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STATE OF WISCONSIN

PERSONNEL COMMISSION

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PHILLIP SMITH,
Appellant,

v.

Secretary, DEPARTMENT OF
INDUSTRY, LABOR AND HUMAN
RELATIONS, and Administrator,
DIVISION OF PERSONNEL,
Respondents.

DECISION
AND
ORDER

Case No. 81-412-PC

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BERRY, et al,
Appellants,

v.

Secretary, DEPARTMENT OF
INDUSTRY, LABOR AND HUMAN
RELATIONS, and Administrator,
DIVISION OF PERSONNEL,
Respondents.

Case No. 81-415-PC

* * * * *

These matters are before the Commission on a second set of jurisdictional objections raised by the respondent Division of Personnel. In an Interim Decision and Order dated August 5, 1982, the Commission examined, on a jurisdictional basis, each of the various theories of proceeding that were argued by the appellants. The facts, as outlined in that Interim Decision, are quite complicated. Very basically, the appellant sought to have the Commission review a decision, based upon the results of an examination, not to hire the appellants as Job Service Specialist-1's-DVOP to fill permanent positions within DILHR, via

an accretion process. The Commission granted respondent's motion to dismiss as to four of the six theories or allegedly inappropriate actions that were identified by the appellants. The respondent's motion was denied as to the remaining two actions, i.e., the classification decision and the unclassified service decision, with the following provisos:

"The record is unclear as to the precise date that the appellants were notified of the classification decision. Therefore, it is impossible to determine whether or not their appeals, filed on October 23, 1981, were timely, pursuant to §230.44(3), Wis. Stats. However, for purposes of this interim decision, the Commission must assume that the appeals were filed within the 30 day time limit." Interim Decision, p.10.

"Therefore, subject to the qualification as to timeliness of the appeal (see p.10, supra), the Commission may, pursuant to §230.44(1)(a), Wis. Stats., review the administrator's tacit decision not to place the DVOP positions in the unclassified service." Interim Decision, p.14.

On August 23, 1982, the respondent Division of Personnel filed two motions for an order dismissing the instant matters. In the first motion, DP argued that the Commission lacks subject matter jurisdiction to determine whether or not an "unclassified service decision" was correct. Respondent's second motion alleged that the appeals had not been timely filed. An affidavit was attached. The appellants have submitted a brief in response. Because none of the parties have requested a hearing on these matters, they are deemed to have waived any right they may have had to such a hearing.

FINDINGS OF FACT

1. On August 18, 1981, George W. Dawes, a Personnel Specialist for DILHR, mailed each of the appellants a letter, stating in part:

The purpose of this letter is to provide information to you concerning the accretion process which will be used to absorb the qualified members of the current Vets House' DVOP staff into the Department of Industry, Labor, and Human Relations, Job Service Division. As you know, under the current contract between Vets House and the Job Service, the DVOP staff were hired and paid as paraprofessionals. However, Public Law

96-466 requires that the Job Service DVOP staff will be classified, paid and work at the entry level professional level, i.e. Job Service Specialist 1.

* * *

A determination must be made of whether each of the current Vets House DVOP staff meet the minimum qualifications for the higher level positions, in accordance with the Wisconsin merit system rules. All current DVOP staff will be asked to take the Job Service Specialist 1 examination. In Wisconsin, we use the examination developed by the U.S. Department of Labor to determine the qualifications of all individuals aspiring to be Job Service Specialist 1's. A passing grade on this examination will attest to the individuals suitability to be appointed as a Job Service Specialist 1. (Emphasis added.)

2. The examination was given on September 12, 1981. Each of the appellants took the exam.

3. The letters of appeal in these matters were filed with the Commission on October 23, 1982.

CONCLUSIONS OF LAW

1. The Commission lacks jurisdiction to review the decision not to place the permanent DVOP positions in the unclassified service.

2. These appeals were not timely filed for the purpose of obtaining review of respondent's classification decision and, therefore, cannot be heard by the Commission.

OPINION

Pursuant to §PC 1.03(3), Wis. Adm. Code, "Any party may move at any time to dismiss an appeal on the ground the commission does not have jurisdiction of the subject matter of the appeal." In Morgan v. Knoll, Personnel Board, Case No. 75-204 (5/25/76), the predecessor agency to the Commission dismissed an appeal as untimely filed and stated in part: "[I]t is a well established legal principle that an objection to subject matter jurisdiction can be raised at any time during the course of the proceedings whether judicial or quasi-judicial." (Citations omitted.)

Therefore, despite the fact that the respondent had previously filed another motion to dismiss this matter and also had an opportunity to object to the Proposed Decision and Order prepared by the hearing examiner dealing with that motion, the respondent still has the right to file the jurisdictional motions that are the subject of this decision.

A. Unclassified Service Decision

Pursuant to the terms of §230.08(2), Wis. Stats., there is an implicit decision by some authority as to whether certain statutory restrictions require the inclusion of a particular position within the unclassified service:

- (2) Unclassified service. The unclassified service comprises positions held by:
 - (z) All other officers and employes of the state whose positions are expressly excluded from the classified service by statute or whose positions cannot be placed under the classified service because of the restrictions placed on them by statute.

The respondent argues that the implicit decision must be imputed to the secretary of the Department of Employment Relations rather than to the administrator of the Division of Personnel as concluded by the Commission in its Interim Decision and Order.

Nothing within §230.08(2), Wis. Stats., specifically designates the authority who is to make the unclassified service determination. As pointed out by the respondent, as long as the authority is not specifically charged to the administrator, it vests in the secretary. Pursuant to §230.04(1), Wis. Stats:

The secretary is charged with the effective administration of this chapter. All powers and duties, necessary to that end, which are not exclusively vested by statute in the Commission, the administrator, the board or appointing authorities, are reserved to the secretary.

Therefore, the Commission concludes that it is legally the secretary's, rather than the administrator's, duty to make any unclassified service decisions. The fact that no evidence was offered to show that the secretary actually carried

out the function is irrelevant. Appellants rely on the provisions of §§230.04(5) and 230.05(5), Wis. Stats. However, those provisions relate to the promulgation of rules and do not act to grant authority to the administrator over all of Subchapter II (Civil Service) of Chapter 230, Wis. Stats. In addition, the administrator's authority under §230.09(2)(g), Wis. Stats., is over classification decisions and not unclassified service decisions.

There are no provisions within §230.44 or .45, Wis. Stats., that grant the Commission jurisdiction over a decision of the secretary as to whether a position belongs within the classified service. In the absence of subject matter jurisdiction, the instant appeals must be dismissed as to that issue.

B. Timeliness

Section 230.44(3), Wis. Stats., states in part:

"Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later ..." (emphasis supplied)

This provision repeatedly has been interpreted as jurisdictional in nature so that the Commission has no authority to hear an appeal that is not filed within the time limit. See, Odau v. Personnel Board, 250 Wis. 600 (1947); Richter v. Division of Personnel, Wis. Pers. Commn. No. 78-261 (1/30/79); State ex rel. DOA v. Personnel Board, Dane County Circuit Court No. 149-295 (1976).

The letter that was mailed to the parties on August 18, 1981 clearly indicated that the DVOP positions were to be classified at the Job Service Specialist 1 level. In order to be appointed to the DVOP positions, the parties subsequently took the JSS1 exam on September 12, 1981.

The Commission concludes that the August 18th letter acted to notify the appellants of respondent's decision relative to the classification of the positions.

Even if the letter failed to reach the appellants, the examination itself provided adequate notice of the classification decision. The appellants had 30 days from receipt of the August 18th letter (or, if they did not receive the letter, from the September 12th exam) in which to file an appeal with the Commission. The appeals were not filed until October 23, 1981, well after the 30 day period had run.

The appellants argue that they lacked standing to file appeals of the classification decisions until they were notified of the consequence of having failed the examination that was given:

The decision not to place the positions in unclassified service and the decision classifying these positions as Job Service Specialist 1 were decisions by which appellants were not aggrieved when those decisions were made. Had they filed appeals with the Personnel Commission with respect to either decision those appeals would have been dismissed as untimely on the ground of lack of standing of the appellants. That the Commission recognizes the "standing" requirement is reflected in the opinion approved by the Commission in this very action. Only after appellants took the examination, failed it, and were notified of their failure and notified of the consequences for their continued employment and consequences for appointment to DVOP positions were they aggrieved.

Everyone who received the August 18th letter was notified that, as a consequence of classifying the positions at the JSS1 level, they would be required to take and pass the JSS1 exam. Once notified of the classification decision, the appellants were in a position to obtain review of that decision and to seek to avoid the exam requirement. In addition, by being forced to take the JSS1 exam, the appellants suffered sufficient injury in fact so that they had standing to appeal the classification decision.

In their argument on standing, the appellants are treading a very narrow line. They are saying on the one hand that they do have standing to challenge the job classification decision (even though they never filled the positions that are alleged to have been improperly classified) and at the same time arguing that they had to be notified that they failed the subsequent examination

before standing was conferred. This suggested delineation fails to explain how notice of a failure to pass an exam relates to obtaining review of a prior classification decision. The appellants in these matters were in the same status, with respect to the classification decision, before and after the exam: they were not filling the JSS1 positions. The Commission is unconvinced that the act of notifying the appellants of the exam results acted to confer standing as to the classification decision. FN

Appellants also state that the period for filing an appeal runs from the "effective date" of the action rather than the date of decision or date of notice of decision. In this case, notice was given via the August 18th letter, so the only question is the appropriate effective dates of the classification decisions. (See §230.44(3), Wis. Stats.) There is nothing that has been presented that would suggest that the effective date of the classification decision was any later than August 18, 1981. It is clear that other procedures were carried on after the 18th by DILHR (and later by DP) based upon the accomplished fact (subject to appeal to the Commission) that the DVOP positions were at the JSS1 level. Therefore, the Commission concludes that the effective date

FN Although the appellants had initially sought review of the respondents' decision not to place the appellants into the permanent DVOP positions, the only action presently in question is the classification decision. The Commission's analysis of the standing issue is limited to the particular classification decision that has been brought into question here and should not be extended to include appeals from examinations, generally.

of this decision was no later than the date of the letter to the appellants (August 18, 1981) rather than September 30, 1981, which was the date that the appellants' employment at the various Job Service offices ended by operation of contract.

The net effect of the Commission's conclusion as to respondent's second set of jurisdictional objections is to dismiss both of the claims that remained from the appellant's initial appeals. Although this result appears to be harsh, it is dictated by the various statutory limitations imposed on the Commission's authority.

ORDER

The respondent's motions to dismiss are granted and these matters are hereby dismissed.

Dated: Sept. 23, 1982

STATE PERSONNEL COMMISSION

KMS:ers

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