

STATE OF WISCONSIN

PERSONNEL COMMISSION

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GEORGE THOMAS,

Appellant,

v.

DEPARTMENT OF INDUSTRY, LABOR,  
AND HUMAN RELATIONS,

Respondent.

Case No. 78-143-PC

\* \* \* \* \*

INTERIM  
DECISION

NATURE OF THE CASE

This is an appeal of a grievance at the third step. The appellant has on file with the commission a separate complaint of discrimination relating to the same transaction that was the subject of the grievance. At the prehearing conference the respondent objected to subject matter jurisdiction on the grounds that there is no jurisdiction under §230.45(1)(c), States., and, if there is jurisdiction, it is not separate from his discrimination complaint. The following findings are based on material in the file which appears to be undisputed.

FINDINGS OF FACT

1. In this grievance appeal appellant alleges that he was discriminated against in the allocation of exceptional performance monetary awards because of his color.

2. In the appellant's discrimination complaint he alleges he was discriminated against in the allocation of exceptional performance monetary awards because of his color. This case has personnel commission file number 78-PC-ER-28.

3. In this appeal (78-143-PC) the appellant requested the following

remedy:

"I request that the secretary of DILHR appoint a committee to oversee the way Job Service Wisconsin allocates exceptional performance monetary awards on a permanent basis. I further request that I receive a monetary award equal to the largest division award granted this year. I further request that if the 5 year review which I have requested shows that blacks have been denied exceptional performance awards in the past by Job Service Wisconsin, a compensatory plan be implemented whereby black employees of Job Service Wisconsin, eligible classification, receive retroactive exceptional performance awards."

4. In his discrimination complaint, no. 78-PC-ER-28, the appellant requested this remedy:

"I, therefore, am requesting a full investigation into the way Job Service Wisconsin arrives at the determination as to who should be awarded exceptional performance monetary awards, as well as how much each award should be. I am further requesting this investigation cover the last five year period. I further request that I receive, from JOB SERVICE WISCONSIN, a monetary award equal to the largest division award granted this year. I understand that no black was awarded over \$25, but the larger awards, ranging from \$50 to \$600 were given only to Spanish and white people.

#### CONCLUSIONS OF LAW

1. The subject matter of this grievance is properly before the commission pursuant to §230.45(1)(c), Wis. Stats.

2. The commission's jurisdiction over this grievance is not inseparable from its jurisdiction over the appellant's companion discrimination complaint, no. 78-PC-ER-28.

#### OPINION

In connection with the question of commission jurisdiction over this grievance appeal under §230.45(1)(c), Stats., the respondent points out that the grievance procedure [APM, Bulletin no. 1, I(D)(1)(b)] limits appeals to the commission to grievances:

" ... which allege that an agency has violated, through incorrect interpretation or unfair application:

1) a rule of the director, state bureau of personnel or a civil service statute (§16.01-16.38, Wis. Stats.)

or

2) a function where the director of the state bureau of personnel has expressly delegated its authority to the appointing officer ...."

The respondent argues: "DILHR is further unaware of how the setting of the amount of an exceptional performance award could violate any of the existing rules of the director or the civil service statutes themselves."

In Grand v. DNR, Wis. Pers. Commn. no. 77-213 (9/13/78), the commission overruled a similar jurisdictional objection to an appeal of the denial of a discretionary performance award, citing §§16.32(1) and 16.01(2), Stats. (1975):

In cooperation with appointing authorities the director shall establish a uniform employe work planning and progress evaluation program, incorporating the principles of management by objectives, to provide a continuing record of employe development and, when applicable, to serve as a basis for decision-making on employe pay increases and decreases ...

... The bureau of personnel with advice and quasi-judicial assistance by the personnel board shall develop, improve and protect a statewide personnel management program which assures that the state hires the best qualified persons available and bases the treatment of its employes upon the relative value of each employe's services and his demonstrated competence and fitness.

In the instant case, §230.12(7), Stats. (1977) provides in part as follows:

"(7) EXCEPTIONAL PERFORMANCE AWARDS. ... It is the declared public policy that pay awards to employes ... shall be granted consistent with sound personnel practice to recognize exceptional performance. Such exceptional performance awards shall be ... awarded to employes in accordance with eligibility determinations of the secretary consistent with the provisions of the approved compensation plan and the schedules contained therein."

Section 230.37(1), Stats. (1977) now provides as follows:

"In cooperation with appointing authorities the secretary shall establish a uniform employe performance evaluation program to provide a continuing record of employe development and, when applicable, to serve as a basis for decision-making on employe pay increases and decreases ... and for other pertinent personnel actions."

The respondent argues that certain statutes e.g.. §230.18, Stats. (1977), do not apply to this transaction. However, the above statutes do apply and arguably would be violated by the denial of an EPA on the basis of color, regardless of whether such denial constitutes an independent violation of another statute such as §230.18 Stats. (1977), because color is not an appropriate performance or evaluation criterion.

For these reasons, in the commission's opinion there is jurisdiction over this appeal pursuant to §230.45(1)(c), Stats. (1977).

The respondent's second objection is that there is no jurisdiction separate from the appellant's equal rights complaint. This objection apparently rests on the thesis that the bestowal of jurisdiction by §230.45(1)(b) over a complaint of discrimination in a personnel transaction under §111.33(2) is incompatible with jurisdiction pursuant to another subsection of §230.45(1) over an appeal of the same transaction as violative of a particular civil service provision.

The revision of the civil service statutes, chapter 196, Laws of 1977, gave the personnel commission jurisdiction over complaints of discrimination against the state as the employer. See §§230.45(1)(b) and 111.33(2), Wis. Stats. (1977). The commission also was given jurisdiction over appeals of grievances pursuant to §230.45(1)(c). Prior to the new law DILHR had jurisdiction over discrimination complaints and the old personnel board had jurisdiction over grievance appeals.

In the opinion of the commission there is nothing in these statutes on their face that would prevent, nor is there legislative intent that would be inconsistent with, an employe pursuing simulataneously an appeal and a discrimination complaint with regard to the same transaction so long as there are different and appropriate allegations of employer error in each one.

The anti-discrimination provisions of Subchapter II of Chapter 111, Wis. Stats., are of course different from the civil service provisions of Subchapter II of Chapter 230. Section 230.45(1) provides various areas of jurisdiction under both subchapters and these different areas of jurisdiction are not mutually exclusive. If a personnel transaction allegedly violates both the civil service code (Subchapter II, Chapter 230), and the anti-discrimination law (Subchapter II, Chapter 111), in the opinion of the commission the act of the legislature in providing a single forum for proceedings under both subchapters did not deprive the complainant or appellant of one of the two potential grounds of error.

For example, §230.16(4) provides in part: "all examinations ... shall be job-related in compliance with appropriate validation standards ...." If an examinee alleged that he or she were unfairly graded on an exam as a result of personal racial bias on the part of an examiner and also that the exam in and of itself was invalid, there is no reason why he or she could not invoke the protection of both §§111.325 and 230.16(4). This conceivably could involve the filing of a discrimination complaint under §230.45(1)(b) and the filing of an appeal of the exam, which involves a decision of the administrator of the division of personnel, via §230.44(1)(a).

Another example involves the requirement set forth in §230.16(2), Stats., that "competitive examinations shall be free and open to all applicants who are residents of this state ...." If an applicant was refused admission to an exam ostensibly because of non-residency and the applicant alleged that (1) he or she was in fact a resident and (2) that the denial in fact was premised on a prohibited discriminatory basis as set forth in Subchapter II of Chapter 111, that applicant should not be restricted to an attempt to prove one or the other of the alleged violations.

In the two cases filed by Mr. Thomas he alleges only discrimination on the basis of color. This alleged discrimination would be illegal under §111.325, Stats. Also, the reduction of a performance award solely on the basis of color would appear to be an improper criterion under the statutory criteria in Subchapter II of Chapter 230 because it is unrelated to merit and level of performance.

There are different remedies available under Subchapter II of Chapter 230 and Subchapter II of Chapter 111. For example, under §230.43(4), an employe is entitled to back pay only with respect to certain limited transactions. See Martin v. DILHR, Wis. Pers. Commn. 74-132 (12/28/78). Remedies under Subchapter II Chapter 111, are not so restricted. See §111.36(3)(b): "... order such action as will effectuate the purpose of this subchapter, with or without back pay."

This does not present a situation where the doctrine of election of remedies, to the extent it might apply in proceedings of this nature, would apply. See Bank of Commerce v. Paine, Webber, J. & C., 39 Wis, 2d 30, 38-39, 158 N.W. 2d 350 (1968):

" 'It has been said that the so called 'inconsistency of remedies' is not in reality an inconsistency between the remedies themselves,

but must be taken to mean that a certain state of facts relied on as the basis of certain remedy is inconsistent with and repugnant to, another certain set of facts relied on as the basis of another remedy. For one proceeding to be a bar to another for inconsistency, the remedies must proceed from opposite and irreconcilable claims of right and must be so inconsistent that a party could not logically assume to follow one without renouncing the other ....' 25 Am. Jur. 2d Election of Remedies, pp. 653, 654, sec. 11."

See also 25 Am. Jur. 2d Election of Remedies §10-13. This is not a situation where there are inconsistent states of fact underlying the two proceedings; to the contrary, the proceedings arise from the same facts.

The Commission wishes to emphasize that although at this point it can ascertain no statutory or other basis for a conclusion that the appellant cannot pursue both these proceedings, the fact that both proceedings are pending in the same forum should provide a number of opportunities to reduce hearing and other processing time through the combination or consolidation of appropriate parts of the proceedings.

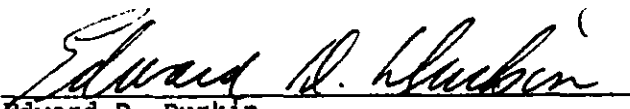
ORDER

The respondent's objection to subject matter jurisdiction is overruled.

Dated: Jan 8, 1979

STATE PERSONNEL COMMISSION

  
Joseph W. Wiley  
Chairperson

  
Edward D. Durkin  
Commissioner