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GEORGE CORNING, *

Appellant, *

v. *

Secretary, DEPARTMENT OF *

EMPLOYMENT RELATIONS, and *

Administrator, DIVISION OF *

PERSONNEL, *

Respondent. *

Case No. 82-185-PC *

* * * * *

INTERIM
DECISION
AND
ORDER

This matter is before the Commission on the respondent's motion to dismiss for lack of subject matter jurisdiction.

The appeal letter in this matter was dated and filed September 9, 1982. It states in pertinent part as follows:

"I hereby appeal the decision of the Department of Employment Relations to refuse to review my position for reclassification ... I request the Commission order reclassification of my position to either Personnel Specialist 4 or Personnel Specialist 5 ..."

The respondents have submitted an affidavit by the DER personnel manager which asserts, in part, that the appellant submitted a request for reclassification of his position accompanied by a position description (PD) signed only by him and not by his supervisor. She advised him that in accordance with current procedures she could not review his position for proper classification without a current PD signed by both him and his supervisor. Subsequently, it appeared that the appellant and his supervisor differed as to what should be in his PD, and the appellant informed the affiant that he had filed his appeal with this Commission and that "... he did not intend to meet with his supervisor to work out the differences between them regarding the

position description ... [and that] as far as he was concerned, the matter was before the Personnel Commission and he did not wish to schedule a position audit with me."

The respondents argue in their brief, in part, that: "appellant's request for reclassification is being processed (see affidavit attached); however, no final decision has been made. This appeal will be ripe once a decision is made and if it is a decision that is unsatisfactory to the appellant."

The appellant argues in his brief in part as follows:

"A copy of Affiant Delores Trutlin's decision which is the basis for this appeal is attached and reads in pertinent part as follows: "A classification review cannot be initiated until the above-mentioned materials are received." The "materials" that are referred to are a "justification" and a "position description" which accurately reflect the position's duties and responsibilities. The responsibility for the preparation of these documents rests with the Supervisor with whom I disagree. The decision made by the Respondents therefore is that until Appellant agrees with his Supervisor, no review can be made by DER. It should be apparent that if Appellant agreed with his Supervisor, no appeal would be necessary. To take the position that since no decision has been made by DER there can be no appeal is to deprive Appellant of due process since Appellant's access to the Commission and ultimately to the Courts could be forever thwarted by Respondents' inability or unwillingness to make a decision. Stating it simply, the refusal to make a decision is in fact a decision."

Section 230.44(1)(b), stats., provides that "Appeal of an action delegated by the administrator to an appointing authority under §230.0(2) shall be to the commission."

It is undisputed that the appointing authority (DER) has the delegated authority to approve the reclassification in question. The question presented on the instant motion is whether there has been an action over which the Commission has jurisdiction.

The Commission agrees in a general sense with the principle that a refusal to act under certain circumstances is cognizable by the Commission pursuant to §230.44(1)(b), stats. In this case, the respondents have refused to process the appellant's reclassification request. However, this refusal is not the same as a denial of the request for reclassification on its merits, and on an appeal the Commission can only address the action that actually was taken.

By way of analogy, if a plaintiff in a lawsuit files a complaint for damages as a result of personal injury, and the case is dismissed by the court because of perceived non-compliance with the statute of limitations, on appeal a reviewing court normally will consider only the limitations issue and not reach the matter of liability for damages, which the lower court did not reach. Similarly, in this case the Commission cannot address the question of whether the appellant's position is more properly classified as Personnel Specialist 3, 4 or 5, since this question was not addressed by the respondents. Rather, the Commission can only address the question of whether the respondents' decision not to process the appellant's reclassification request without a PD agreed to by the appellant and his supervisor was correct.


While the Commission concludes that there is a basis for jurisdiction over this appeal, it suggests that prior to further proceedings, which of necessity would be limited to the seemingly peripheral issue as discussed above, that the appellant and his supervisor consult in an attempt to reach agreement on a mutually acceptable PD.

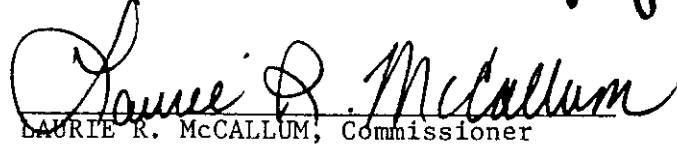
ORDER

The respondents' motion to dismiss filed October 5, 1982, is denied.

Dated: October 27, 1982

STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson


LAURIE R. McCALLUM, Commissioner

AJT:ers

Commissioner James Phillips abstained
from voting in this matter.

Parties

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