

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MICHAEL WAGNER, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF REVENUE, Respondent.

Case ID: 254.0003

Case Type: PA

DECISION NO. 39304

Appearances:

Michael Wagner, 1225 Huron Court, Oshkosh, Wisconsin, appearing on his own behalf.

Nicole Rute, 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 October 4, 2021, Michael Wagner 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 work location/telecommuting by requiring that he continue to work in Madison rather being allowed to telecommute or work in Appleton and had also improperly threatened him with reassignment. On December 8, 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 violations. The parties thereafter filed extensive argument-the last of which was received January 25, 2022.

Having reviewed the matter, the Commission concludes that it does not have § 230.45(1)(c) jurisdiction over the alleged violations.

NOW, THEREFORE, it is:

ORDERED

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

Issued at the City of Madison, Wisconsin, this 22nd 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.

ER 46.04 Management rights.

(1) Nothing in this chapter is intended to interfere with the sole right of the employer to carry out its statutory mandate and goals under s. 111.90, Stats.

(2) For the purpose of this chapter, the management rights of the employer include, but are not limited to, the following:

- (a) Utilizing personnel, methods and means to carry out the statutory mandate and goals of the agency.
- (b) Determining the size and composition of the work force.
- (c) Managing and directing the employees of the agency.
- (d) Hiring, promoting, transferring, assigning or retaining employees.
- (e) Establishing reasonable work rules.
- (f) Taking disciplinary action for just cause against an employee.
- (g) Laying off employees due to lack of work or funds or organizational changes.

Citing Wis. Admin. Code §§ ER 46.03 (2)(f) and (j) and ER 46.04(2)(a) and (c), DOR contends that Wagner is not allowed to use the grievance procedure to dispute DOR's action under applicable work location rules or its Career Executive assignment rights. Because Wagner'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 Wagner 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 work location policies and Career Executive assignment discretion.

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 issue of where an employee works falls under both “Utilizing personnel, methods and means to carry out the statutory mandate and goals of the agency” and “Managing and directing the employees of the agency” as those phrases are used in the ER 46.04 description of “Management rights” that cannot be grieved. Furthermore, ER 46.03 (2)(f) explicitly states that Career Executive reassignments cannot be grieved.¹ Because the issues raised in the appeal 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.

¹However, if Wagner is reassigned as part of the Career Executive program and believes that reassignment to be based on improper motivation, ER-MRS 30.10 (2) potentially provides the Commission with jurisdiction to review the reassignment at that time.

Issued at the City of Madison, Wisconsin, this 22nd day of February 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman