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PHILLIP SMITH,
Appellant,

v.

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

Case No. 81-412-PC

* * * * *

BERRY ET AL.,
Appellants,

v.

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

Case No. 81-415-PC

* * * * *

INTERIM
DECISION
AND
ORDER

These matters are before the Commission upon respondents' jurisdictional objections. Briefs have been filed and a jurisdictional hearing was held.

FINDINGS OF FACT

1. The Disabled Veterans Outreach Program (hereinafter referred to as DVOP) is designed to provide employment assistance to the nation's unemployed disabled Vietnam-era veterans.

2. DVOP was developed in 1977 by the Department of Labor:

Under the DVOP, outreach units will be established and staffed by disabled Vietnam-era veterans within the employment service in the 100 largest cities with at least one unit in each State. These veterans will work

as para-professionals in federally funded jobs for a period of 18 months. They will concentrate on identifying disabled veterans in need of services and bringing them into the mainstream of the labor market, helping them avail themselves of the program and services to which they are entitled, including special consideration for public service jobs. Staff of these outreach units also will be responsible for developing private sector jobs for disabled veterans making use of available labor market information.

Department of Labor, Employment and Training Administration, Employment Service, Program Letter No. 11-77, March 8, 1977.

3. Subsequent correspondence to the respective state agencies involved provided that DVOP units were to be staffed by disabled Vietnam-era veterans utilizing whatever procedures that were appropriate under state law. Funding for the positions came from CETA Title III discretionary funds.

4. At the outset of the program, the State of Wisconsin hired its DVOP staff as project limited term employees which permitted the employment of individuals on a limited term basis for up to one year.

5. As a consequence of a statutory revision in January, 1979, project LTE status was eliminated and a contract was entered into between the Disabled American Veterans (DAV), and the State of Wisconsin Job Service in order to continue the program. The contract was in effect from January 1, 1980 until February 1, 1981.

6. After a competitive bidding process, Vets House, Inc. was awarded the contract to operate DVOP from February 1, 1981, until September 30, 1981. The contract provided, in part, as follows:

Payment to employes will be within the Job Service Assistant 3 pay range.... The Contractee [Vets House] is the employer of staff hired under these funds...

* * *

DVOP staff work in the Job Service District and/or Local Offices as listed in attached allocation table.

* * *

The DVOP Program shall be jointly administered by the Contractor [Job Service Division] and Contractee in accordance with attached program guidelines. The Contractor will provide staff training, office space and facilities and functional supervision within the priorities of the local office, under the policy contained at present and future Employment and Training Administration Guidelines applicable to the DVOP program.

Staff employed in the DVOP Program on the effective date of the Contract, will be retained by the Contractee. New hires and/or terminations will be mutually agreed to by both parties to the Contract.

* * *

In the event that funds should cease to be available, this contract may be cancelled by written notification to the Contractee by the Contractor.

* * *

Contractor reimbursement to program staff shall be identical to approved current State of Wisconsin rates for Business travel and expenses.

7. On October 17, 1980, Public Law No. 96-466, entitled Veterans' Rehabilitation and Educational Amendments of 1980 (hereinafter referred to as VREA) was enacted. The net effect of the VREA was to establish a permanent, Department of Labor-funded DVOP instead of the CETA-funded program that had previously existed. The Act provided in part:

(a) (2) Funds provided to a State under this subsection shall be sufficient to support the appointment of one disabled veterans outreach program specialist for each 5,300 veterans of the Vietnam era and disabled veterans residing in such State. Each such specialist shall be a veteran. Preference shall be given in the appointment of such specialists to disabled veterans of the Vietnam era. If the Secretary finds that a disabled veteran of the Vietnam era is not available for any such appointment, preference for such appointment shall be given to other disabled veterans. If the Secretary finds that no disabled veteran is available for such appointment, such appointment may be given to any veteran. Each such specialist shall be compensated at a rate not less than the rate prescribed for an entry level professional in the State government of the State concerned.

* * *

(d) Persons serving as staff in the disabled veterans outreach program conducted under title III of the Comprehensive Employment and Training Act on the date of enactment of this section shall be appointed as disabled veterans' outreach program specialists in the State in which such individual is so serving, unless the Secretary for good cause shown determines that such individual is not qualified for such appointment. 38 U.S.C Section 2003A

8. As of October 17, 1980, the date of the enactment of the VREA, all of the five appellants in these matters were employed as DVOP specialists, pursuant to the contract between DAV and Job Service.

9. In a subsequent directive from the Deputy Assistant Secretary, Department of Labor, to "all state employment security agencies," paragraph (d) of Section 2003A was discussed:

Under the merit system standards administered by the U. S. Office of Personnel Management, all States now have acceptable plans for determining minimum qualifications for positions in State ES agencies. Accordingly, determinations made by State merit system agency officials on qualifications will be acceptable to the Department of Labor, including eligibility for appointment of DVOP staff on board as of date of enactment.

The directive also provided that the administrators of the state employment security agencies were to take the following actions:

(1) Meet with State Merit System Director and discuss the impact of provisions of P.L. 96-466 relating to the DVOP program on current policies and regulations. Urge the State Merit System Director to make necessary administrative changes or to initiate revisions to State policies, as appropriate.

(2) Elevate to the ETA Regional Administrator in writing, DVOP issues on the State merit system that cannot be resolved at the state level, with copies to the State and Regional Directors for Veterans employment.

(3) Review and revise current DVOP position description as needed to reflect functions mandated by P. L. 96-466.

(4) Initiate administrative actions necessary to ensure proper classification and entry-level professional compensation of DVOP staff.

(5) Hold a preliminary planning meeting with the State Director for Veterans Employment (SDVE) on implementing P. L. 96-466 provisions which relate to assigning DVOP staff, particularly on the outstationing of staff in locations other than ES local offices.

10. The Department of Employment Relations is the State Merit System Agency for the State of Wisconsin.

11. By letter dated July 21, 1981, to the Deputy Secretary of DILHR, the Acting Regional Administrator, Region V, Department of Labor, established the procedures for filling Wisconsin's DVOP positions:

1. Following state merit procedures, the Job Service Specialist-DVOP examination will be given. Entrance to the examination will be restricted to individuals who can document that they are disabled Vietnam-era veterans, including all eligible current DVOP staff who are interested in a permanent position with the Wisconsin agency.

2. The selection process will be as follows:

a. First the certification list of eligibles from the Job Service Specialist-DVOP examination will be utilized.

b. Second, within the Wisconsin agency, current Job Service Specialists who meet the disabled Vietnam-era veteran criteria, will be reassigned and appointed as a DVOP.

3. If it is necessary to recruit additional DVOPs, the Regional Office will be contacted regarding the next steps to be taken. Additional recruitment efforts will have to be cleared with the Veteran Employment Service.

12. Respondent Division of Personnel (DP) has delegated responsibility for classification decisions for the Job Service Specialist 1 (JSS1) and 2 (JSS2) classifications to DILHR.

13. Sometime prior to late August, 1981, DILHR determined that the duties and responsibilities of the permanent DVOP position fell within the scope of the JSS1 classification.

14. As a consequence of the classification decision, respondent DP is deemed to have made a tacit decision not to consider the DVOP positions as being within the unclassified service.

15. In late August, 1981, Jack Lawton, of DILHR's personnel office contacted Dan Wallock , DP, and advised Mr. Wallock that DILHR would be using the Job Service Specialist exam to determine whether existing DVOP staff were "at least minimally qualified" for permanent JSS1 appointments. DP agreed to provide sufficient copies of the exam and to schedule, conduct and grade the examinations.

16. The decision to set the passing score or cut off point at 93.00 was made by DILHR. Its decision was based upon the fact that DP had used 93.00 as the passing score when it had previously administered the exam.

17. The examination was given on September 12, 1981, to twenty-two people, all of whom were existing DVOP staff. Thirteen persons passed the examination and were thereby identified by DILHR as incumbents in the DVOP positions. Nine persons failed the exam.

18. Whenever the State "becomes responsible for a function previously administered by another governmental agency, a quasi-public, or a private enterprise" (§230.15(1), Wis. Stats.) DP has the responsibility to determine "appropriate eligibility, pay, employe benefits and status" for those persons identified by the new employing agency as position incumbents.

19. DP has a uniform written policy of automatically waiving competition and examination in accretion matters. The policy was followed for the accretion of the DVOP positions.

20. DP's determination of an incumbent's "eligibility" for accretion is generally limited to consideration of whether they have previously been employees of the sending agency and whether they are minimally qualified to do the job. For a position requiring a licensed veterinarian, for example, DP

would determine whether the prospective employe held such a license. Where the position does not require a license, DP merely considers whether the agency has indicated that the employe has performed his or her duties satisfactorily.

21. In this case, DP determined that all 13 of those persons identified by DILHR as position incumbents were "eligible" for accretion and all 13 were subsequently hired to fill permanent DVOP positions in DILHR.

22. Respondent DILHR never requested nor did respondent DP ever establish an exceptional employment list to enable the state to hire the occupationally handicapped or disadvantaged for the permanent DVOP positions.

23. Appellant Smith's employment history is representative of the other appellants in this matter for the purpose of determining whether he attained permanent status in class as a DVOP specialist in DILHR.

24. Mr. Smith was employed as limited term employe (LTE) with DILHR at the Job Service Assistant 3 classification level for the period from July, 1979, until January 1, 1980.

25. Persons employed as LTE's lack permanent status in class.

26. Upon the effective date of the contract between DAV and Job Service, Mr. Smith was employed under the contract after DAV had evaluated his performance in DVOP but without an examination.

27. Upon the effective date of the contract between Vets House and Job Service, Mr. Smith's employment was continued under the new contract based upon his past performance, and without an examination.

28. While employed under the Vets House contract, Mr. Smith satisfactorily completed a probationary period of approximately two months.

29. At no time relevant to this matter was Mr. Smith's position covered by a collective bargaining agreement.

30. Whether employed by DILHR as an LTE, or working under either the DAV or Vets House contract, Mr. Smith worked in a Job Service district office, and received programmatic supervision from Job Service employes.

31. During the term of the Vets House contract, hiring decisions for new employes (i.e., individuals other than those persons who had worked under the DAV contract and were automatically reemployed under the Vets House Contract) were made by a panel of three persons including one DILHR representative, one Vets House representative and a third person agreed to by both Vets House and DILHR. Major disciplinary decisions were made only upon the agreement of both Vets House and DILHR.

32. Mr. Smith was not appointed to a position of permanent employment in the state civil service, nor did he complete a mandatory probationary period within the state service. Therefore, Mr. Smith as well as the other appellants in this matter never attained permanent status in class.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction to review respondents' decision to classify the DVOP positions at the JSS 1 level.

2. The Commission lacks jurisdiction to review the decision to require existing DVOP staff to successfully complete the JSS 1 examination.

3. The appellants lack standing to contest the administrator's accretion decision.

4. The Commission has jurisdiction to review the decision of respondent DP not to include the DVOP positions in the unclassified service.

5. The Commission lacks jurisdiction to review any decision by the respondent DILHR effectively discharging the appellants.

6. The Commission lacks jurisdiction to consider the appropriateness of creating an exceptional employment list for filling the permanent DVOP positions.

OPINION

The appellants in these matters have asserted a variety of legal theories in an effort to trigger the Commission's jurisdiction. The underlying action being complained of is the 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.

The facts recited above indicate that the program had originally been staffed by DILHR LTE's, but from January, 1980 until September 30, 1981, the program functions were performed under contract with first, the Disabled American Veterans and later, with Vets House. Pursuant to a federal law enacted on October 17, 1980, then existing DVOP staff were to be appointed as DVOP specialists in "the State in which such individual is so serving, unless the Secretary for good cause shown determines that such individual is not qualified for such appointment." The appellants were all serving as DVOP staff on October 17, 1980, but subsequently failed a qualifying examination and were not designated by DILHR as position incumbents for the permanent DVOP positions in DILHR.

Classification Decision

Appellants argue that the Commission has jurisdiction over the respondent's decision to classify the permanent DVOP positions in DILHR at the JSS 1 level rather than at some other level. Classification decisions are reviewable under either §230.44(1)(a) or (b), Wis. Stats., depending on whether the administrator has delegated classification authority to the appointing authority (here, DILHR). In this case, the JSS 1 classification has been delegated to DILHR so the action is appealable under §230.44(1)(b), Wis. Stats. Pursuant to §230.05(2)(a), Wis. Stats., the administrator must also be named as a party.

Respondent DP argues that the classification decision did not in itself cause the injury alleged by the appellants. While it is true that the direct cause of appellants' injuries appears to have been the qualifying examination, the classification decision apparently determined the type of exam that was ultimately given. A different classification result might have meant either that no exam could have been given or that a different exam would have been scheduled. Therefore, the appellants were, in fact, aggrieved by the classification decision and have standing to bring this appeal. Wisconsin's Environmental Decade, Inc. v. PSC, 69 Wis. 2d 1, 230 N.W. 2d 243 (1975).

The issue presented is the correctness of the respondent's classification decision based upon the information available at the time the decision was reached. Whether or not a meaningful remedy is available to the appellants if they were to prevail on this issue is beyond the scope of this interim order.

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.

Examination Decision

DILHR and/or the Department of Labor decided to require that each DVOP staff member seeking a permanent position with DILHR successfully complete the JSS 1 examination in order to confirm that they were "minimally qualified" for appointment. The role of DP with respect to the examination was limited to providing an exam location and machine-scoring the exam.

Representatives of DP testified that the administrator had no input into the decision to utilize the JSS 1 exam, and that the administrator had to abide

by any qualifying decisions made by DILHR and/or the Department of Labor, no matter how obnoxious. In contrast, DILHR's personnel director testified that the decision to give the qualifying examinations was approved by DP. A memorandum from DILHR to DP dated October 8, 1981, also discussed this topic:

Job Service wished to objectively measure the capabilities of the VETS House DVOP staff members to assure that the persons accreted into the Job Service Specialist 1 classification would be at least minimally qualified. To this end, I contacted you in late August to explain the proposed accretion and to arrange for the September 12 testing of 22 VETS House employes through the regular State Division of Personnel exam facilities. We agreed that SDOP would administer and score the written exam that was developed and validated by the Educational Testing Service as a ranking instrument for Job Service Specialist 1 candidates. The established passing point was to be used in the scoring process.

Weighed together, the evidence indicates that DP's role was, in fact, limited to supplying the exam and administering and scoring it. DP was not involved in the decision to use the JSS 1 exam to determine "minimal qualifications."

Nothing within its statutory authority provides the Commission with the jurisdiction to review the decision by DILHR and/or the Department of Labor (or, presumably Vet's House) to require a qualifying examination in these matters. As discussed above, the decision was not made by the administrator (§230.44(1)(a), Wis. Stats.), nor did the administrator delegate to DILHR the authority to establish minimum qualifications for the position. (§230.44(1)(b), Wis. Stats.) As noted below, the administrator's role commenced at the point that DILHR, as the prospective employing agency, identified incumbents for the permanent DVOP positions based on the results of the examination. The JSS 1 examination, as used by DILHR for determining whether individuals were "at least minimally qualified", was utilized for a purpose that is outside the state civil service procedures. Given DILHR's use of the exam as a screening device prior to any accretion decisions by the administrator, the provisions of §230.16, Wis. Stats.,

are inapplicable. Specifically, the reference in §230.16(4), Wis. Stats., to "examinations" that "shall be job-related ... and shall be subject to the approval of the administrator" refers to examinations "under this subchapter." §230.16(1)(a), Wis. Stats. (Emphasis added)

The specific question of whether the examinations constituted discipline that would be appealable under §230.44(1)(c), Wis. Stats., is treated below on page 14. There was never a certification of the DVOP eligibles; therefore, the examination cannot be considered a "personnel action after certification which is related to the hiring process." (§230.44(1)(d), Wis. Stats.) Upon review of the remaining jurisdictional provisions found in §230.45(1), Wis. Stats., none appear to apply to the examination decision at issue here.

Accretion Decision

After the results from the examination were tabulated, DILHR notified DP that thirteen individuals were designated as position incumbents for purposes of accreting them into the state classified service. Once DP received the list, it applied §230.15(1), Wis. Stats., and determined "appropriate eligibility, pay, employe benefits and status identified in §§230.28 and 230.35." All thirteen of the individuals were determined by DP to be eligible for accretion.

As a general matter, the administrator's decisions as to eligibility for accretion under §230.15(1), Wis. Stats., constitute a "personnel decision of the administration" that is appealable to the Commission pursuant to §230.44(1)(a), Wis. Stats. Therefore, someone who was identified by the prospective employing agency as a position incumbent and who was subsequently determined to be ineligible for accretion by the administrator, would have a means of obtaining review of the administrator's decisions. In this case, the evidence shows that the appellants could not even be considered for accretion by the

administrator, due to the preclusive determination of "minimal qualification" made by DILHR. Therefore, the appellants were not aggrieved by the administrators accretion decision; they did not suffer any injury as a consequence of that decision. Standing to maintain an appeal requires injury to the plaintiff or petitioner from the agency action. Wisconsin's Environmental Decade, Inc. v. PSC, (supra). The appellants in these matters lack standing to contest the administrator's accretion decisions.

Unclassified Service Decision

The appellants argue that the respondents should have hired them in the unclassified service rather than placing the DVOP positions within the classified service as JSS 1's. The decision not to place the positions in the unclassified service must be considered to have been a tacit determination that was made at the same time that DILHR exercised its delegated authority to classify the DVOP positions at the JSS 1 level.

The respondent administrator, argued that any classified/unclassified result is based upon the statutory designation of unclassified positions found in §230.08(2), Wis. Stats. However, this argument fails to account for the interpretation that is contemplated by §230.08(2)(z), Wis. Stats:

- (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.

Given the language of the above provision, some authority must be in a position to determine whether or not certain statutory restrictions would require inclusion of a position within the unclassified service. In the absence of any specific designation of authority to make such a determination, that authority

must be imputed to the administrator.

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.

"Discharge Decision"

The appellants allege that the respondent's failure to appoint them constituted a discharge from their positions and entitles them to review of the "discharge" decision by the Commission.

The Commission's jurisdictions over disciplinary matters is derived from §230.44(1)(c), Wis. Stats., which reads:

If an employe has permanent status in class, the employe may appeal a demotion, layoff, discharge, or reduction in pay to the Commission, if the appeal alleges that the decision was not based on just cause.

The term "permanent status in class" is not defined within the statutes. However, in the rules of the administrator of DP, the term is defined as follows:

"Permanent status in class" means the rights and privileges attained upon successful completion of a probationary period required upon an appointment to permanent, seasonal or seasonal employment. §Pers. 1.02(13), Wis. Adm. Code.

The weight of the evidence presented in this case indicates that the appellants did not complete the requisite probationary period, and were never notified that they had obtained permanent status in class. (See §Pers. 13.10, Wis. Adm. Code). Mr. Smith testified that he passed a two month probationary period during the term of the Vets House contract. However, this period is significantly shorter than the minimum six-month mandatory probation period specified in §Pers. 13.02, Wis. Adm. Code. Also a part of the record in this matter is the affidavit of DILHR's Personnel Director stating that there were no personnel or payroll records indicating that the appellants had served probationary periods. The appellants submitted a copy of a document (Exhibit A, attached to appellant Berry's reply brief) purporting to be a Probationary Service Report/Training Qualification

Report for Mr. Berry, dated May of 1979. This document must be construed merely as evidence that appellant Berry had completed a training period while employed as an LTE. The Commission's interpretation of this document as well as the general question of whether the appellants had permanent status in class is based in part on the fact that the respondent DP found it necessary to employ accretion procedures in order to appoint the thirteen individuals who passed the examination to permanent positions. Different procedures would have been followed if the appellants had permanent status in class.

Substantial evidence was submitted regarding the nature of DILHR's role under the Vets Home contract in the day-to-day operation of DVOP. It is clear from the evidence that Job Service personnel had supervised the DVOP programmatic functions. Job Service also was an equal partner with Vets House in the making of hiring and disciplinary decisions regarding DVOP personnel, and DILHR, rather than Vets House, is paying any unemployment compensation obligations that exist for the DVOP employees who served under the contract.

However, none of this evidence acts to grant the appellants permanent status in class. Even if the appellants may appropriately be deemed to be employees of the State of Wisconsin during the terms of both the DAV and Vets House contract, they still would only have maintained their prior LTE status. Mere passage of time as an LTE employee does not result in permanent status in class. Therefore, the Commission lacks the authority to review any decision by the respondent DILHR to discharge the appellants.

Exceptional Employment List

Appellants also argued that the administrator failed to create an exceptional employment list for use in filling the DVOP permanent positions. The use of such lists is provided for in §Pers 27.02(2), Wis. Adm. Code:

USE OF EXCEPTIONAL EMPLOYMENT LISTS. Under authority to determine appropriate eligible lists, the administrator may, upon written request of an appointing authority, authorize the establishment of an exceptional employment list from a standard employment list when such list is required to meet the criteria outlined in the contract or guidelines under which a position is fully or partially funded, or for the purpose of employing the occupationally handicapped or disadvantaged. (See also §230.08(2), Wis. Stats.)

In the present case, no "standard employment list" was either utilized or available. DILHR's decision as to who was "minimally qualified" was made independently of the administrator who in turn was obligated to apply the accretion provision (§230.15(1), Wis. Stats.) as to those persons designated by DILHR as position incumbents. DP's accretion decision was limited to determining the eligibility of those individuals identified as position incumbents by DILHR. Under the provisions of §230.15(1), Wis. Stats., it would have been improper for the administrator to have created any additional list of eligibles for accretion beyond those persons identified by DILHR. Only after the accretion process had been completed, assuming that some of the DVOP positions remained vacant, could the administrator have created an exceptional employment list for filling the vacancies. A decision by the administrator in this area was effectively preempted by the apparent decision of DILHR (acting as the appointing authority) to fill any remaining vacancies by transfer and voluntary demotion rather than by open recruitment of individuals outside the agency. See Affidavit of James Van Sistine, dated October 16, 1981, which states in part:

All the thirteen who passed the examination have been certified to Job Service Specialist 1 positions. That a total of forty-one positions were authorized by current law. Sixteen of these positions were filled internally by transfer and voluntary demotion. Thirteen positions were filled by those who took the examination and passed. There are twelve positions open of which four will remain open temporarily pursuant to the verbal commitment made to the [U.S. District] court.

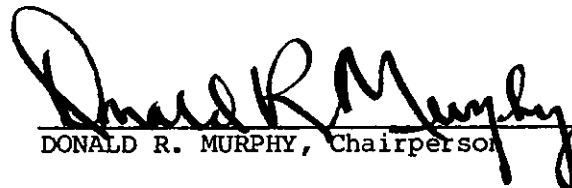
Only when DILHR opts to fill vacancies by open recruitment will the exceptional employment list become an available option. Under these circumstances, DILHR's decision to fill at least sixteen vacancies internally rather than by open recruitment is not a decision that is reviewable by the Commission.

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ORDER

The respondents' motion to dismiss these matters on jurisdictional grounds is denied as to the respondents' classification decision and the unclassified/classified service decision and is granted as to the remaining matters that the appellants have sought to raise as the basis for their appeals.

Dated: August 5, 1982 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson


LAURIE R. McCALLUM, Commissioner

KMS:jmf


JAMES W. PHILLIPS, Commissioner

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