

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 LEONARD PFLUGRAD,  
                     Appellant,  
 v.  
 Secretary, DEPARTMENT OF  
 EMPLOYMENT RELATIONS,  
 Secretary, DEPARTMENT OF  
 HEALTH AND SOCIAL SERVICES,  
 and Director, BOARD OF  
 VOCATIONAL, TECHNICAL AND  
 ADULT EDUCATION,  
                     Respondents.  
 Case No. 83-0176-PC  
 \* \* \* \* \*

INTERIM  
 DECISION  
 AND  
 ORDER

This matter is before the Commission on motions by respondents Department of Employment Relations (DER) and Board of Vocational, Technical and Adult Education (BVTAE) to dismiss the appeal.

On August 11, 1983, the same date that the appellant filed a notice of appeal and an amended notice of appeal:

Please be advised that pursuant to §230.44(1)(a) and (b), Wis. Stats., Leonard Pflugrad does hereby appeal from the actions of the administrators of the above-named respondent agencies and the actions delegated by the administrators under §230.05(2), Wis. Stats., whereby the above-named agencies, individually and in concert, have defacto and in fact refused to examine and certify the claimant, have refused to give due consideration to his qualifications for employment and, in concert with other agencies, have conspired to deprive the complainant of opportunities in civil service employment.

At a prehearing conference held on November 30, 1983, the appellant agreed to file a more definite statement as to the basis for his appeal. That statement, filed on January 9, 1984, essentially included three allegations: 1) That on July 15, 1983, John Preston, an employe of DER, informed

the appellant that he (Mr. Preston) had told respondent Department of Health and Social Services (DHSS) "to ignore the Complainant's name on the certification list;" 2) That "BVTAE has continually sabotaged the Complainant's efforts to seek employment in the public and private sectors;" and 3) That DHSS has ignored "the Complainant's certification for positions available in June, August and October, 1983." In a later brief, the appellant also alleged that on or about July 20, 1983, an employe of BVTAE had "violated the terms of [a 1981] agreement between BVTAE and the Complainant not to release any job related references without first receiving the Complainant's express, written consent."

Both BVTAE and DER have filed motions to dismiss the appeal for lack of jurisdiction. The parties were granted the opportunity to file briefs.

The statutory provisions setting forth the limits of the Commission's authority were amended by 1983 Wisconsin Act 27 which went into effect on July 2, 1983. That act effectively reorganized the Department of Employment Relations and created a Division of Merit Recruitment and Selection and a Division of Classification and Compensation out of what had previously been the Division of Personnel. Until the amendments went into effect the Commission had the authority to review most, if not all, of the decisions made by the Administrator of the Division of Personnel as well as specified decisions made by an appointing authority. The amendments do not change the Commission's power to hear appeals of the specified decisions made by appointing authorities but the revisions narrow the scope of the reviewable decisions made within DER. Those provisions of §230.44(1), Stats., as amended, that are relevant to this proceeding read as follows:

- (1) Appealable actions and steps. Except as provided in paragraph (e), the following are actions appealable to the Commission under §230.45(1)(a):

- (a) Decisions made or delegated by administrator [of the division of merit recruitment and selection]. Appeal of a personnel decision under this subchapter made by the administrator or by an appointing authority under authority delegated by the administrator under §230.05(2).

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- (d) Illegal action or abuse of discretion. 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.

The amended appeal in this matter identifies three respondents.

Respondent DHSS is alleged to have ignored appellant's certification for positions available in June, August and October, 1983. Selection decisions are clearly appealable under §230.44(1)(d), Stats., where a timely appeal is filed. In order for an appeal to be timely, it must be 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." §230.44(3), Stats. The position available in October of 1983 is not a proper subject of this appeal because it was not available until after the appeal was filed on August 11, 1983. The appellant should have either filed a separate appeal or should have filed an amendment to his pending appeal within 30 days of the October hiring decision in order to perfect an appeal of that decision. He did neither.

It is unclear from the documents in the record precisely what positions appellant is referring to as being "available" in June and August. It is impossible to determine whether or not the instant appeal was timely filed in respect to the selection of a candidate for either of those positions. Because respondent DHSS has not heretofore raised a timeliness objection, the Commission will grant the appellant a period 15 days from the date of this decision in which to identify the positions by

classification and to indicate the date on which the appellant was notified he was not selected.

Respondent DER is alleged to have violated §230.17, Stats., and §ER-Pers 6.10, Wis. Adm. Code, by advising an agency to ignore the appellant's name while selecting a candidate from a certification list that included the appellant. Appellant argues that he was effectively decertified by DER even though DER failed to take the steps required for decertification under §ER-Pers 6.10, Wis. Adm. Code. By statute, the Administrator of the Division of Merit Recruitment and Selection may decertify an eligible individual under those conditions established in the Administrative Code. The decertified individual is entitled to obtain a statement from the Administrator of the reason for the decertification and can then appeal the decision to the Commission. In the present case, the appellant does not argue that his name was not actually certified to DHSS. Instead, additional information from DER allegedly undermined the certification. The appellant's allegations meet the jurisdictional requirements of §230.44(1)(d), Stats., in that they allege that after the certification list had been submitted, DER acted illegally or otherwise abused its discretion in telling DHSS to ignore the appellant's name. This conduct could be considered to constitute a "personnel action" under, as that term is used in the statute, if it effectively decertified the appellant and removed him from consideration.

Respondent BVTAE is alleged to have sabotaged appellant's employment efforts (by misrepresenting appellant's record of performance from when he was previously employed at BVTAE) and to have violated the terms of a 1981 agreement by releasing information to prospective employers. In a prior appeal, the appellant obtained review of a 1982 decision by DER to remove

the appellant's name from the register of eligible candidates for the Management Information Specialist 4 classification. Pflugrad v. DER, 82-207-PC (3/17/83). The Commission affirmed DER's decertification decision. In doing so, the Commission refused to permit the appellant to introduce evidence to show that "the facts concerning his employment at BVTAE, the Director of State Courts and the UW were not as reflected in his work record:"

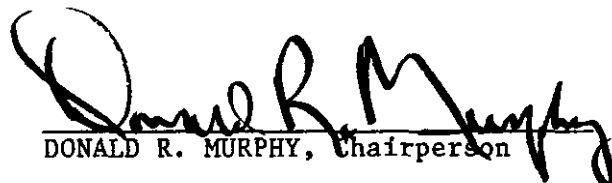
If this line of testimony were permitted, the appellant essentially would be litigating the issues, for example, of whether there was a proper basis for certain of his evaluations at BVTAE, and whether there was proper cause for the termination of his employment at the latter two agencies. Such inquiry goes beyond what is set forth in §ER-Pers 6.10(8), Wis. Adm. Code, and should not be permitted in an appeal of an action by the administrator acting pursuant to that rule. Also beyond the scope of the hearing is evidence as to the motives of the BVTAE in providing information regarding the appellant's work record to the administrator. Such motivation is not material to the question of whether the administrator had an appropriate basis for removing the appellant's name from the certification because of unsatisfactory work record or employment references.

In the present case, the appellant has failed to specify the instances which underly the allegation that BVTAE is (improperly) thwarting the appellant's employment efforts. Even if he had, there is no indication that the events would constitute "personnel action" rather than merely responses to requests for recommendations or for summaries of appellant's employment record. There is no indication that the legislature intended for agencies to be exposed to §230.44(1)(d), Stats., appeals by merely responding to such requests. Respondent BVTAE is also alleged to have violated a 1981 agreement by releasing information on or about July 20, 1983 to "prospective employer." It should be noted that there is no allegation that the July 20th disclosure was made to a state agency rather than to a prospective employer outside of the state civil service.

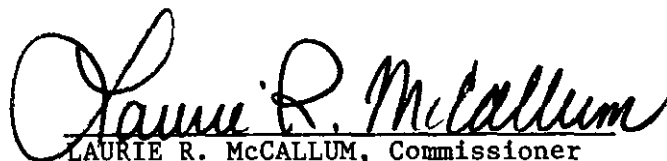
ORDER

Respondents' motion to dismiss is granted as to BVTAE, but denied as to DER. Appellant has fifteen days from the date of this decision in which to identify the position(s), by classification, that were available to the appellant in DHSS during the months of June and August, 1983 and the dates the appellant was notified that he was not selected for those positions.

Dated: March 29, 1984 STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Chairperson

KMS:jat

  
LAURIE R. McCALLUM, Commissioner

  
DENNIS P. MCGILLIGAN, Commissioner