

STATE OF WISCONSIN

PERSONNEL COMMISSION

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THOMAS J. McSWEENEY, *

Appellant, *

v. *

Secretary, DEPARTMENT OF *

JUSTICE and *

Administrator, DIVISION OF *

MERIT RECRUITMENT & SELECTION *

Respondents. *

Case No. 84-0243-PC *

* * * * *

INTERIM
DECISION
AND
ORDER

The prehearing conference report dated February 6, 1985, contains the following under "FURTHER PROCEEDINGS":

The parties agreed that the Commission should analyze the question of whether it has the authority to consider the constitutional issue as raised by the appellant in his notice of appeal and any subsequent brief. The parties indicated there did not appear to be any dispute of the underlying facts. None of the parties indicated that they wished to submit briefs.

For the sole purpose of analyzing "the question of whether it has the authority to consider the constitutional issue[s] as raised by the appellant," the Commission will assume the appellant's factual allegations as set forth in the notice of appeal.

In summary, this appeal involves the respondents' refusal to consider the appellant's application for employment in the classified civil service because of the appellant's admitted failure to satisfy statutory residency requirements:

230.14(2) The administrator may recruit outside of this state only if the administrator determines that there is a critical shortage of residents of this state possessing the skills or qualifications required for the position.

* * *

230.16(2) Competitive examinations shall be free and open to all applicants who at the time of application are residents of this state and who have fulfilled the preliminary requirements stated in the examination announcement....

* * *

230.03(12) 'Resident of this state' meant a person who, on the date an application under s.230.16(i) is filed:

- (a) Has established a residence, as defined in s.6.10(1), in this state not less than 10 days earlier;
- (b) Has resided in this state for not less than a total of one year out of the immediate preceding 5 years;
- (c) Is eligible to register to vote in this state; or
- (d) Is the spouse of a person meeting the requirements of par. (a), (b) or (c).

The appellant's "notice of appeal" states, inter alia, at page 5:

... the actions of the Appellees [respondents] or their failure to act violates the Applicant-Appellant's 'right-to-travel' and the constitutional provisions set out in paragraph one (1) of this Notice of Appeal. Section 230.03, Wisconsin Statutes and other relevant statutes, if any, are facially invalid being in violation of the constitutional provisions cited herein. Also, said statute(s) deny Applicant-Appellant his constitutional rights as applied in this case. For example, some positions with the State of Wisconsin require residency or marriage to a Wisconsin resident, while other do not, and it would appear not all departments enforce the unconstitutional provisions at issue here. In any event, the Applicant-Appellant is denied due process and the equal protection of the law under both the U.S. Constitution and the Wisconsin Constitution, because of the discrimination toward him as a single person.

Paragraph 1 of the notice of appeal states as follows:

1. This is an appeal brought pursuant to Sec. 230.45, Wisconsin Statutes, raising substantial federal questions under the Commerce Clause of the U. S. Constitution, Article IV's Privileges and Immunities Clause of the U. S. Constitution, the Due Process Clause of the 14th Amendment to the U. S. Constitution, the Equal Protection Clause of the 14th Amendment to the U. S. Constitution and the equal protection and due process guarantees of the Wisconsin Constitution, brought by the Applicant-Appellant to overturn the Appellees' decision declining to process the Applicant-Appellant's questionnaire or application to

be an Assistant Attorney General for the State of Wisconsin (Attorney 15) based on the Plaintiff's status as a nonresident or non-citizen of Wisconsin or the fact the Applicant-Appellant is not married to a resident or citizen of Wisconsin.

The Commission must first consider the extent of its power to consider the constitutional arguments raised by the appellant.

In 1 Am Jur 2d Administrative Law §185, p. 989, the general rule is stated as follows:

... it is universally recognized that administrative agencies, as such, do not determine constitutional issues....

This general area has been addressed by the Wisconsin Supreme Court in the specific context of the powers of administrative zoning boards. The Court has held that such bodies do not have the authority to rule on the constitutionality of municipal legislative enactments. See Kmiec v. Town of Spider Lake, 60 Wis. 2d 640, 646, 211 N.W. 2d 471 (1973):

The zoning ordinance of the town of Spider Lake stands as a legislative act of the town. The review boards are administrative agencies which have been created by the same legislative body. Such administrative agencies are clothed with no right to repeal or declare unconstitutional zoning ordinances enacted by the legislative body from which it derives its existence. Therefore, the plaintiffs' remedy in seeking review by such an administrative agency under ordinary circumstances would afford the plaintiffs no relief because it is the plaintiff's contention that the zoning ordinance relied upon by the defendant is unconstitutional as applied to his property.

The Court has distinguished between issues as to the constitutionality of an enactment and issues of a procedural due process nature arising from the application of an enactment. See Master Disposal v. Vil. of Menomonee Falls, 60 Wis. 2d 653, 659, 211 N.W. 2d 477 (1973); Kmiec v. Town of Spider Lake, 60 Wis. 2d at 645:

In considering the issue of exhaustion of remedies, we would point out that there is a well-defined distinction in applying this judicial policy to the statutory administrative remedies in zoning cases. Such questions as the absence of constitutional

due process in the manner in which the administrative agencies conduct proceedings, and which ordinances to apply, come within the scope of the doctrine of exhaustion of remedies.

See also Nodell Ins. Corp. v. Glendale, 78 Wis. 2d 416, 426, 254 N.W.

2d 310 (1977):

In Kmiec v. Town of Spider Lake, 60 Wis.2d 5640, 645, 211 N.W.2d 471 (1973), this court recognized a "well-defined distinction in applying this judicial policy [of exhaustion of remedies] to the statutory administrative remedies in zoning cases.... [A] challenge to the constitutional validity of a zoning ordinance presents a question of law. Such a challenge may properly be made by commencing an action for declaratory judgment and the doctrine of exhaustion of remedies is not applicable. Compare: Master Disposal v. Village of Menomonee Falls [60 Wis.2d 653, 211 N.W. 2d 477 (1973)]." The reason for this exception is that an appeal to the administrative agency would not have afforded the party adequate relief since the administrative agency has no right to repeal or declare unconstitutional zoning ordinances enacted by the legislative body from which the board derives its existence.

By contrast, in this case the board of appeals does have the power to invalidate the conditions imposed by the plan commission and to afford relief to the property owners without invalidating the ordinance itself. (emphasis supplied)

It seems clear, based on these general principles, and because the Commission's specific enabling statutes do not confer such power, that the Commission lacks the authority to rule on the question of the constitutionality of the statutes relating to the requirement of Wisconsin residency for civil service employment. Presumably the Commission could consider questions concerning alleged constitutional violations emanating from the statutes as applied, the determination of which would not involve reaching any conclusions as to the facial constitutional validity of such statutes, if this case presents such issues.

In his appeal, the appellant asserts, inter alia:

Also, said statute(s) deny Applicant-Appellant his constitutional rights as applied in this case. For example, some positions with the State of Wisconsin require residency or marriage to a Wisconsin resident, while others do not, and it would appear not all departments enforce the unconstitutional provisions at issue here. Notice of Appeal, p.5 (emphasis supplied)

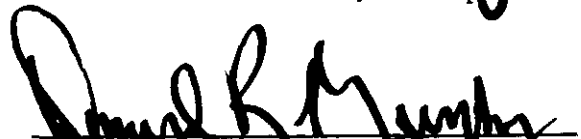
Therefore, another prehearing conference will be scheduled to discuss processing these remaining issues.


ORDER

It is ordered that this matter be scheduled for another prehearing conference to discuss processing those issues which the Commission has the authority to hear and determine.

Dated: March 13, 1985 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner

AJT:jmf
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Parties

Thomas J. McSweeney
1701 26th Street
Des Moines, IA 50310

Sue Christopher
Administrator, DMRS
P. O. Box 7855
Madison, WI 53707

Bronson LaFollette
Attorney General
DOJ
P. O. Box 7857
Madison, WI 53707