

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 DAVID WING. *
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 Appellant, *
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 v. *
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 Secretary, DEPARTMENT OF *
 EMPLOYMENT RELATIONS, *
 *
 Respondent. *
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 Case No. 84-0084-PC *
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INTERIM
 DECISION
 AND
 ORDER

This matter is before the Commission on respondent's motion to dismiss. The case arises from a decision by the respondent not to select the appellant to fill a vacant Budget and Management Analyst position. The following facts appear to be undisputed.

1. During March of 1984, respondent issued a "Servicewide Transfer Announcement" for the position of Budget and Management Analyst (BMA) 3, 4 or 5 in the Division of Administrative Services, DER.

The announcement stated, in part:

WHO MAY APPLY: This is a permanent opportunity open to any state employe not serving a limited term or project appointment, who is eligible to be appointed to this position on a transfer or voluntary demotion basis. This includes persons currently classified as Budget and Management Analyst 3, 4 or 5; persons in other classifications in the same or counterpart pay ranges who meet the qualifications; persons who are qualified and eligible for reinstatement; and persons qualified and currently in a higher classification who are willing to take a demotion.

* * *

HOW TO APPLY: Submit a letter of interest and a resume or full statement of qualifications outlining your pertinent background and work experience to Delores Trutlin, (608) 266-9564; Department of Employment Relations, 149 East Wilson Street, P. O. Box 7855, Madison, WI 53707. DO NOT SUBMIT YOUR MATERIALS TO THE STATE DIVISION OF MERIT RECRUITMENT AND SELECTION.

SELECTION: Those individuals who appear to be best qualified will be invited to a personal interview.

2. At the time of the announcement, the appellant was classified as a BMA4.
3. The appellant and 12 other classified employees applied for the vacancy. All applicants were interviewed.
4. The appellant was not selected for the position.
5. The Division of Merit Recruitment and Selection neither developed and administered a civil service examination to fill the position nor certified any names from an examination register for the purpose of filling the BMA position.

The Commission's jurisdiction over appeals from personnel transactions is premised on the provisions of §230.44(1), Stats., and for those cases arising from the non-contractual grievance procedure, on §230.45(1)(c), Stats. Nothing in the case file indicates that the appellant is asking the Commission to act as the final step arbiter in the non-contractual grievance procedure.

The relevant portions of §230.44(1), Stats., provide that the Commission may hear appeals of the following actions:

(a) Decision made or delegated by administrator. 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).

(b) Decision made or delegated by secretary. Appeal of a personnel decision under §§230.09(2)(a) or (d) or 230.13 made by the secretary or by an appointing authority under authority delegated by the secretary under §230.04(1m).

(c) Demotion, layoff, suspension or discharge. If an employee has permanent status in class, the employee may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.

(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 appellant argues that he sought to be reinstated into the position in question and that the Administrator of the Division of Merit Recruitment and Selection (the "administrator" under §230.44(1)(a), Stats.) decided only to allow transfers into the position. To support the argument, the appellant relies on a portion of respondent's brief which states:

The only involvement the administrator had with this transaction is the authorization of the transfer under §230.29, Stats., and Ch. ER-Pers 15, Wis. Adm. Code. That authorization is limited to a determination of eligibility for transfer, that is, a certification that the applicants current pay range is the same or counterpart to the one for which the application was filed. Respondent's brief, p. 3.

Several provisions in Ch. ER-Pers 16, Wis. Adm. Code, are relevant to determining the relative roles of the Administrator and of an appointing authority in filling a position by reinstatement:

ER-Pers 16.01 Definition. (1) Reinstatement and restoration mean the act of re-appointment without competition of an employe or former employe (a) to a position in the same class in which the person was previously employed or (b) to a position in another classification to which the person would have been eligible to transfer had there been no break in employment or (c) to a position in a class having a lower pay rate or pay range maximum for which the person is qualified to perform the work after the customary orientation provided to new workers in the position.

(2) Re-appointment under sub. (1) may be either permissive at the discretion of the appointing authority or mandatory as required by the law or rule of the administrator. In those instances where an employe or former employe has "eligibility" for reinstatement, the action is permissive. In those instances where an employe or former employe has the "right" of restoration, the action is mandatory. In these rules of the administrator, "reinstatement" refers to a permissive act and "restoration" refers to a mandatory right.

* * *

ER-Pers 16.02 Report of appointing authority; approval by administrator. All reinstatements and restorations shall be reported to the administrator for approval as may be required.

The "Servicewide Transfer Announcement" indicated that applicants for the BMA position were to submit an application to DER, and not to the

Division of Merit Recruitment and Selection. Respondent apparently concedes that the Administrator subsequently verified the current pay range of all applicants. There is no indication that the Administrator ever reviewed the appellant's application in terms of whether he was eligible for reinstatement. Indeed the rules indicate that the appointing authority has the discretion to select an applicant for reinstatement but that the administrator must then approve the reinstatement as provided in s. ER-Pers 16.02, Wis. Adm. Code. The facts show that the appointing authority did not select the appellant for reinstatement, but selected another applicant instead. Therefore, the administrator did not make a "personnel decision" relative to appellant's reinstatement that may be appealed under §230.44(1)(a), Stats.¹

Certain decisions made or delegated by the Secretary of DER are appealable to the Commission under §230.44(1)(b), Stats. However, the current case fails to raise a question regarding classification, regrade or personnel records, so this case is not appealable as a decision of the Secretary.

The appeal also does not arise from a demotion, layoff, suspension, discharge or reduction in base pay and therefore does not fall within the scope of §230.44(1)(c), Stats.

¹ Appellant also argues that the respondent failed to comply with s. ER-Pers. 16.01(1), Wis. Adm. Code. which defines reinstatement as "re-appointment without competition." The appellant suggests that the oral questions during his interview for the BMA position constituted "competition." This argument fails to take into account the discretion specifically granted to the appointing authority under s. ER-Pers 16.01(2), Wis. Adm. Code, in making appointment decisions regarding employees with eligibility for reinstatement.

Under §230.44(1)(d), Stats., a "personnel action after certification which is related to the hiring process in the classified service" may be appealed to the Commission.

A recent decision interpreting this provision is Seep v. DHSS, 83-0032-PC, 83-0017-PC-ER (10/10/84). In Seep, the appellant sought to appeal a decision not to reinstate her into a vacant institution aide position. The Commission made the following analysis:

The main jurisdictional question is whether the denial of Ms. Seep's application for reinstatement constituted a personnel action "after certification" inasmuch as Ms. Seep herself was not certified for the position.

To begin with, §230.44(1)(d) uses the term "after certification". It does not say "after a certification" or "after certification of the appellant." This statutory language refers not to a specific event, but rather to a point in the selection process "after certification."

This particular line of demarcation has substantial significance, as can be seen from the roles of the administrator and the appointing authorities in the selection process.

The administrator is responsible for recruitment, §230.14, Stats., examination, §230.16, Stats., and the certification of eligibles to the appointing authorities, §230.15, Stats.²

The appointing authorities have the authority to appoint persons to vacancies, see §230.06(1)(b), 230.25(2), Stats.

The point of certification marks the extent of the administrator's legal authority in the selection process. The appointing authority is generally responsible for actions in the selection process which occur after the point of certification. Actions which occur at or prior to certification, and which typically concern the examination process, are appealable pursuant to §230.44(1)(a) or (b) as actions of the administrator. Actions which occur after the point of certification (and which meet the other criteria set forth in §230.44(1)(d)) are appealable pursuant to §230.44(1)(d), Stats.

A reinstatement is a form of appointment. §ER-Pers 16.01(1), Wis. Adm. Code. It is a permissive act at the discretion of the appointing authority. §ER-Pers 16.01(2), Wis. Adm. Code. An original appointment also is a discretionary act, as the appointing authority has the discretion to choose from among those certified. See Jacobson v. DILHR, Wis. Pers. Comm. No. 79-28-PC 4/10/81):

²These functions may be delegated to the appointing authorities, see §230.05(2)(a), Stats.

In such a post-certification hiring decision, it is a deeply-rooted principle of the Wisconsin Civil Service that the appointing authority does have considerable discretion as to whom to appoint. See, e.g., State ex rel Buell v. Frear, 146 Wis. 291, 131 N.W. 832 (1911). p. 25.

An appointing authority, in considering whom to appoint to a vacancy, can choose from among those certified following examination, and from among those eligible for reinstatement. While applicants for reinstatement are not themselves certified, their names may be submitted to the appointing authority in conjunction with a certification, See §ER-Pers 12.02(3), Wis. Adm. Code:

The administrator may submit the names of persons interested in transfer, reinstatement or voluntary demotion along with a certification or, at the request of the appointing authority, in lieu of a certification.

From a purely statutory standpoint, it would appear that a decision by the appointing authority on reinstatement is a "personnel action," that it is "related to the hiring process in the classified service," and that it is "after certification" in the sense, discussed above, that certification refers to a point in the staffing process. Even if "after certification" were interpreted as a reference to a particular certification, the record in this case shows that the denial of reinstatement occurred after a certification related to the position in question. Finally, the statute does not by its terms require that the appellant be actually certified as a prerequisite for appeal pursuant to §230.44(1)(d), Stats., and the commission can discern no reason for finding such a requirement by implication.

From a policy standpoint, there is a good deal of similarity between decisions on reinstatements and on original appointments. The major point of similarity is that both decisions are committed to the sound exercise of the appointing authority's discretion. The commission cannot discern any substantial policy reason why the legislature would not want a decision on reinstatement to be appealable under §230.44(1)(d), Stats.

In Seep, other applicants for the position in question were certified, even though the Ms. Seep was not. In the present case, the appellant was not certified, nor was anyone else certified for the BMA position. The appointment process was restricted to those persons seeking transfer, reinstatement and demotion to the BMA position. All of the applicants were interviewed by the appointing authority. No examination was given and, therefore, no eligibles were certified.

Even though no certification actually occurred with respect to the BMA position, the point of obtaining a group of eligible applicants was passed. This was done by having the appointing authority select an applicant from among all of those who sought to transfer, reinstate or demote into the position. This procedure took the BMA appointment process past the point of certification and into the realm of the exercise of selection discretion by the appointing authority.

The apparent intent of §230.44(1)(d), Stats., is to permit, inter alia, appeals of appointment decisions. Those decisions are made in all instances by the appointing authority. There are no apparent policy reasons for interpreting §230.44(1)(d), Stats., to permit appeals of appointment decisions only when an actual certification by the administrator preceded the selection decision. An interpretation of the phrase "personnel action after certification" to exclude appointment decisions that were not preceded by a particular certification would result in an illogical distinction within one category of personnel selection decisions. An employe seeking reinstatement, voluntary demotion, or transfer into a position could appeal an alleged abuse of discretion in the appointment decision if the appointing authority's consideration of eligibles included those certified as a result of competition, but could not appeal if there was no such certification because the appointing authority had requested only the names of those interested in transfer, reinstatement or voluntary demotion, pursuant to §ER-Pers 12.02(3), Wis. Adm. Code:

The administrator may submit the names of persons interested in transfer, reinstatement or voluntary demotion along with a certification or, at the request of the appointing authority, in lieu of a certification.

The Commission is convinced that no such distinction was intended and that the legislature utilized the phrase "after certification" to refer to

a certain segment of the appointment process. Compare, Nichols v. Lee, 26 P. 157, 160, 16 Colo. 147 (1891), where the Colorado probate law provided, inter alia:

Whenever, after inventory and appraisement therein, as herein provided, it shall appear that the personal estate of any decedent is insufficient to discharge the just debts... resort may be had to the real estate.

The court discussed the effect of the absence of an "inventory and appraisement" on the right of the estate administrator to sell real estate as follows:

Since the petition in this case fails to show the making of an inventory, and does not state therein was an appraisement, and the record affirmatively shows that nothing of the sort was done, it is contended that it could not serve as a basis for proceedings to sell real estate. This can only be contended for on the hypothesis that the making of the inventory and the appraisement are conditions precedent to the exercise of the right by the administrator to resort to the real estate for satisfaction of the debts. This contention cannot be supported by the phraseology of the statute, for it does not provide that it shall appear by the inventory and appraisement that the personal estate is insufficient, but the right to resort to the realty is given whenever it appears that the personalty is insufficient for the purpose. The words 'after inventory and appraisement' can properly be taken only as a designation of the time at which, or before which, the administrator may not make his application. It is simply a statutory method of fixing the order of proceedings, and in no sense can be so held to be a condition precedent as to make a failure to observe that statutory provision necessarily fatal to the proceedings. The reasoning of the principal opinion on the lack of necessity for an inventory and appraisement under the facts existing in this case is entirely satisfactory and convincing." (emphasis added) (On Rehearing).

Another possible example of this type of provision is contained in §230.44(4)(c), Wis. Stats., which provides: "After conducting a hearing on an appeal under this section, the Commission shall either affirm, modify or reject the action which is the subject of the appeal." It would seem unlikely that this statute would be interpreted as requiring that the Commission actually conduct a hearing as a prerequisite to affirming, modifying or rejecting an appealed action, in cases submitted on briefs or

decided by default or stipulation. Rather, the term "after conducting a hearing" would more likely be considered a point of demarcation in the processing of the appeal by the Commission.

The respondent has cited a number of cases in support of the contention that the Commission lacks jurisdiction over this appeal. In the opinion of the Commission, these cases are for the most part distinguishable or should be overruled.

In Cihlar v. DHSS, 79-106-PC (8/30/79), and Lundeen v. DOA, 79-208-PC (6/3/81), the Commission assumed jurisdiction over appeals of denials of reinstatement where the denials apparently followed certifications for the vacancies in question. However, the Commission never specifically addressed the question of whether such certifications were necessary from a jurisdictional standpoint. In Seep v. DHSS, 83-0032-PC (10/10/84), the Commission assumed jurisdiction over a similar appeal, and, as noted above, suggested that there was no necessity for a certification.

In Kawczynski v. DOT, 80-181-PC (11/4/80), the appeal involved a non-appointment as a limited term employe (LTE). The Commission held it had no jurisdiction under §230.44(1)(d), Stats.:

Certification is a process by which appointing authorities are informed of the names of the persons at the head of the register following a competitive civil service examination for a vacancy in the classified service. See §230.25. Limited-term appointments do not require formal civil service examination and certification procedures. See, e.g., §Pers. 8.02(3), Wis. Adm. Code. Therefore, the decision on hiring made here was not a personnel action after certification, and is not appealable pursuant to §230.44(1)(d).

Because LTE employment transactions generally do not require as much formal process as permanent employment, including the permanent appointment process, this holding is consistent with Seep. As was discussed in Seep, the point of certification normally marks a line of demarcation between the

parts of the civil service staffing process that are the legal responsibilities of the administrator of DMRS and the appointing authorities, respectively. In an LTE staffing, this entire civil service staffing process normally is not followed, and there is no point of certification.

Both Ziemke v. DHSS, 80-390-PC (4/23/81), and Starczynski and Mayfield v. DOA, 81-275, 276-PC (12/2/81), have potentially distinguishing features.

In Ziemke, the appellant was certified for a particular position that was not in question on the appeal. Some months later, he apparently was inadvertently offered, in error, an appointment to a different vacancy to which he had not been certified and which was filled by appointment from a union transfer list.

In Starczynski and Mayfield, the appellants were Building Maintenance Helpers who accepted transfers. Several weeks after the transactions were informed that their new salaries had been incorrectly computed and would have to be reduced, and they appealed.


However, to the extent these two decisions may constitute precedence that jurisdiction under §230.44(1)(d), Stats., requires the presence of a specific certification, as opposed to the certification stage in the civil service hiring or selection process, they are overruled for the reasons set forth above.

ORDER

Therefore, the respondent's motion to dismiss is denied, and this matter may proceed to hearing on the issue established by the Commission in an Interim Order dated March 5, 1985.

Dated: April 3, 1985 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner

KMS/AJT:jmf
JGF002/2

Laurie R. McCallum, Commissioner,
did not participate in the consideration
or decision of this matter.

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