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STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

FLORICE W. FISK,
 Appellant,

v.

Secretary, DEPARTMENT OF
 TRANSPORTATION,
 Respondent.

Case No. 79-83-PC

* * * * *

INTERIM
 DECISION
 AND
 ORDER

NATURE OF THE CASE

A hearing was held before the undersigned on the issue of subject-matter jurisdiction and this decision is limited to issues relating to jurisdiction.

FINDINGS OF FACT

1. The appellant was promoted to Budget and Management Analyst 4 in DHSS effective September 25, 1977, with a six months probationary period ending March 24, 1978.
2. The appellant transferred to another Budget and Management Analyst 4 position in DOT effective March 13, 1978.
3. The DOT position had a 12 months probationary period.
4. The appellant was notified of the 12 months length of the probationary period prior to accepting the appointment.
5. Because of absences due to injury and illness, her probationary period was extended to April 16, 1979.
6. By letter of March 23, 1979, Commission's Exhibit 2, the appellant was informed that her work had not measured up to the expectations

of management and that: " ... I have decided no. to extend your employment beyond an extended probationary period of March 23, 1979."

7. The appeal in this matter, Commission's Exhibit 1, a letter dated March 29, 1979, filed March 30, 1979 contained the following text:

"Please be advised that I am appealing the personnel action of Roger Schrantz, Administrator of Division of Planning and Budget, State Department of Transportation. This action consisted placing a letter of reprimand in the personnel file of Florice W. Fisk, a copy of which is hereby attached and made a part of hereof as Exhibit A. [Commission's Exhibit 2]."

8. The Certification Request/Report Form prepared in connection with the appellant's transfer from DHSS to DOT inadvertently originally contained a probation termination date of September 11, 1978, appropriate for a six-month probationary period, instead of March 12, 1979, appropriate for a 12 month probationary period. When this was discovered, the original form was changed to reflect the March 12, 1979, date, but a copy of the form that had been placed in appellant's personnel file was not changed.

CONCLUSIONS OF LAW

1. The appeal letter may be amended to reflect an appeal of the appellant's probationary termination.

2. The amendment will relate back to the date the appeal originally was filed (March 30, 1979).

3. The doctrine of laches does not apply to prevent the respondent from asserting that the appellant was subject to a twelve month probationary period.

4. The respondent established a legally effective 12 month probationary period for the appellant and at all times during her employment with DOT her legal status was that of probationary employee.

5. The transfer of the appellant from DHSS to DOT was not appealed and is not properly before the Commission.

OPINION

TIMELINESS OF APPEAL

The respondent argues that a timely appeal has not been filed pursuant to §230.44(3), Stats., which requires that an appeal be filed within 30 days of the effective date of the action or 30 days of receipt of notice, whichever is later. The respondent's objection is grounded on the theory that the appeal letter does not appeal the appellant's termination.

The appeal letter does characterize the personnel action appealed as the "placing a letter of reprimand in the [appellant's] personnel file" However, the "letter of reprimand" is attached to, and incorporated into, the appeal. The letter can be construed to some extent as a reprimand since it does criticize the appellant's work performance. However, it also indicates that the appellant's employment would not be extended beyond the end of her probation.

Under these circumstances, the principles set forth in Oakley v. Bartell, Wis. Pers. Commn. 78-66-PC (10/10/78) apply. The opinion in that case contained the following discussion:

"In the Commission's view, parties to personnel appeals should be permitted a good deal of liberality in amending pleadings. It is a general rule of administrative law that pleadings are liberally construed and are not required to meet the standards applicable to pleadings in a court proceeding.

See 73 C.J.S. Public Administrative Bodies and Procedures §120., General Electric Co. v. Wis. Empl. Relations Board, 3 Wis. 2d 227, 245 (1958), National Realty & Constr. Co. v. Occupational Safety & Health Review Commission, 489 F.2d 1257, 1264 (D.C. Cir. 1973). Amendments to pleadings are committed to the sound discretion of the agency, see 2 Am. Jur. 2d Administrative Law §374.

In judicial proceedings in this state the new code of civil procedure permits great liberality in amending pleadings. Pleadings may be amended without leave of court at any time "prior to the entry of the scheduling order," §802.09(1) Stats., and the amendment relates back to the date of the filing of the original pleading "if the claim asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading," §802.09(3), Stats. While these provisions do not apply to administrative proceedings, this Commission does not believe any stricter rule is called for in the regulation of proceedings before it.

As is set forth below, in the Commission's opinion this appeal is cognizable pursuant to §230.44(1)(d), Stats. The appellant will be permitted to file an appropriate amended pleading that makes it clear that she is appealing her probationary termination, and this will relate back to the time the original appeal was filed.

OBJECTIONS TO TRANSFER

Appellant makes a number of objections to the legality of her transfer from DHSS to DOT. This transaction was never appealed. Even under a liberal approach to permitting amendments, there is no way that the existing appeal could be amended and considered to relate back to be timely with respect to the transfer.

APPELLANT'S STATUS AS PROBATIONARY OR PERMANENT

The appellant's argument that she was not legally required to have served a twelve month probationary period rests primarily on the assertion that she was not informed that there was a twelve month

probationary period until long after she had started work with DOT. The Commission's contrary finding on this point negates this argument.

The certification request form originally indicated that the probationary period would end on September 11, 1978. This later was changed to March 11, 1979. This change was not reflected in the copy of the form that had been placed in Ms. Fisk's personnel file. In the Commission's opinion, this does not affect the length of the probationary period.

The appellant also argues that the respondent is estopped by laches from asserting that appellant was on a 12 month probationary period. The Commission cannot ascertain any basis for such a conclusion.

Since the appellant was on probation at the time of termination, she cannot appeal her termination pursuant to §230.44(1)(c), Stats., which is limited to permanent employees. However, a decision to terminate probationary employment is "a personnel action after certification which is related to the hiring process in the classified service" and is appealable under §230.44(1)(d), Stats., which provides the jurisdictional basis for this appeal. See Wagaman v. DHSS, (9/14/79), 79-141-PC.

FURTHER PROCEEDINGS

The appellant argues that a sufficient record was made at the hearing to provide a basis for the decision of the substantive matters presented by this appeal. Given the nature of the notice of hearing (limited to jurisdictional issues) and the prior uncertainty as to the jurisdictional basis for this appeal, the parties must be given an opportunity for a hearing on the merits in the absence of waiver.

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If the parties should agree to a decision on the basis of the existing evidentiary record, further arguments on the merits might be desirable.

ORDER

The respondent's objections to subject-matter jurisdiction are overruled and the appellant will have 20 days following the date of this Order in which to serve and file an amended appeal. Each party shall notify the Commission within 30 days of the date of this Order whether he or she will waive further hearing in this matter and if so whether he or she wishes to make additional arguments on the merits.

Dated: Jan. 23, 1980. STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Charlotte M. Higbee
Commissioner

AJT:jmg