

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MICHAEL GOLDBERG, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF REVENUE, Respondent.

Case ID: 254.0004

Case Type: PA

DECISION NO. 39300

Appearances:

Michael Goldberg, 642 Mill Avenue, Union Grove, Wisconsin, appearing on his own behalf.

Anfin Jaw, Attorney, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Revenue.

DECISION AND ORDER GRANTING MOTION TO DISMISS

On November 12, 2021, Michael Goldberg filed an appeal with the Wisconsin Employment Relations Commission pursuant to Wis. Stat. § 230.45(1)(c) alleging that the State of Wisconsin Department of Revenue (DOR) had violated a policy related to employee time off for blood donations. On December 20, 2021, DOR filed a motion to dismiss asserting that the dispute falls outside the scope of matters that can be grieved and thus that the Commission does not have jurisdiction over the alleged policy violation. Goldberg filed a response to the motion on December 21, 2021.

Having reviewed the matter, the Commission concludes that it does not have jurisdiction over the alleged policy violation.

NOW, THEREFORE, it is:

ORDERED

The motion to dismiss is granted and the appeal is dismissed.

Issued at the City of Madison, Wisconsin, this 3rd day of February, 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER
GRANTING MOTION TO DISMISS

Wisconsin Stat. § 230.45(1)(c) gives the Commission the power to “[s]erve as final step arbiter in the state employee grievance procedure established under s. 230.04(14).”

Wisconsin Stat. § 230.04(14) states that “[e]xcept as provided in s. 230.445, the administrator shall establish, by rule, the scope and minimum requirements of a state employee grievance procedure relating to conditions of employment.”

The grievance procedure referenced in Wis. Stat. § 230.04(14) is found in Wis. Admin. Code Ch. ER 46, and provides in relevant part:

ER 46.03 Scope.

(1) Under this chapter, an employee may grieve issues which affect his or her conditions of employment, including any matter on which the employee alleges that coercion or retaliation has been practiced against the employee except as provided in sub. (2).

(2) An employee may not use this chapter to grieve:

(a) A personnel action or decision of the director or the administrator that is directly appealable to the Wisconsin Employment Relations Commission under s. 230.44, Stats.;

(b) An action delegated by the director or by the administrator to an appointing authority that is directly appealable to the Wisconsin Employment Relations Commission under s. 230.44, Stats.;

(c) A demotion, suspension without pay, discharge, removal, layoff, or reduction in base pay that is grievable under s. 230.445, Stats.;

(d) A personnel action after certification which is related to the hiring process that is appealable to the Wisconsin Employment Relations Commission under s. 230.44, Stats.;

(e) Denial of hazardous employment benefits under s. 230.36 (4), Stats.;

(f) The reassignment of a career executive employee under s. ER-MRS 30.07 (1);

(g) The failure of a supervisor to process a reclassification request.

- (h) An oral reprimand;
- (hg) A written instruction related to job performance or work conduct;
- (hr) The evaluation methodology used by an employer to determine a discretionary pay award or the amount of the award;
- (i) The content of written agency rules and policies;
- (j) A condition of employment which is a right of the employer as defined in s. ER 46.04; or
- (k) Any matter related to wages, hours of work, and fringe benefits.

Citing Wis. Admin. Code § ER 46.03 (2)(k), DOR contends that Goldberg is not allowed to use the grievance procedure to dispute DOR's action under applicable blood donation rules. Because Goldberg's dispute with DOR does not fall within the scope of the grievance procedure, DOR argues that the Commission lacks jurisdiction to review the matter as the Wis. Stat. § 230.45(1)(c) final step arbiter under Wis. Admin. Code § ER 46.07(1).

Wisconsin Admin. Code § ER 46.07(1) defines the Commission's jurisdiction under the grievance procedure as follows:

If the grievant is dissatisfied with the decision received from the administrator or designee at the second step under s. ER 46.06 (2) (b) 2., the decision may be grieved to the commission only if it alleges that the employer abused its discretion in applying subch. II of ch. 230, Stats., or the rules of the director promulgated under that subchapter, subchs. I and II of ch. 230, Stats., or the rules of the administrator promulgated under those subchapters, or written agency rules, policies, or procedures

The Commission would understand Goldberg to argue that the DOR motion to dismiss should be denied under ER 46.07 (1) because DOR is abusing its discretion under the applicable blood donation policies.

The Personnel Commission (the agency that previously had jurisdiction to determine the scope of § 230.45(1)(c)) ruled that if a dispute cannot be raised under the ER 46.03 grievance procedure, then ER 46.07 did not give it "back door" jurisdiction to consider the matter under § 230.45(1)(c). *See Luchsinger v. PSC*, 82-233-PC (1/83). This Commission followed that precedent in *Benish v. DOC*, Dec. No. 38820 (WERC, 3/21).

In this matter, the Commission is satisfied that the blood donation issue falls under "Any matter related to wages, hours of work, and fringe benefits" as that phrase is used in the ER 46.03

(2)(k) description of matters that cannot be grieved. Because the issue cannot be grieved, it follows that the Commission lacks jurisdiction under § 230.45(1)(c) to consider the matter. Therefore, the motion to dismiss has been granted and the appeal has been dismissed.

Issued at the City of Madison, Wisconsin, this 3rd day of February 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman