

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JONATHON THIEL, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0593

Case Type: PA

DECISION NO. 39951

Appearances:

Jonathon Thiel, 151707 Tulip Lane, Wausau, Wisconsin, appearing on his own behalf.

David Makovec, 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 Corrections.

ORDER GRANTING MOTION TO DISMISS

On July 24, 2023, Jonathon Thiel 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 Corrections (DOC) had violated a policy related to filling a vacant post. On August 4, 2023, the DOC 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. Thiel filed a reply on August 11, 2023.

Having reviewed the matter, the Commission concludes that it does not have Wis. Stat. § 230.45(1)(c) 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 1st day of September 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING 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.

Here, Thiel applied and was interviewed for a Rapid Response Team post. He did not receive the post and alleges DOC's conduct violated DOC Policy 200.30.502.

The DOC contends that Thiel is not allowed to use the grievance procedure to dispute the DOC's action. The DOC argues that Thiel is challenging the content of written agency rules and policies, which cannot be grieved per Wis. Admin. Code § ER 46.03(2)(i). The DOC also argues

that Thiel is challenging the DOC's management rights of hiring, promoting, transferring, assigning or retaining employees, which cannot be grieved per Wis. Admin. Code §§ ER 46.03(2)(j) and ER 46.04(2)(d). Because Thiel's dispute with the DOC does not fall within the scope of the grievance procedure, the DOC 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).

Thiel contends that the DOC's motion to dismiss should be denied under Wis. Admin. Code § ER 46.07(1) because the DOC abused its discretion in the hiring process by making an exception for a non-eligible employee to take the position instead of offering the position to an eligible employee.

The Commission rejects Thiel's contention that the action in dispute involved a "hiring process." This was DOC filling a post pursuant to its right to assign employees. In addition, as discussed below, Wis. Admin. Code § ER 46.07(1) does not provide a jurisdictional basis for the Commission to review the merits of this appeal.

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 Personnel Commission (the agency that previously had jurisdiction to determine the scope of Wis. Stat. § 230.45(1)(c)) ruled that if a dispute cannot be raised under the Wis. Admin. Code § ER 46.03 grievance procedure, then Wis. Admin. Code § 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 decision as to who fills a post cannot be grieved. Who fills a post is within management's rights regarding "assigning . . . employees" under Wis. Admin. Code §§ ER 46.03 (2)(j) and ER 46.04(2)(d). Because the issue raised in the appeal cannot be grieved, it follows that the Commission lacks jurisdiction under Wis. Stat. § 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 1st day of September 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman