

STATE OF WISCONSIN

PERSONNEL COMMISSION

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MARY L. WITT, *

Appellant, *

v. *

Secretary, DEPARTMENT OF *

INDUSTRY LABOR AND HUMAN *

RELATIONS, and Secretary, *

DEPARTMENT OF EMPLOYMENT *

RELATIONS, *

Respondents. *

Case No. 85-0015-PC *

* * * * *

INTERIM
DECISION
AND
ORDER

This matter is before the Commission with respect to a number of preliminary issues concerning jurisdiction, standing and ripeness. The parties, through counsel, have filed briefs.

This appeal was filed on February 1, 1985, and "amended complaints" were filed on April 9, 1985, and July 12, 1985. The first amended complaint filed April 9, 1985, was comprehensive and intended to replace the original complaint. It consists of six "causes of action." The Commission's decision will discuss the issues raised as to the various contentions set forth in the "causes of action."

FIRST CAUSE OF ACTION

The appellant alleges, in summary, that due to a reorganization, the position she has held for the last four years -- Section Chief, Bureau of Employment Programs (Pay Range 16) -- was reallocated downward to the Pay Range 15 level, leaving her without a permanent position. She requested a Pay Range 16 vacancy as Director of the Madison Job Service District, but

this was denied, and the vacancy is to be filled by open competition. She alleges the decision to deny her this position is arbitrary and capricious and an abuse of discretion.

SECOND CAUSE OF ACTION

Appellant further alleges that a decision had been made to place her in the Madison District Job Service Director position but that this had been rescinded due to hearsay information obtained by Mr. Adams, the Job Service Administrator, concerning her performance, and that she was forced to take a less desirable Pay Range 16 position in Janesville which is at a distance from her Middleton residence. It is alleged that his decision to deny her the Madison position and to transfer her to Janesville was founded on an inadequate basis and constituted an abuse of discretion.

THIRD CAUSE OF ACTION

Appellant further alleges she is a white female, that the decision not to give her the Madison District Job Service Director position but to fill that job by open competition was due to Mr. Adams' stated desire to appoint a minority individual, that pursuant to the Job Service Affirmative Action Plan there is no underutilization of minorities in the relevant category of "officials/administrators," and that Mr. Adams' decision, to the extent that it is based on the foregoing factors, is a violation of §§230.06, 230.01(2), 230.03(2), 230.03(4m) and 230.18, Stats.

ANALYSIS

As far as can be ascertained from the pleadings and briefs, the first three "causes of action" can be broken down into a number of appealable transactions:

- 1) Respondent DILHR's refusal to allow appellant to transfer into the Madison Job Service District Director position;

2) In connection therewith, DILHR's decision to instead fill the position through open competition in an effort to make an affirmative action (minority) hire;

3) Respondent DILHR's decision to transfer appellant to the Janesville position;

4) In connection therewith, respondent DILHR's failure to have obtained approval for the transfer by the Administrator, Division of Merit, Recruitment and Selection [DMRS], DER, as required by §§230.29, Stats., and ER Pers. 15.02, Wis. Adm. Code.

To begin with, there is no provision under §§230.44 or 230.45 which gives the Commission the authority to hear appeals of an appointing authority's decisions as to transfers. In her brief, the appellant makes the following argument:

"... transfers are an area under the authority of the administrator pursuant to §230.05(1). There is absolutely nothing in §230.06, the powers and duties of appointing authorities, which speaks of transfers. Therefore, all of DILHR's decisions relating to Ms. Witt's removal to Janesville were under the express or implied delegation of the administrator's powers and are appealable under §230.44(1)(a)."

Section 230.05(1), Stats., is a general statement concerning the administrator's powers:

"All powers necessary for the effective administration of the duties specified for the administrator under this subchapter are reserved to the administrator."

It does not enlarge the administrator's authority over transfers beyond what is set forth in §230.29, Stats.:

"A transfer may be made from one position to another only if specifically authorized by the administrator."

Further, §230.06(1)(b), Stats., gives appointing authorities the power of appointment. A transfer is defined as a "... permanent appointment of an employe to a different position ..." Section ER Pers. 15.01, Wis. Adm. Code (emphasis added).

Clearly, there is nothing to support the contention that "all of DILHR's decisions relating to Ms. Witt's removal to Janesville were under the express

or implied delegation of the administrator's powers and are appealable under §230.44(1)(a)." Appellant's attempts to distinguish prior Commission holdings on its lack of jurisdiction over appeals of transfers are unpersuasive.

However, that narrow aspect of the transfer process, authority for which is vested in the administrator by §230.29, Stats. -- i.e., authorization of transfers -- can be appealable as a decision of the administrator pursuant to §230.44(1)(a), Stats. See Ford v. DHSS & DP, 82-0243-PC, 83-0011-PC, 83-0020-PC (6/9/83). That in this case the administrator apparently did not authorize the transaction does not necessarily foreclose jurisdiction, as under certain circumstances an omission may be appealable as an action.

Compare, Bartell v. DHSS, 84-0038-PC-ER (9/13/85):

"As to the ... argument, that the failure to adjust complainant's salary was not an 'event,' the Commission notes the definition of 'event' in Black's Law Dictionary, Revised Fourth Edition p. 654, includes the following: 'The word is broad enough to include an omission.'"

However, an appeal of the administrator's action or inaction in failing to authorize the transfer does not perforce give rise to jurisdiction over the transfer itself, as argued by the appellant:

"The provisions of §230.29 are mandatory. The administrator must specifically have approved the transfer of Ms. Witt as an individual from one specific position to another specific position. In the absence of this specific authorization, the transfer is subject to Commission review and is void. Stasny v. DOT, 78-158-PC (10/12/79); affd. DOT v. Pers. Commn., 79-CV-7102, (Dane Cir. 1981)."

Stasny involved an appeal of a noncontractual grievance concerning a transfer under then current law. It does not stand for the proposition that a transfer somehow becomes directly appealable to the Commission because it was not properly authorized. The allegation which is made here, that there was a statutory requirement for the administrator to have approved the transfer, but she failed to do so, provides the minimum essential elements

for jurisdiction. However, the Commission cannot perceive how this could lead to any jurisdiction over the transfer itself, since there is no statutory provision for such an appeal.

Therefore, the only cognizable aspect of the transfer of the appellant to the Janesville position is the alleged failure of authorization pursuant to §§230.29, Stats., and ER Pers. 15.02, Wis. Adm. Code. The refusal to permit transfer into the Madison position is not cognizable at all, since it does not involve even a theoretical exercise of power by the administrator. The appointing authority must decide to attempt to appoint someone to a different position under §ER Pers. 15.01, Wis. Adm. Code, before the administrator possibly could be called on to authorize the transaction.

There also is no jurisdiction over the related decision of Mr. Adams to fill the position by open competition rather than by transfer of the appellant. There is nothing in the civil service code which gives the administrator the authority to make such a decision, and which would support jurisdiction under §230.44(1)(a), Stats. Rather, it is part of the general authority of the appointing authorities pursuant to §230.06(1)(b), Stats., and is acknowledged at §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." (emphasis added)

See also Ford v. DHSS, supra; Miller v. DHSS, Wis. Pers. Commn. No. 81-137-PC (10/2/81); Stasny v. DOT, Wis. Pers. Commn. No. 79-217-PC (1/12/81).

FOURTH AND FIFTH CAUSES OF ACTION

Appellant's allegation, as amended by the pleading filed July 12, 1985, is that in connection with the Job Service reorganization, the position of Special Applicant Services Director was created as a pay range 17 level, and that a male employe was regraded into that position on or about June 20,

1985, as opposed to filling it by competition. It is alleged that this transaction was part of a pattern and practice of discrimination against women employes and violative of §§ER Pers 3.01(4), 3.015(1) and (2), 14.01, 14.015, Wis. Adm. Code, and 230.01(2) and 230.09(2), Stats.

ANALYSIS

Respondents have argued that this aspect of the appeal is premature, as the actual regrade had not occurred at the time their briefs were filed. However, the subsequent effectuation of the transaction presumably has resolved this issue.

Respondent DILHR argues that the appellant lacks standing to pursue this aspect of the appeal, citing Sersch v. DILHR & DER, Wis. Pers. Commn. No. 84-0227-PC (3/13/85). However, Sersch is not applicable here since it did not really involve an issue of standing. Rather, the appellants indicated they were not attacking the reclassification of certain positions in another unit, but rather were alleging that they were discouraged from exercising their contractual transfer rights to the positions because they were given misinformation about the future of the unit and the positions.

In the instant case, the appellant's standing is quite clear, since she could have competed for the position in question if it had been filled by competition as opposed to reclassification and regrade.

The respondents also argue that the allegations concerning sex discrimination merely repeat allegations contained in Ms. Witt's companion complaint under the Fair Employment Act, No. 85-0011-PC-ER. She points out there are a number of provisions in the civil service code, independent of the Fair Employment Act, concerning nondiscrimination in certain aspects of employment. There is no apparent reason why the appellant cannot pursue her allegations of illegality with respect to these civil service code

provisions, although consolidation for hearing with No. 85-0011-PC-ER obviously may be indicated.

SIXTH CAUSE OF ACTION

This cause of action alleges that Mr. Adams retaliated against the appellant for having filed a sex discrimination complaint and otherwise opposed sex discrimination by refusing to give her an "acting" assignment that would have the effect of protecting her pay and seniority at the pay range 16 level.

ANALYSIS

Respondent DILHR argues that the Commission would only have jurisdiction over the subject matter of this claim if appellant had pursued it through the noncontractual grievance procedure, but she had not. The appellant did not respond to this argument in her brief. There is no statutory provision for a direct appeal to the Commission of the denial of an acting assignment, and therefore, the Commission lacks subject matter jurisdiction over this "cause of action."

ORDER

With the exception of so much of this appeal as relates to the allegations of the failure of the administrator of DMRS to have authorized the transfer of the appellant to the Janesville position, and the regrade of the male employe in the Special Applicant Services Director position, the remainder of this appeal is dismissed for lack of subject matter jurisdiction.*

Dated: September 26, 1985

STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. MCCALLUM, Commissioner

AJT:jgf
JGF002/2

*It should be noted that this order does not pertain to, nor address any aspect of, the Commission's jurisdiction under the Fair Employment Act, §230.45(1)(b) and Subch. II, Ch. 111, Stats.