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GARY MILLER,

Appellant,

v.

Secretary, DEPARTMENT OF  
HEALTH & SOCIAL SERVICES,

Respondent.

Case No. 81-137-PC

\* \* \* \* \*

DECISION  
AND  
ORDER

This matter is before the Commission a second time on a jurisdictional objection by the respondent. The respondent at the initial prehearing conference held on May 27, 1981, objected to the Commission's jurisdiction on the ground that the appeal was untimely filed. Following the submission of briefs, the Commission on July 21, 1981, entered an order denying respondent's motion to dismiss on that ground.

A second prehearing conference was held on August 19, 1981, at which certain issues were proposed. Subsequently, on September 1, 1981, the respondent filed objections to these proposed issues which contained additional jurisdictional objections.

The following issues were proposed at the August 19th prehearing conference:

Whether the decision(s) or delay(s), if any, effectuating the decision(s) as to:

- (a) how to fill the position of Administrative Officer 1 - Confidential in the Division of Community Services, DHSS, and;
- (b) moving the appellant into said position;

constituted an illegal action(s) under the civil service statutes or rules or an abuse(s) of discretion.

The appeal letter in this matter stated in pertinent part as follows:

"Please accept this as my appeal of the utilization of the 'new' Personnel Rules (effective March 1, 1981) to effectuate a transfer (vs. a promotion) to the A.O. series.

I believe the appropriate transactions should have been implemented utilizing the existing Personnel Rules since the action was initiated during the time when these rules were in effect. The process was significantly slowed and manipulated in order to utilize the 'new' rules, thus circumventing a pay adjustment."

It is apparent, based on this appeal letter, that the appellant objects both to the type of transaction the department utilized (transfer vs. promotion) and the timing of the transaction (before or after the effective date of the new personnel rules).

There are five possible bases for Commission jurisdiction over this appeal -- ss.230.44(1)(a), (b), (c) or (d), or 230.45(1)(c), stats. This could not be an appeal under s.230.45(1)(c), ("... serve as final step arbiter in a state employe grievance procedure ...") because there is no indication that the grievance procedure was followed or a grievance filed in this case. Section 230.44(1)(d) ("... personnel action after certification which in related to the hiring process ...") is inapplicable because this case does not involve any of the enumerated transactions.

This leaves as possible jurisdictional bases s.230.44(1)(a) ("Decision of administrator.") and s.230.44(1)(b) ("Action delegated by administrator.").

The initial decision whether to fill a position by competition or transfer, and the decision as to when to fill a position, are decisions of the appointing authority. See s.230.06(1)(b), stats. If the appointing authority decides to fill a position by examination, then the administrator is responsible for the examination and certification process, see ss.230.16, 230.25, stats. If the appointing authority decides to fill a position by transfer, then the administrator

is responsible for approving or disapproving the transfer, see s.230.29, stats., and the administrator's decision is limited to the issue of whether the transaction satisfies the limited criteria set forth in the statute and rule. See ss Pers 15.01 and 15.02, Wis. Adm. Code; Stasny v. DOT, Wis. Pers. ommn. 79-217-PC (1/12/81). In other words, the appointing authority makes the initial decision as to which process - promotion or transfer - to use to fill a vacancy. The Administrator's role is in connection with the implementation of the particular process once it is chosen. Therefore, the determination at issue here as to how and when to fill the position is not that of the administrator, either directly or on a delegated basis, and hence is not appealable pursuant to s.230.44(1)(a) or (b), stats.

For these reasons, the Commission concludes that it lacks jurisdiction over the subject matter of this appeal.

The jurisdictional objection ruled on above was not raised until after the second prehearing conference held in this case. While it is axiomatic that jurisdictional questions be raised at any time, the Commission recommends that whenever possible all jurisdictional questions be raised at an early stage in proceedings so that piecemeal litigation of cases can be avoided.

ORDER

This appeal is dismissed for lack of subject matter jurisdiction.

Dated: October 2, 1981 STATE PERSONNEL COMMISSION

Gordon H. Brehm  
GORDON H. BREHM *KMS*  
Chairperson

Charlotte M. Higbee  
CHARLOTTE M. HIGBEE *sh*  
Commissioner

Donald R. Murphy  
DONALD R. MURPHY  
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AJT:ers

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