

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SUSAN FREYE, Appellant,

vs.

Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 177
No. 71843
PA(adv)-271

Decision No. 34129

Appearances:

Sean Heiser, Field Representative, AFSCME Council 24, 8033 Excelsior Drive, Madison, Wisconsin 53717, for the Appellant.

Paeg Heckel, Labor Relations Specialist, Office of State Employment Relations, 101 East Wilson Street, Madison, Wisconsin 53707-7855, for the Respondent.

ORDER GRANTING MOTION TO DISMISS

This matter is before the Wisconsin Employment Relations Commission on a motion to dismiss for lack of subject matter jurisdiction. The motion was ready for decision when, on January 28, 2013, Respondent declined to file a reply brief. 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

Dec. No. 34129

FINDINGS OF FACT

1. Appellant Susan Freye is an employee of the Department of Corrections.
2. Effective January 1, 2012, DOC modified its policy relating to the use of vacation leave as a substitute for hours an employee is absent due to illness. The new policy provides, in part:

Effective January 1, 2012 when an employee calls in sick, he/she will identify his/her intended leave type to cover the absence. An employee who calls in sick and wishes to use vacation or another type of annual leave may do so “insofar as the needs of the service permit” (Wisconsin Administrative Code ER 18.02(6)(b)). This means granting of the use of annual leave in lieu of sick leave is based on the needs of the work unit and based on operational availability.

If operational availability does not permit granting of other leave, such as vacation, etc., the employee is required to use sick leave and is further required to use sick leave when reporting the absence in his/her time sheet (paper or electronic). The employee is not authorized to convert to another leave unless otherwise required or directed by Human Resources. [Emphasis in original.]

3. Appellant “called in sick” for her shifts scheduled on August 21 and September 4, 5 and 6, 2012. She did not have sufficient accumulated sick leave to cover the entire period of her absence so she wished to use her available sick leave and combine it with 14 hours of vacation leave. The employer denied all of Appellant’s requests to substitute vacation hours for sick leave on those dates. Because of these actions, Appellant coded her time sheet for those 14 hours as leave without pay.

4. By letter dated October 22, 2012, Respondent issued Appellant a letter of reprimand. According to the letter of discipline, the 14 hours of leave without pay were taken without prior approval and were “unexcused absences” in violation of Respondent’s work rule that prohibits “[u]nexcused absence or excessive absenteeism.”

5. Appellant proceeded through the grievance procedure and then filed an appeal with the Commission.¹

¹ In her brief, Appellant wrote; “Through the grievance process the employee was allowed to use leave time for 9/6/12 as she did call in two days prior to request the leave.” However, this sentence is inconsistent with her letter of appeal. The discrepancy is inconsequential in terms of the Commission’s decision on Respondent’s motion.

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

CONCLUSION OF LAW

The Commission lacks subject matter jurisdiction over this matter as an appeal filed under Sec. 230.44(1)(c), Stats.

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

ORDER²

This matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 6th day of June, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

² 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.

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MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

At the beginning of 2012, Respondent modified its policy relating to substituting vacation leave for sick leave. (Human Resources Policy Number 200.30.02) The new policy provides that substitution may only occur after the employer has assessed the “needs of the work unit” and “operational availability.” When Appellant called in sick for her shifts on August 21, September 4, 5 and 6, her employer concluded that work conditions at the time did not satisfy the requirements for permitting substitution, and refused her substitution requests. Appellant was forced to take 14 hours of absence as leave without pay. Late in October, Respondent issued her a written reprimand. The disciplinary letter asserts: 1) Employees are “not authorized to utilize LWOP without prior approval”; 2) Appellant failed to obtain the requisite approval; so 3) the leave without pay was “unauthorized” and violated a work rule.

According to her brief, Appellant “has appealed . . . not her written reprimand, but in fact her 14 hours of leave without pay (LWOP) that she was forced to take as a non-disciplinary suspension.” More specifically, Appellant contends “there was sufficient coverage at the work unit” on the days in question to satisfy the new policy and that Respondent violated the policy by not allowing her to substitute leave for those absences. She argues that by refusing to allow substitution, her hours of leave without pay “constitute a constructive suspension” that the Commission may review. The question before the Commission is one of subject matter jurisdiction.³

Appellant’s concession that she is not appealing her October 22 reprimand is consistent with our previous decisions that we lack subject matter jurisdiction over a reprimand. Decker v. DOC, Dec. No. 33593 (WERC, 12/2011) (“we do not have jurisdiction over a letter of reprimand which is neither in lieu of a suspension, nor with the practical effect of a suspension”).

Instead of the reprimand, Appellant is focusing on decisions not to allow her to substitute vacation leave for sick leave.

³ The facts in this matter are comparable to those in Boyea v. DOC, Dec. No. 33930-A (WERC, 2/2013), but the only contention relating to jurisdiction in that case was that appellant’s pay had been “reduced” so the Commission had authority to review the appeal as a “reduction in base pay,” one of the forms of discipline specifically listed in Sec. 230.44(1)(c), Stats. We rejected the argument and dismissed the appeal. Here, Appellant relies on a different jurisdictional theory that, while referenced in the Commission’s Boyea decision, was not formally advanced by the appellant in that case. Our decision in the present matter is consistent with our decision in Boyea.

Appellant's jurisdictional argument that she was constructively suspended relies on cases applying the Federal Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111.

However, the Commission's authority to hear cases must arise from within our Wisconsin law, not from the Federal Civil Service Reform Act. Wisconsin's Civil Service Code derives from Ch. 230, Stats., and administrative rules issued by the Office of State Employment Relations (Ch. ER 1 - 47) and its Division of Merit Recruitment and Selection (Ch. ER-MRS 1 - 34).

Pursuant to Sec. 230.44(1)(c), Stats., the Commission may review a "demotion, layoff, suspension, discharge or reduction in base pay . . . if the appeal alleges that the decision was not based on just cause." We conclude that where, as here, an employee in effect created the loss of pay by virtue of their own conduct, the employee has not received a "suspension" within the meaning of Sec. 230.44(1)(c), Stats.

Appellant has not met her burden to establish the Commission's subject matter jurisdiction over this appeal. Accordingly, her appeal is dismissed.

Dated at Madison, Wisconsin, this 6th day of June, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner