79-26-PC (Pers. Comm. 7/31/79). The Wisconsin Court of Appeals has described the subject matter jurisdiction of administrative agencies as follows:

Subject matter jurisdiction, in general, is the power of a tribunal to treat a certain subject matter in general. . . . [T]he subject matter jurisdiction of administrative agencies – that is, their authority to hear certain subject matters in general – is conferred and specified by statute. *See State v. DILHR*, 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977) (powers of an administrative agency are limited to those expressly authorized or fairly implied by the statute under which it operates). . . . Statutes such as Wis. Stat. §§ 230.44(1) and 230.45(1), which establish the nature of the matters an administrative agency is authorized to hear, define subject matter jurisdiction

Stern v. WERC, 2006 WI App 193, ¶ 24, 296 Wis. 2d 306, 324-325, 722 N.W.2d 594, 603 (footnote omitted). The Commission's authority to review various civil service personnel actions arises from Secs. 230.44 and 230.45, Stats. Section 230.45(1)(a), Stats., provides in relevant part that the Commission shall "[c]onduct hearings on appeals under s. 230.44." Section 230.44(1), Stats., expressly identifies the kinds of "actions appealable to the commission under s. 230.45(1)(a)". Under Section 230.44(1)(c), these kinds of appealable actions include "a demotion, layoff, suspension, discharge or reduction in base pay . . . if the appeal alleges that the decision was not based on just cause."

The Commission's holding and reasoning in Garcia v. DOC, Dec. No. 32890 (WERC, 10/09), support the conclusion that the Commission lacks subject matter jurisdiction in this case. Relying on Stern, the Commission in Garcia held that it lacked subject matter jurisdiction over a written reprimand, "[b]ecause a written reprimand is not expressly identified as an appealable action under Sec. 230.44(1), Stats.," and because "none of the actions directly appealable to the Commission . . . implies that the Commission has authority to hear appeals of written reprimands." *Id.* Although the Appellant herein challenges not the written reprimand itself but rather the Respondent's refusal to remove the written reprimand from his personnel file, the reasoning in Garcia applies with equal force. Simply put, Sec. 230.44, Stats., neither expressly nor impliedly authorizes the Commission to hear appeals regarding the removal of a written reprimand (or anything else) from an Appellant's personnel file. Accordingly, the Commission lacks subject matter jurisdiction over this appeal.

The Appellant's arguments to the contrary do not disturb this conclusion. He argues that "[u]nder the language of the [collective bargaining agreement], appellant could remove the written reprimand from the Personnel file one year after the date of incident provided no other discipline ensued", and that the "Appellant was discipline free from 6/29/11 [the date of the incident] to 6/29/12." (App. Br. 1) According to the Appellant, moreover, the Respondent improperly relied on an executive directive with an effective date of February 26, 2012, to deny his request for removal of the written reprimand. He further advances various arguments based on Chapter 111.70, Stats., regarding the employer's duty, notwithstanding Act 10's elimination of collective bargaining rights, "to maintain the status quo during a contract hiatus". In support of these arguments, he cites various labor relations decisions interpreting Ch. 111.70, Stats. These arguments on the merits, however, share a fundamental flaw in the context of this motion: they beg the question of whether the Commission has jurisdiction to hear them. The answer is unequivocally "no," because, as discussed above, an appeal of an employer's refusal to remove a written reprimand from a personnel file is simply not a subject matter that Sec. 230.44(1)(c), Stats., expressly or impliedly authorizes us to hear. Moreover, having clarified in his December 10 email that his appeal is to be considered as "filed under Sec. 230.44(1)(c), Stats.", the Appellant cannot now rely on Ch. 111.70, Stats., to confer jurisdiction, and the cited decisions interpreting that Chapter are therefore inapposite.

The Appellant also asserts in his appeal letter that "Wis. Stat. § 103.13(4) allows for removal of information from [an employee's] Personnel File"; however, insofar as this assertion seeks to establish a basis for subject matter jurisdiction other than Sec. 230.44(1)(c), Stats., it must fail for at least two reasons. First, as noted, the Appellant's December 10 email precludes a statutory basis for jurisdiction other than Sec. 230.44(1)(c), Stats. Second, even if the Commission were to consider Sec. 103.13(4), Stats.,² as an alternative jurisdictional ground, that section does not expressly or impliedly authorize the Commission to hear disputes over the contents of employees' personnel files. To the contrary, in the event of an irreconcilable dispute between the employer and employee regarding "any information contained in the personnel records," the employee's remedy is to "submit a written statement explaining the employee's position" that "shall be included whenever that disputed portion of the personnel record is released to a 3rd party as long as the disputed record is a part of the file." Sec. 103.13(4), Stats. That Sec. 103.13(4), Stats., expressly provides a remedy to resolve disputes over the contents of personnel records – one that does not include the Commission's review – negates any suggestion that the Legislature intended to authorize our review.

²Sec. 103.13(4), Stats., provides:

PERSONNEL RECORD CORRECTION. If the employee disagrees with any information contained in the personnel records, a removal or correction of that information may be mutually agreed upon by the employer and the employee. If an agreement cannot be reached, the employee may submit a written statement explaining the employee's position. The employer shall attach the employee's statement to the disputed portion of the personnel record. The employee's statement shall be included whenever that disputed portion of the personnel record is released to a 3rd party as long as the disputed record is a part of the file.

Lastly, the Appellant argues in his appeal letter that by virtue of his employer's executive directive, which, according to the Respondent, prevents the removal of the letter of reprimand from his personnel file, he "will always be subject to a property loss going forward in the disciplinary process." Therefore, the Appellant concludes, the Respondent's refusal to remove the reprimand "violates his 'Just Cause' rights". The Appellant appears to be suggesting that under principles of progressive discipline, the consequence of a written reprimand forever lurking in his file may be the imposition of more severe future discipline that may include a property loss (*e.g.* an unpaid suspension or discharge). At issue herein, however, is whether the Commission has jurisdiction over the *subject matter* of this appeal – *i.e.* the employer's refusal to remove the reprimand from the Appellant's personnel file. For purposes of jurisdictional analysis, that subject matter is discrete from, and unaffected by, the progressive disciplinary effect it may have on any future infractions the Appellant may commit and any future appeals he may file.

In light of the foregoing analysis, the Appellant has not met his burden to establish the Commission's subject matter jurisdiction over his appeal of the Respondent's refusal to remove a letter of reprimand from his personnel file. Accordingly, his appeal is dismissed.

Dated at Madison, Wisconsin, this 11th day of April, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner