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 DALE M. WIARS,
 Appellant,
 v.
 Administrator, DIVISION OF
 MERIT RECRUITMENT AND
 SELECTION,
 Respondent.
 Case No. 86-0209-PC
 * * * * *

INTERIM
 DECISION
 AND
 ORDER

This matter is before the Commission on respondent's motion to dismiss for lack of subject matter jurisdiction. The parties filed written arguments on the matter.

This matter was filed with the Commission as an appeal from respondent's decision not to allow appellant to compete in the examination for an Architect 6 position because he did not meet the Wisconsin residency requirement. The following facts appear to be undisputed.

FINDINGS OF FACT

1. The appellant submitted an application for an Architect 6 position with the Wisconsin Board of Vocational, Technical and Adult Education.

2. By letter dated November 6, 1986, respondent notified the appellant that he was not eligible to compete in the examination for the position because he did not meet the residence requirements set forth in sec. 230.16(2), Stats.

3. On December 3, 1986, appellant filed an appeal of this denial as follows:

Enclosed is a letter of the State of Wisconsin, dated November 6, 1986, denying my application as a non-resident by its stipulation of Wisconsin Statute 230.03 (12).

As a former resident, voter, and taxpayer of over twenty years, that was forced to leave the state in 1980 due to the economic conditions of Wisconsin at that time; I believe this denial is unjust and unwarranted.

I respectfully request your review of this matter and for reinstatement as a viable applicant for this position. I ask that the position in question be held open without determination pending a decision of this request by the personnel commission.

CONCLUSION OF LAW

The Commission has jurisdiction over this appeal.

DECISION

At issue is sec. 230.16(2), Stats., which reads as follows:

230.16 APPLICATIONS AND EXAMINATION. (1) ...

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(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. To assure that all residents of this state have a fair opportunity to compete, examinations shall be held at such times and places as, in the judgment of the administrator, most nearly meet the convenience of applicants and needs of the service. If a critical need for employes in specific classifications or positions exists, the administrator may open competitive examinations to persons who are not residents of this state.

In his brief, complainant argues as follows:

The Commission has been advised that I was a resident of Wisconsin for over two decades, a voter, a taxpayer, an elected official of municipal government, and was previously offered the position in the Wisconsin VTAE system.

I contend that the Wisconsin denial of my application is:

- 1) Arbitrary and capricious.
- 2) Unconstitutional as applied.

The Commission discussed the extent of its power to consider the constitutional arguments raised by the appellant in McSweeney v. DOJ/DMRS, 84-0243-PC (3/13/85). McSweeney's appeal, like appellant's, involved respondent's refusal to consider McSweeney's application for employment in the

classified civil service because of his admitted failure to satisfy statutory residency requirements. The Commission concluded that based on general principles concerning administrative authority, and because the Commission's specific enabling statutes do not confer such power, it lacked the authority to rule on the question of the constitutionality of the statutes relating to the requirement of Wisconsin residency for civil service employment. However, the Commission went on to state:

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.

McSweeney, again like the appellant, alleged that his constitutional rights as applied in the case were denied. (emphasis supplied) The Commission went on to issue an Order scheduling a prehearing conference "to discuss processing those issues which the Commission has the authority to hear and determine."

Applying the McSweeney standard herein, another prehearing conference will be scheduled to discuss processing any issues pertaining to appellant's allegation that the denial of his application was "unconstitutional as applied." Presumably, at such a prehearing conference appellant's allegation that the aforesaid denial was "arbitrary and capricious" may be discussed within the context of framing an issue.

In his brief, appellant requests "that the position be held available and that my application be accepted without reservation or stipulation as a candidate." In its brief, respondent states:

[A]t the request of the appellant, I am stating for the record that the filling of the Architect 6 position will be carried out in accordance with established procedures. More specifically, a hiring decision will not be delayed because of this proceeding.

Not only does the Commission lack any explicit authority to order that this position be held open, but §230.44(4)(d), stats., provides:

"The Commission may not remove an incumbent or delay the appointment process as a remedy to a successful appeal under this section unless there is a showing of obstruction or falsification as enumerated in s.230.43(1)."

It follows that if the commission lacks the authority to delay the appointment process as a remedy to a successful appeal¹, it lacks the authority to delay the appointment process pending completion of an appeal process that might or might not result in a "successful appeal." Therefore, the Commission cannot act to hold this position open either as a result of a successful appeal or on an interim basis pending appeal.

Respondent has also raised an issue as to appellant's standing:

Second, the Commission should dismiss this proceeding on the grounds that the Appellant lacks standing to bring the appeal. There is no doubt that the Appellant is not a Wisconsin resident. The statute grants to the Administrator of DMRS the authority to open examinations to nonresidents if a critical need exists. However, in this case the general requirement of the statute - the examination was open to residents only - was imposed. The Administrator did not make a determination that a critical need existed. Determining that a critical need exists is the only discretionary act authorized by the statute, and, therefore is the only decision that may be appealed. However, if the Administrator had opened the examination to nonresidents, the only persons that would have standing to appeal the decision are Wisconsin residents who, as a result of the decision, might have to compete against more numerous eligible applicants than they would have had the examination been restricted to residents only. Wisconsin residents have a legally protected interest - an interest created by sec. 230.16(2), Stats., in having civil service examinations restricted to Wisconsin residents, an interest that can be abrogated by the Administrator only if there is a critical need. On the other hand, the Appellant has no such legally protected interest to have examinations open to nonresidents. Accordingly, since there is no direct effect on the Appellant's legally protected interests resulting from the Administrator's decision not to open the examination up to nonresidents, the appellant does not have standing to appeal. Milwaukee Metropolitan Sewerage District v. Wisconsin Department of Natural Resources, 126 Wis.2d 63 (1985).

¹ There has been no suggestion that this case involves any allegation of obstruction or falsification as set forth in §230.43(1), stats.

The Commission does not agree that appellant as a non-resident lacks standing because §230.16(2), stats., provides that examinations shall be open to residents, unless there is a determination that there is a critical need for employes in specific classifications or positions. The appellant has alleged that the denial of his application involved an arbitrary and capricious action and that §230.16(2) violated his constitutional rights as it was applied to him. If he can show that the decision not to open this competition to non-residents was arbitrary and capricious or that the statute as applied violated his constitutional rights, then there will be an injury to a legally protected interest. Such a showing cannot be ruled out on the limited record that exists at this stage of this proceeding.

ORDER

Respondent's motion to dismiss for lack of subject matter jurisdiction and for lack of standing as set forth in her letter of December 23, 1986, is denied.

Dated: March 4, 1987

STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner