

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 ROBERT RUCK, *
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 Appellant, *
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 v. *
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 Secretary, DEPARTMENT OF *
 NATURAL RESOURCES, *
 *
 Respondent. *
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 Case No. 86-0007-PC *
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 * * * * *

DECISION
AND
ORDER

This matter is before the Commission on respondent's motion to dismiss for lack of subject matter jurisdiction. Neither party requested a hearing on the motion. The parties filed written arguments on the matter.

The facts set out below appear to be undisputed.

FINDINGS OF FACT

1. Robert Ruck, hereinafter referred to as the appellant, was appointed to the permanent position of Forest Fire Control Assistant 1 in the Department of Natural Resources (DNR) effective July 21, 1985.
2. In his appointment letter dated July 17, 1985, appellant was informed by Charles Higgs, District Director, Lake Michigan District that he would be required to serve a twelve (12) month probationary period with a one (1) step pay increase after satisfactory completion of the first six (6) months.
3. The aforesaid July 17th letter additionally informed appellant of certain other job requirements including that he move to his new location as soon as possible, as the assignment required that he reside within a ten (10) mile radius of Wausaukee, Wisconsin, that he be available by

telephone, that he submit to yearly physical fitness tests and that he maintain a valid Wisconsin driver's license.

4. Appellant's appointment was processed as a counter-part pay range transfer from his position as an Institution Aide I in a previous period of state employment. Although his classification changed, appellant's salary remained the same.

5. At or about this same time, appellant was told that his collective bargaining unit and overtime status would remain unchanged.

6. By letter dated December 11, 1985, Charles Higgs informed the appellant of DNR's intent to retain him in permanent employment upon the completion of the 6 month permissive probationary period on January 20, 1986. The letter also stated that in accordance with the personnel rules the appellant would not receive an increase upon completion of the permissive probationary period.

7. By letter dated January 10, 1986, appellant filed a timely appeal of the denial of a one (1) step increase. In his letter appellant stated that he felt he was being penalized for being a state employe prior to beginning his DNR employment and expressed the belief that the denial of the one step wage increase was an abuse of discretion pursuant to s. 230.44, Stats.

8. On January 14, 1986, the Commission received a letter from the appellant dated January 9, 1986, which requested "a hearing as stated in WSEU Contract Article 10, Section 0, Paragraph 1, to determine my eligibility for a one-step increase after satisfactory completion of a 6 month, permissive probation period." The appellant argued that denying him the increase was in violation of WSEU contract Article 7, Section 3, paragraph 1 and noted the DNR was changing his employment offer "in regards

to pay." The appellant lastly stated that if he had known that he would not receive an increase that he would not have accepted the DNR position, "due to another job offer outside of State Service."

CONCLUSIONS OF LAW

1. The appellant has standing to pursue this appeal.
2. The Commission does not have subject matter jurisdiction over this appeal.

DECISION

Standing

Since there is no provision in either §230.44 or §230.45, Stats., setting forth criteria for standing to appeal pursuant to §230.44(1), Stats., the Commission must look to the relevant provisions in Chapter 227, Stats., to resolve the standing issue. See, e.g. Heil v. DP, 78-0013-PC (12/20/78).

There are two definitions found within Chapter 227 which provide assistance in applying the principle of standing. The term "party" found in §227.01(6) and the phrase "person aggrieved" defined in §227.01(8) refer to "adverse effect" or "substantial interests" as a prerequisite to standing.

The Commission in Pullen v. DILHR, 79-0072-PC (5/15/86) examined the issue of standing within the meaning of these definitions by looking at the Wisconsin Supreme Court holding in Wisconsin's Environmental Decade, Inc. v. PSC, 69 Wis. 2d, 1, 10 (1975). In Wisconsin's Environmental Decade, the Court set out the Wisconsin rule of standing stating that:

The first step under the Wisconsin rule is to ascertain whether the decision of the agency directly causes injury to the interest of the petitioner. The second step is to determine whether the interest is recognized by law".

The first question to be asked under Pullen then is whether the challenged agency action caused the appellant injury in fact?

Respondent argues that appellant's claim he might not have accepted the DNR appointment if he knew that no wage increase would be forthcoming after six months is speculative. Accordingly, respondent argues that appellant lacks the standing necessary to prosecute his appeal before the Commission, citing Pullen, supra, in support thereof.

However, this argument really runs to an issue not now before the Commission -- i.e., whether the appellant can establish the necessary elements for the application of equitable estoppel. Under the Wisconsin's Environmental Decade case, the question is whether the decision of the agency directly causes injury to the interest [of the party] 69 Wis. 2d at 10. In the instant case, the decision sought to be challenged is the decision to not give appellant a step increase on completion of probation. This is a direct injury to the appellant's interest.

The second question is "... whether the interest asserted is recognized by law..." id. The appellant's interest arguably is protected by the theory of equitable estoppel, see Porter v. DOT, 78-154-PC (5/14/79), affd., Dane Co. Cir. Ct. No. 79CV3420 (3/24/80) and at this stage of this proceeding it is premature to determine whether the elements of the doctrine are present.

Subject Matter Jurisdiction

The next question the Commission must address is whether it has jurisdiction over the subject matter of this appeal. The asserted, and basically the only possible basis for appeal, is §230.44(1)(d), Stats., which provides for appeals of:

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....

The personnel action being appealed here is the respondent's denial of a step increase upon completion of appellant's (non-original) probation, pursuant to §ER-Pers 29.03(2), Wis. Adm. Code. While this is a "personnel action" and it is after the certification stage, the question remains as to whether it is "related to the hiring process."

The "hiring process" involves the appointing authority's decision as to whom to appoint to a vacancy, and, at least arguably, the determination of the employe's initial incidents of employment -- e.g., starting salary, whether to require a permissive probationary period, etc.

In Board of Regents v. Wisconsin Personnel Commission, 103 Wis. 2d 545, 558-560, 309 N.W. 2d 366 (Ct. of App. 1981), one of the issues the Court addressed was whether the Commission had jurisdiction pursuant to §230.44(1)(d), Stats., over an appeal of a probationary termination. The court held, inter alia:

The hiring process cannot be reasonably construed to embrace the acquisition of permanent status in class.... We believe it unreasonable to conclude that an employe has not been hired until he has successfully completed a ... probationary period.

That the hiring has been completed as to a probationer who attains that status is shown by the employe rights accorded to the probationer....
103 Wis. 2d at 559.

If the hiring process is completed when the employe begins employment as, or attains the status of, a probationary employe, and the hiring process does not include the employer's decision whether the probationary employe should pass probation and attain permanent status in class, it cannot include the subsequent decision of whether the employe should be granted a step increase upon successful completion of probation.

The appellant cites Porter v. DOT, supra, where the Commission assumed jurisdiction pursuant to §230.44(1)(d), Stats., over an appeal involving

the employer's rescission of a commitment as to starting salary. However, that case involved an issue as to starting salary, not as to a salary adjustment which occurred after the employe had completed probation. Furthermore, there apparently was no issue raised in that case as to jurisdiction, and it was decided before the Board of Regents case.

Since the Commission determines that there is no statutory basis for subject matter jurisdiction over this appeal, it does not reach the question of whether its jurisdiction is superseded by operation of §111.93(3), Stats.

It should be noted that the Commission does not reach the appellant's claim that the respondent is equitably estopped from denying him a step increase on completion of probation. Rather, it decides solely that it is not a forum which has subject matter jurisdiction over this appeal.

ORDER

This appeal is dismissed for lack of subject matter jurisdiction.

Dated: December 29, 1986 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


LAURIE R. McCALLUM, Commissioner


DONALD R. MURPHY, Commissioner

DPM/AJT:jmf
JGF003/2

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