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 JAMES SCURLOCK,  
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 Appellant,  
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 v.  
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 Attorney General, DEPARTMENT  
 OF JUSTICE, and Secretary,  
 DEPARTMENT OF INDUSTRY,  
 LABOR AND HUMAN RELATIONS,  
 \*  
 Respondents.  
 \*  
 Case No. 82-8-PC  
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D.O.

DECISION AND ORDER

This is an appeal from a denial of permissive reinstatement. The respondent has objected to subject matter jurisdiction on the ground that there was no certification of a list of eligibles for the vacancy in question. Both parties have filed briefs. The findings that follow are based on documents in the file and appear to be undisputed. Because neither party has requested an evidentiary hearing or suggested that any jurisdictional facts are in dispute, they have waived any right to a jurisdictional hearing.

FINDINGS OF FACT

1. The appellant had previously been employed by respondent DILHR in a Regulation Compliance Investigator 3 position until 1980, when he was laid off and subsequently resigned.
2. On November 17, 1981, respondent DOJ posted a transfer opportunity for a Regulation Compliance Investigator 3 position. No applications for transfer were received within the November 23, 1981, deadline.
3. On November 24, 1981, the appellant requested permissive reinstatement to the RCI 3 position in DOJ.
4. On December 2, 1981, DOJ notified Patricia Chucka that she would be laid off from her Senior Special Agent 2 position.
5. On December 7, 1981, Ms. Chucka notified DOJ that she was exercising her rights to transfer to the still vacant RCI-3 position in lieu of lay off.

Her appointment to the RCI-3 position was subsequently confirmed by DOJ.

6. No examination was given, no register of eligibles created and no names were certified for the RCI-3 vacancy to which the appellant sought to be reinstated.

#### CONCLUSION OF LAW

The Commission lacks subject matter jurisdiction over the instant appeal.

#### OPINION

Of the various sources for the Commission's jurisdiction, only one has been placed in issue in the present case. §230.44(1)(d), Wis. 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. (Emphasis added)

It is undisputed that there was no certification of names for the position in question. The clear meaning of the statutory language is that unless there has been a certification of eligible candidates, no appeal pursuant to §230.44(1)(d), Wis. Stats., will lie. The appellant suggests that anyone like the appellant who, at some previous time, was hired for a position at the RCI-3 classification was effectively certified for the RCI-3 position that is the subject of the appeal. This argument was addressed by the Commission in Ziemke v. DHSS, Case No. 80-390-PC, (4/23/81). In that case, the appellant had been certified and was not selected for a Research Analyst 5 position. A second position became vacant and was announced for transfer under the contract. Apparently, the appellant was offered the second vacant position by mistake. The offer was rescinded and the selection was made off of the union transfer list. The Commission stated:

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 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.

Nothing within the appellant's brief indicates that the Commission's ruling in Zienke should not be applied here.

ORDER

This matter is dismissed due to lack of subject matter jurisdiction.

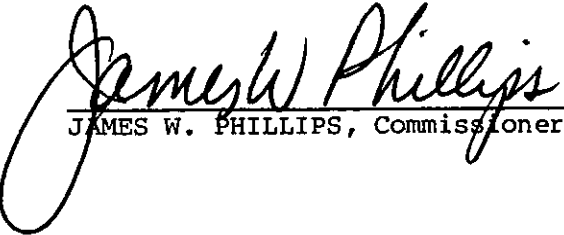
Dated: July 26, 1982

STATE PERSONNEL COMMISSION

  
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LAURIE R. McCALLUM, Commissioner

KMS:jmf

  
JAMES W. PHILLIPS, Commissioner

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