

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*

DEAN A. ZIEMKE,  
 Appellant,

v.  
 Secretary, DEPARTMENT OF  
 HEALTH AND SOCIAL SERVICES,  
 Respondent.

Case No. 80-390-PC

\* \* \* \* \*

DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This matter is before the Commission on respondent's motion to dismiss for lack of subject-matter jurisdiction. The following findings are based on material which appears to be undisputed.

FINDINGS OF FACT

1. A Research Analyst 5 position became vacant in February, 1980. A union transfer list was established and forwarded to the supervisor, but no appointment was made from this list and it was returned to personnel on March 26, 1980.

2. This position was announced for competition in April, 1980. The appellant was examined, certified, and interviewed, but not offered appointment. An appointment to this position was made on November 10, 1980.

3. Another Research Analyst 5 position became vacant in October, 1980, and was announced to the union pursuant to Art. VII, Section 1 of the Collective Bargaining Agreement between the state and AFSCME, Council 24, on November 11, 1980. A union transfer list was established and

sent to the supervisor on November 24, 1980. This list was returned to personnel on December 3, 1980, noting that a selection had been made off the union transfer list.

5. Article VII, Sec. 1 of the aforesaid agreement states in part as follows:

"When a permanent vacancy occurs in a permanent position in an employing unit ... the employer shall notify the local union ... Interested permanent employees ... who are in the same classification and who have completed their probationary period in the classification of the vacancy shall indicate their desire for a transfer by notifying the Employer within (5) calendar days of notice to the employe or within seven (7) calendar days notice to the Union whichever is greater ..."

OPINION

It is not completely clear from the record, but apparently the vacant position was offered to the appellant on November 28, 1980, by oversight, the appellant having placed by competition on a register for the same classification earlier that year.

The respondent argues that this appeal is foreclosed by the operation of §111.93(3), Stats.:

"If a labor agreement exists between the state and a union representing the state and a union representing a certified or recognized bargaining unit, the provisions of such agreement shall supersede such provisions of civil service and other applicable statutes relating to wage, hours and conditions of employment whether or not the matters contained in such statutes are set forth in such labor agreement.

\* \* \*

Since the appeal herein is covered by a contract, the Personnel Commission lacks subject matter jurisdiction of the appeal and must enter an Order dismissing it."

Section 230.44(1)(d), Stats., provides that:

"A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the Commission."

In the opinion of the Commission, the legislative intent behind §111.93(3), Stats., was, in recognition of the authorization of collective bargaining for state employees, to establish priorities between contract and statutory provisions as to bargainable matters. The statute provides that the provisions of the agreement are to have priority. For example, §230.35(5)(b), Stats., provides in part that the "standard basis of employment shall be divided into 5 work days of 8 hours each ...." If the State and a union were to bargain and reach agreement on a work week of 4 days of 10 hours each, this would not be in "violation" of §230.35(5)(b), Stats., because this provision relates to "wages, hours, and conditions of employment" and therefore was superseded once the parties reached agreement on the contract.

Section 111.93(3), Stats., has no application to matters which are non-bargainable. As to these matters, the civil service rules and statutes continue to apply. Prohibited subjects of bargaining include:

"(b) Policies, practices and procedures of the civil service merit system relating to:

1. Original appointments and promotions specifically including recruitment, examinations, certification, appointments and policies with respect to probationary periods.

2. The job evaluation system specifically including position classification ..." §111.91(2)(b), Stats.

Post certification personnel actions related to the hiring process in the classified service, alleged to be illegal or an abuse of discretion, are appealable to the Commission pursuant to §230.44(1)(d), Stats. To the extent that the personnel actions relate to original appointments or promotions, they fall within the category of non-bargainable subjects. To the extent that they relate to transfers, they fall within the category of bargainable subjects.

If it were determined that this is an appeal of a post-certification personnel action related to the hiring process in the classified service, alleged to be illegal or an abuse of discretion, the Commission would have jurisdiction over the appeal. If the respondent were to establish that the transfer in question had been dictated by the provisions of a collective bargaining agreement, this conceivably could serve as a defense against the substantive charge that it acted illegally or abused its discretion, but it would not divest the Commission of subject-matter jurisdiction.

The threshold question is whether there are present the elements of an appeal under §230.44(1)(d), Stats. Apparently neither the appellant nor anyone else was certified for the position in question. Rather, it appears that the appellant was offered a position through oversight or other error, following his certification some months earlier for a different position. This raises the question of whether the term "after certification" in §230.44(1)(d), refers to "after certification" for the position in question, or could mean "after certification" for any position.

In the opinion of the Commission, the latter interpretation could

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lead to absurd results. A person certified at any time for any position could challenge the failure of an appointing authority to appoint him or her to an entirely unrelated position for which the appointing authority had no legal basis for which to consider his or her appointment.

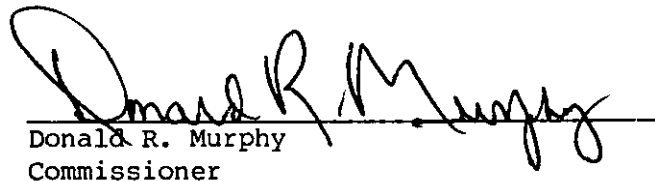
Since there was no certification for the position in question, the Commission lacks jurisdiction over the subject matter of this appeal.

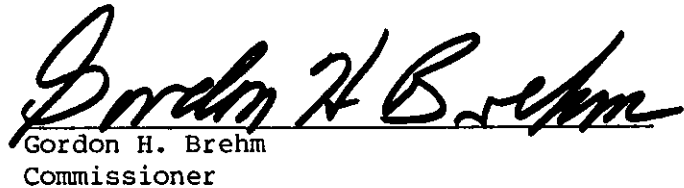
ORDER

This appeal is dismissed for lack of subject-matter jurisdiction.

Dated: April 23, 1981.

STATE PERSONNEL COMMISSION

  
Donald R. Murphy  
Commissioner

  
Gordon H. Brehm  
Commissioner

AJT:jmg

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