



STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 NANCY COZZENS-ELLIS, *
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 Appellant, *
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 v. *
 *
 President, UNIVERSITY OF *
 WISCONSIN SYSTEM (Madison), *
 *
 Respondent. *
 *
 Case No. 87-0085-PC *
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 * * * * *

FINAL
 DECISION
 AND
 ORDER

This matter is before the Commission following the issuance of a proposed decision and order by the hearing examiner. The Commission has considered the parties' objections and arguments and has consulted with the examiner.

While the Commission concludes the proposed decision properly concluded that this appeal was untimely filed, it do so by an incorrect conclusion regarding effective date because it incorrectly characterized the "action" which is the subject matter of this appeal.

Section 230.44(3), Stats., provides, inter alia:

Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later....

The proposed decision contains the following discussion at p. 3:

The subject matter of the appeal is respondent's decision to promote Ms. DePagter, and not the appellant, to the Security Supervisor 1 position at the Clinical Science Center. Therefore, the Commission must determine the effective date of that promotion.

However, in the Commission's view, the subject matter of this appeal is inextricably tied to respondent's failure to have promoted appellant. There presumably would have been no basis for an appeal of Ms. DePagter's promotion if appellant had not been passed over in the process. Looking at the action appealed as the failure or refusal to promote appellant, it does not follow that the effective date would be the effective date of someone else's -- i.e., Ms. DePagter's -- promotion. Rather, the effective date would be the date (May 4, 1987), as set forth at Finding #3, when Chief Hanson selected the other candidate, and necessarily rejected appellant, for promotion.

This conclusion is reinforced by considering the possible effect of a conclusion that the subject matter of an appeal like this is the promotion of someone else, rather than the non-promotion of the person taking the appeal. In a case where the appointing authority decides to reduce his or her consideration of those certified for promotion, say from five to two, and notifies the three rejected candidates they are no longer under consideration, it is unlikely that an appeal filed by one of them at that time would be considered premature because it preceded promotion of the ultimately successful candidate.

This conclusion as to the nature of the subject matter of appeals such as this is also reinforced at least inferentially by a line of Commission cases wherein the Commission asserted subject matter jurisdiction under §230.44(1)(d), Stats., over appointing authorities' decisions not to reinstate ex-employees where those decisions were not connected to decisions to appoint other individuals. See, Lundeen v. DOA, 79-208-PC (6/3/88), Frank v. DHSS, 83-0173-PC (9/28/84).

CONCLUSIONS OF LAW

1. This appeal, having been filed more than 30 days after both the date of notice to the appellant (May 5, 1987), and the effective date of the action appealed (May 10, 1987), was untimely filed under §230.44(3), Stats.

2. The 30-day time period for filing an appeal under §230.44(3), Stats., is jurisdictional in nature and is not subject to equitable tolling.

DISCUSSION

Section 230.44(3), Stats., provides inter alia:

"Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, which is later...."

Since it is clear from the evidentiary hearing that appellant had notice of her nonselection on May 5, 1987, and the appeal was not filed until more than 30 days thereafter, on June 11, 1987, the primary issue is the determination of the effective date of the action appealed.

The subject matter of the appeal is respondent's decision to promote Ms. DePagter, and not the appellant, to the Security Supervisor I position at the Clinical Science Center. Therefore, the Commission must determine the effective date of that promotion.

The Wisconsin Administrative Code, §ER-Pers 14.01, defines a promotion as follows:

"Promotion means the permanent appointment of an employe with permanent status in class to a different position in a higher class than the highest position currently held in which the employe has permanent status in class." (emphasis added)

Section ER-Pers 1.02(1), Wis. Adm. Code, provides:

"'Appointment' means the action of an appointing authority to place a person in a position within the agency in accordance with the

ORDER

The proposed decision and order, a copy of which is attached hereto, is adopted by the Commission as its final disposition of this matter with the following changes:

1. Conclusion of Law #1 is modified to read as follows:

1. This appeal, having been filed more than 30 days after both the date of notice to appellant (May 5, 1987) and the effective date of the action appealed (May 4, 1987), was untimely filed under §230.44(3), Stats.

2. The Discussion contained on pages 3 and 4 is deleted.

3. The first paragraph at the beginning of page 5 is amended to read as follows:

Inasmuch as the effective date of the transaction was May 4, 1987, the date of notice was May 5, 1987, and the appeal was not filed until June 11, 1987, the Commission must conclude the appeal was untimely filed under §230.44(3), Stats.

Dated: Sept 20, 1988 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Commissioner

AJT:jmf
JMF11/2

Attachment


GERALD F. HODDROTT, Commissioner

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 Appellant, *
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 President, UNIVERSITY OF *
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PROPOSED
 DECISION
 AND
 ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(d), Stats., of the denial of a promotion. This matter is before the Commission following an evidentiary hearing on respondent's motion to dismiss on timeliness grounds.

FINDINGS OF FACT

1. Appellant has at all relevant times been employed by respondent in the classified civil service in the Department of Police and Security at UW-Madison, which has been headed by Chief Ralph Hanson.

2. Appellant was among those certified for consideration for promotion to two Security Supervisor I positions within the Department.

3. On May 4, 1987, Chief Hanson selected two candidates, Ms. DePagter and Mr. Simmons, for promotion to these positions.

4. Appellant was notified verbally on May 5, 1987, by Security Supervisor 2 James Kaszubski that these two other persons had been selected for promotion to the two positions.

5. Also on May 5, 1987, an employe of respondent placed a letter in complainant's mailbox at work that informed her of her nonselection.

Appellant did not open the mailbox or said letter for several days thereafter, although she knew there was a letter there.

6. Chief Hanson advised Ms. DePagter by letter dated May 5, 1987, Respondent's Exhibit 3, that "... you are promoted to the position of Security Supervisor I effective May 10, 1987...."

7. Chief Hanson also promulgated Special Order No. 25-87 dated May 5, 1987, which contained the following:

"1. Effective May 10, 1987, Security Officer 3 Carol DePagter and Security Office 2 Wesley Simmons are promoted to the position of Security Supervisor I.

* * *

3. Security Supervisor I DePagter will report to Sgt. Gary Johnson at the Clinical Science Center for duty and assignment on the 4:00 p.m. to 12:00 midnight shift."

8. Ms. DePagter began earning at the Security Supervisor I pay level as of May 10, 1987, and the appointing authority fixed her seniority date at May 10, 1987.

9. Management intended that the employe whom Ms. DePagter would be replacing as a Security Supervisor I at the Clinical Science Center would provide her with an initial period of on-the-job training. Primarily because this employe was off on May 10, 1987, management directed Ms. DePagter to work at her old assignment at the Elvehjem Art Center.

10. Ms. DePagter first reported to the Clinical Science Center and began performing the duties and responsibilities of the Security Supervisor I position on May 13, 1987.

11. Appellant filed this appeal with this Commission on June 11, 1987. To the extent that this is an appeal under §230.44(1)(d), Stats., as opposed to a complaint of discrimination under Subch. II, Ch. 230, Stats., it relates only to the DePagter appointment.

Since the appeal in the instant case was filed more than 30 days after both the effective date of the denial of the promotion (May 4, 1987) and the date of notice to appellant (May 5, 1987), it is untimely under §230.44(3), Stats.

In the event the foregoing were to be disturbed on appeal, the Commission notes in the alternative that if effective date is determined by reference to the effective date of Ms. DePagter's promotion, it would agree with the conclusion set forth in the proposed decision.

Appellant put great stress in her arguments on a legislative interest behind §230.44(3), Stats., of protecting employes' appeal rights, and contended that the Commission should utilize an effective date that would be the most visible to an employe who may wish to appeal a transaction. However, the legislature already has specifically provided in §230.44(3), Stats., that the time for appeal cannot run until the employe receives notice of the action, and then it begins to run from the date of notice to the employe or the effective date of the action, whichever is later. The determination of effective dates of appointments has significance for a number of reasons, such as seniority and employe benefits, having nothing to do with appeals, and the personnel rules provide an explicit definition of the effective date of appointment at §ER Pers 1.02(1), Wis. Adm. Code. Under such circumstances, it is not appropriate to construe §ER Pers 1.02(1) by engrafting language that is not there which would require that an appointment is not effective until the employe reports for work at the work site of the new position on the starting date and time.

law and these rules. An appointment shall be effective when the employe reports for work or is in paid leave status on the agreed starting date and time. Acting assignments under ch. ER-Pers 32 are not appointments." (emphasis added)

The determination of the effective date in this case turns on an interpretation of the language "when the employe reports for work" in the aforesaid rule. In the opinion of the Commission, the only rational way to interpret this language is as not requiring that the employe report to the worksite of the new position on the date in question, but merely requiring that the employe report for work in the manner directed by management.

To begin with, the rule by its terms does not require that the employe report for work at a specific location. It simply states that the "appointment shall be effective when the employe reports for work or is in paid leave status on the agreed starting date and time." Furthermore, if the rule were to be construed as implicitly requiring that the employe report at the site of the new position, this could lead to absurd results.

For example, if Ms. DePagter had called in sick on May 10th, she would have been in paid leave status as a Security Supervisor I on that date and there would not have been any possible question under §ER-Pers 1.02(1), Wis. Adm. Code, but that the effective date of the promotion would have been May 10th. Similarly, if she had reported to the Clinical Science Center on May 10th and had been told by Sgt. Johnson to work at the Elvehjem, there also would have been no possible question but that the effective date of the promotion would have been May 10th. There is no reason why there should be a different result here, when instead of calling in sick or reporting at the Clinical Science Center, management advised Ms. DePagter prior to the start of the shift to report to the Elvehjem on a temporary, one-day basis, while earning at the Security Supervisor I rate of pay, and she did so.

Inasmuch as the effective date of the transaction was May 10, 1987, and the appeal was not filed until June 11, 1987, 32 days later, and 37 days after the date of notice, the Commission must conclude the appeal was untimely filed under §230.44(3), Stats.

In a post-hearing brief, appellant contended that the 30-day time for appeal should be tolled for equitable reasons, because it was reasonable for her to interpret May 13th, when Ms. DePagter actually began working in the new position, as the effective date of the promotion, and because the two-day delay in filing the appeal did not prejudice respondent.

However, since §230.44(3), Stats., contains the language "may not be heard," the Commission and the Courts consistently have interpreted this subsection as jurisdictional in nature, and therefore not subject to equitable tolling, see Van Laanen v. Wettengel and Schmidt, Wis. Pers. Bd. No. 74-17 (1/2/75); State of Wisconsin ex rel DOA v. Personnel Bd., Dane Co. Cir. Ct. No. 149-295 (1976); Richter v. Division of Personnel, Wis. Pers. Commn. No. 78-261-PC (1/30/79).

ORDER

This appeal is dismissed as untimely filed.

Dated: _____, 1988 STATE PERSONNEL COMMISSION

DENNIS P. MCGILLIGAN, Chairperson

AJT:rcr
DPM/1

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

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