

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*  
 THOMAS J. PFEIFER,  
     Appellant/Complainant,  
 v.  
 Secretary, DEPARTMENT OF  
 INDUSTRY, LABOR AND HUMAN  
 RELATIONS,  
                     Respondent.  
 Case Nos. 86-0201-PC  
           86-0149-PC-ER  
 \* \* \* \* \*

INTERIM  
 DECISION  
 AND  
 ORDER

This matter is before the Commission on the issue of subject matter jurisdiction. Since there appeared to be a dispute as to the facts relating to subject matter jurisdiction, an evidentiary hearing as to jurisdiction was held before a hearing examiner. After the examiner issued a proposed decision finding jurisdiction present, but before the Commission rendered a final decision, respondent by letter of October 6, 1987, stated he withdrew his objection to jurisdiction. After the attorneys were unable to reach agreement as to how to deal with the matter, complainant's counsel by letter of November 13, 1987, registered his opposition to the withdrawal of the motion. Respondent's counsel has responded by letter of December 1, 1987.

In his letter opposing the withdrawal of respondent's objection, complainant's counsel cites the fact that complainant was forced to go through with a hearing, and asserts that in the event that the same objection were raised elsewhere, he would want to raise the final decision of the Commission on this point by way of res judicata or collateral estoppel.

In his response, respondent's counsel argues that whether there was a hearing on the objection is not material to the question of whether the Commission should permit withdrawal of the objection. Furthermore, he questions the likelihood that a question as to Commission jurisdiction would be raised in some other forum, and asserts that his letter withdrawing the objection would be more than adequate for purposes of collateral estoppel.

While there does not appear to be a great deal of authority on this issue, the approach courts have normally followed is not to permit the withdrawal of a motion after it has been heard, in the absence of a stipulation. See Marsh v. Marsh, 63 N.Y.S. 2d 42, 43-44 (S. Ct. 1946); Haeberkorn v. Macrae, 233 N.Y.S. 2d 793, 795 (S. Ct. 1962). In this case, the Commission not only has heard the objection but also has issued a proposed decision. See Kossoff v. Samsung Co. Ltd., 474 N.Y.S. 2d 180, 183 (S. Ct. 1984). Therefore, in the absence of agreement by complainant, the Commission will deny respondent leave to withdraw the objection and proceed to consider the proposed decision.

The Commission has considered respondent's objections and arguments with respect to the proposed decision and order, and consulted with the examiner, and will adopt the proposed decision and order as its resolution of the respondent's objection to subject matter jurisdiction.

ORDER

The proposed decision and order, a copy of which is attached hereto and incorporated by reference as if fully set forth, is adopted by the Commission as its decision on the respondent's objection to subject matter jurisdiction.

The parties will be contacted by the Commission for the purpose of scheduling a conference regarding further processing of these cases.

Dated: December 17, 1987 STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

  
DONALD R. MORPHY, Commissioner

AJT:jmf  
JMF01/2

ATTACHMENT

  
LAURIE R. McCALLUM, Commissioner

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*  
 \*  
 THOMAS J. PFEIFER, \*  
 \*  
 Appellant/Complainant, \*  
 \*  
 v. \*  
 \*  
 Secretary, DEPARTMENT OF \*  
 INDUSTRY, LABOR AND HUMAN \*  
 RELATIONS, \*  
 \*  
 Respondent. \*  
 \*  
 Case Nos. 86-0149-PC-ER \*  
 & 86-0201-PC \*  
 \*  
 \* \* \* \* \*

PROPOSED  
 DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This is an appeal of a hiring decision pursuant to §230.44(1)(d), Stats., and a charge of discrimination alleging discrimination on the bases of age and sex in relation to such hiring decision. On February 5, 1987, respondent filed a motion to dismiss the subject appeal on the basis that, since appellant's/complainant's name did not appear on the "official" list of certified candidates, appellant/complainant was not certified for the subject position and the Commission did not have subject matter jurisdiction under §230.44(1)(d), Stats., since the subject matter of the appeal did not involve "a personnel action after certification which is related to the hiring process." (emphasis added). On the same date, respondent filed a motion to dismiss the subject charge of discrimination on the basis that the failure to hire complainant could not have constituted discrimination because complainant had not been certified for the vacancy by respondent and there was thus no legal basis to offer complainant the position. A hearing was held on June 23, 1987, before Laurie R. McCallum, Commissioner.

FINDINGS OF FACT

1. Some time prior to September 23, 1986, it became apparent that the position of Job Service District Director for the Waukesha district was likely to be vacated as the result of the transfer of the position incumbent.

2. Roland Odland, the Southeast Regional Job Service Director, had the effective authority to fill such position if it were to become vacant. In view of the likelihood of such a vacancy, Mr. Odland contacted respondent's Bureau of Personnel on or around September 23, 1986, and requested an "unofficial" list of certified candidates. Such an "unofficial" written list was provided to Mr. Odland and consisted of the names of those candidates who would have been certified to Mr. Odland if the subject position had been vacant and a certification request had been approved and initiated on or before that date.

3. Mr. Odland contacted the candidates whose names appeared on the "unofficial" list on September 23, and 24, 1986, to determine their availability for and/or interest in the subject position. Mr. Odland noted these determinations on his written "unofficial" list. His notations indicate that two of the candidates on the list, Sharon Bello and Richard Lecher, were not interested in the subject position. Mr. Odland contacted respondent's Bureau of Personnel on or around September 24, 1986, and, upon advising them that two candidates on his "unofficial" list were not interested in the subject position, the Bureau advised him to add appellant's/complainant's name to the list. Mr. Odland added appellant's/complainant's name in writing to his "unofficial" list. Mr. Odland contacted appellant/complainant on September 25, 1986, and appellant/complainant advised Mr. Odland that he was interested in the subject position.

4. Once the subject position was vacated, Mr. Odland used his "unofficial" list from which to make his selection decision. He had followed this procedure in filling other vacant positions and the Bureau of Personnel had sanctioned his use of this procedure in these previous instances.

5. Once the subject position was vacated, a formal certification request was initiated and, using the availability/interest information provided to them by Mr. Odland by phone on or around September 24, 1986, (see Finding 3 above), the Bureau of Personnel generated an "official" list of certified candidates on October 9, 1986. Although the record is not clear, it appears that, because Richard Lecher was mistakenly designated by the Bureau of Personnel on this "official" list as interested in the position, the Bureau of Personnel regarded the list as complete since it contained the names of 5 candidates interested in the subject position (not counting those included through expanded certification) and thus they did not add the name of the next eligible candidate on the register (appellant/complainant) to this "official" list.

6. Mr. Odland considered appellant/complainant for the subject vacancy but appellant/complainant was not selected.

7. On November 17, 1986, appellant/complainant filed a timely appeal of this selection decision with the Commission.

8. On December 9, 1986, appellant/complainant filed a charge of discrimination with the Commission in relation to this selection decision alleging discrimination on the bases of age and sex.

CONCLUSIONS OF LAW

1. These matters are cognizable pursuant to §§230.44(1)(d), 230.45(1)(a) and (b), and 111.33(2), Stats.
2. Based on the current record, the complainant has suffered an adverse employment action that is reviewable under the Fair Employment Act.

DECISION

Appeal

Respondent's primary argument is that appellant was never certified for the subject position since his name did not appear on the "official" list of certified candidates and, as a result, the Commission lacks subject matter jurisdiction over the appeal under §230.44(1)(d), Stats., since it does not involve "a personnel action after certification which is related to the hiring process."

The Commission does not agree with respondent that appellant was not certified for the subject position. Respondent cites no authority for, nor is the Commission aware of any authority for, respondent's proposition that only those candidates whose names appeared on the "official" list of certified candidates could be regarded as certified candidates for the subject position. Neither the Wisconsin Statutes nor the Wisconsin Administrative Code specify the form which a list of certified candidates must take nor the means by which it must be transmitted to the hiring authority. Mr. Odland testified that he had used the procedure he used to fill the subject position to fill other positions, with respondent's Bureau of Personnel's full knowledge and cooperation. In addition, Jack Lawton, Chief of Staffing Services for respondent's Bureau of Personnel, testified that, if the staff of the Bureau's certification unit gave the name of an additional candidate to a hiring authority over the phone, that candidate

would be considered certified for the position. The practice of using "unofficial" lists with telephone-relayed additions is susceptible to many problems but respondent's Bureau of Personnel has sanctioned the use of such a procedure and, in view of this, the Commission concludes that appellant was certified for the subject position. It is also interesting to note in this regard that only as the result of a clerical error was appellant's name not included on the "official" certification list, i.e., if the availability/interest information provided by Mr. Odland by phone to respondent's Bureau of Personnel had been correctly transcribed so as to indicate that Mr. Lecher's lack of interest in the subject position, an additional name would have been required to be added to the list and there is no dispute that this additional name would have been appellant's.

Even if appellant had not been certified for the subject position, there is precedent for the conclusion that the Commission would still have subject matter jurisdiction. In Lundeen v. DOA, Case No. 79-208-PC (6/3/81) and Seep v. DHSS, Case No. 83-0032-PC (7/7/83), the Commission specifically rejected the contention that the appellant him/herself must have been certified as a precondition to establishing jurisdiction under §230.44(1)(d), Stats. In each of these appeals, the appellant had not been certified for the subject position but had been considered for but denied reinstatement after a list of certified candidates for the subject position had been generated. In the instant case, appellant had also been considered but not selected for the subject position after a list of certified candidates had been generated. The Commission affirms its holdings in the Lundeen and Seep cases and applies it to the facts of the instant appeal as well.



Charge of Discrimination

The bases of the Commission's subject matter jurisdiction over the charge of discrimination are §§230.45(1)(b) and 111.33(2), Stats. Respondent contends, in challenging the Commission's subject matter jurisdiction over this charge of discrimination, that "the failure to hire complainant could not have constituted discrimination because complainant had not been certified for the vacancy by respondent and there was thus no legal basis to offer the complainant the position." The respondent fails to relate how, even if the facts were as alleged by respondent, this would deprive the Commission of subject matter jurisdiction over the charge of discrimination. Respondent's argument is more akin to one which challenges complainant's standing to bring the charge of discrimination, i.e., which argues that, since complainant should not have been considered for the subject position because he was not certified for it, complainant suffered no "injury in fact" (see Wisconsin Environmental Decade v. PSC, 69 Wis. 2d 1, 230 N.W. 2d 243 (1975)) when someone other than he was selected for the subject position and he, therefore, does not have standing. First of all, the Commission has already concluded the complainant was certified for the subject position. Moreover, complainant was considered for the subject position by the hiring authority and was the subject, therefore, of an adverse personnel action by respondent, suffered an "injury in fact," when someone else was selected for the subject position.

ORDER

Respondent's motions to dismiss are denied.

Dated: \_\_\_\_\_, 1987      STATE PERSONNEL COMMISSION

\_\_\_\_\_  
DENNIS P. MCGILLIGAN, Chairperson

LRM:jmf  
JGF004/2

\_\_\_\_\_  
DONALD R. MURPHY, Commissioner

\_\_\_\_\_  
LAURIE R. McCALLUM, Commissioner