

* * * * *

DARYL RANSOM, *

Appellant, *

v. *

President, UNIVERSITY OF *

WISCONSIN SYSTEM (Milwaukee) *

Respondent. *

Case No. 87-0125-PC *

* * * * *

INTERIM
DECISION
AND
ORDER

This matter is before the Commission on motion of the University of Wisconsin Systems, the respondent, to dismiss appellant's appeal for lack of jurisdiction. Neither party requested a hearing but elected to file written arguments. The following findings are based on briefs filed by the parties and the case record file.

FINDINGS OF FACT

1. Appellant, at all times pertinent to this appeal, was employed by respondent at the University of Wisconsin-Milwaukee (UW-Milw.).

2. On July 24, 1987, appellant filed an appeal with this Commission alleging that his name was wrongfully not included among the list of eligible applicants for the vacant Laborer Specialist position at UW-Milw. Both UW-Milw. and the Division of Merit Recruitment and Selection (DMRS) were designated as parties respondent.

3. A prehearing conference by phone was held on September 3, 1987. At that conference respondents proposed the following two issues:

1. Whether DMRS violated §230.25 or ER-Pers 12 in failing to certify appellant to the Laborer Special position?
2. Was UW-Milwaukee's decision not to appoint appellant to the Laborer-Special position illegal or an abuse of discretion?

No agreement as to the issue could be reached by the parties. Appellant was to submit a statement of issues by November, 1987. Also, the case was placed on the hearing calendar.

4. On February 12, 1988, eleven days before the date for hearing, another telephone conference was held. During that conference, appellant contended that respondent had violated §§230.19 and 230.20, Wis. Stats., and Adm. Code ER-Pers 6.01 because respondent had an open recruitment and his name was not on the certified list of eligible candidates for the position, which was provided by DMRS as a result of the open statewide recruitment. Appellant proposed the following issue:

Did the employer violate §§230.19, 230.20 and Adm. Code ER-Pers 6.01 in filling the position on the UW-Milwaukee ground crew vacated by Willie Bowman.

Also, the parties stipulated to the dismissal of DMRS as a party.

5. Respondent, in response to appellant's proposed issue, moved to dismiss for lack of subject matter jurisdiction.

6. The following factual background is undisputed:

Respondent began recruitment for the Laborer Specialist position in November, 1986. UW-Milw. requested a certification from DMRS of UW-Milw. candidates and a servicewide certification list, if there were fewer than five UW-Milw. candidates. Appellant's name was included on the second of two lists of candidates submitted by DMRS and he was interviewed for the position. Because only two candidates were interested in the position, respondent, in accordance with its original request, made an additional request to DMRS for names of certified candidates. DMRS provided an additional certification list, but recruitment efforts were stopped due to insufficient funds for the position.

In May, 1987, authority was given UW-Milw. to fill the position. Respondent resumed recruitment and requested it to be statewide and expanded to include special recruitment of minorities. The list that followed from DMRS did not include the name of the appellant. At this point, UW-Milw. attempted to cancel the statewide recruitment and reinstate servicewide recruitment to protect the interest of certified candidates from the previous recruitment. This latter request to reinstate servicewide recruitment was denied by DMRS on July 20, 1987. Appellant's name was not on the current statewide certification list and he could not be considered for the position.

CONCLUSIONS OF LAW

1. The Commission has authority to decide the jurisdictional question before it.

2. The Commission lacks jurisdiction over the subject matter of this appeal based on the issue proposed by appellant, with respect to §§230.19 and ER-Pers 6.01, Wis. Adm. Code, but has subject matter jurisdiction over the second issue proposed by respondents.

OPINION

This motion presents the issue of whether the Commission has subject matter jurisdiction over appellant's claim that respondent violated §§230.19 and 230.20 Wis. Stats. and ER-Pers 6.01, Wis. Adm. Code, when it requested open recruitment for its vacant Laborer Specialist position. Appellant argues that respondent's request for open recruitment is delegated by the administrator (DMRS). In support of his argument, appellant

makes the following statement: Since DMRS allows the agency to request certification on any basis it chooses, and since that decision has a direct bearing on who is selected for a vacancy, the action is delegated. Appellant provides no legal basis for this argument, and it is clear from the documents submitted that UW-Milw. had not in fact been delegated responsibility by DMRS pursuant to §230.05(2)(a), Stats., to have made the certifications itself.

In a similar case, Miller v. DHSS, Wis. Pers. Comm., 81-137-PC (10/2/81), where the appellant objected to the type of procedural transaction used to fill a vacant position, the Commission said, "the appointing authority makes the initial decision as to which process -- promotion or transfer -- to use to fill a vacancy. The administrator's role is in connection with the implementation of the particular process once it is chosen. Therefore, the determination... as to how and when to fill the position is not that of the administrator, either directly or on a delegated basis, and hence not appealable pursuant to §230.44(1)(a) or (b), Stats." Having excluded the other basis for jurisdiction over the appeal, the Commission concluded that it lacked subject matter jurisdiction.

While the instant case, unlike Miller, which was appealed because appellant contested filling a position by transfer instead of promotion, involves filling a position by open recruitment as opposed to servicewide recruitment, the legal underpinnings are similar. Respondent's initial decision as to whether to fill a position by transfer or promotion, and in the latter case whether to request in-service competition or open recruitment is a direct, undelegated power which is not appealable per se to the Commission.

While respondent UW-Milw. clearly had no legally cognizable role in the context of alleged violations of §230.19, Stats., and ER-Pers 6.01, Wis. Adm. Code, its role as appointing authority is subject to §230.20, Stats., which deals with recommendations. Therefore, while the Commission does not have jurisdiction over this entire matter in the context of the issue framed by appellant, this does not mean that the entire appeal should be dismissed as sought by respondent. Furthermore, appellant's contentions apparently can be aired under the heading of the issue respondents previously proposed at the first prehearing conference:

Was UW-Milwaukee's decision not to appoint appellant to the Laborer-Special position illegal or an abuse of discretion.

Appellant is contending that UW-Milw.'s decision to request further certification after his initial certification and interview was a means to the end of not appointing him to the position. This action of respondent in failing or refusing to hire appellant can be characterized as a "personnel action after certification which is related to the hiring process in the classified service which is alleged to be illegal or an abuse of discretion...." §230.44(1)(d), Stats. Evidence that would tend to show that UW-Milw. requested an additional, or a particular type of certification for the purpose of undermining appellant's chances for the appointment apparently would be relevant to the issue framed by respondents. Also relevant to this issue would be evidence as to whether respondent improperly relied on recommendations in violation of §230.20, Stats.

Finally, respondent argues this appeal is untimely under §230.44(3), Stats., because it was filed more than 30 days after the request for open recruitment was made on June 10, 1987. However, it appears to be undisputed that it was filed within 30 days of when appellant received notice of that

action, as well as within 30 days after he received notice of his non-selection for the Laborer-Special position.

ORDER

1. Pursuant to the stipulation of the parties, DMRS is dismissed as a party respondent.

2. Respondent UW-Milw.'s motion to dismiss this appeal for lack of subject matter jurisdiction is denied.

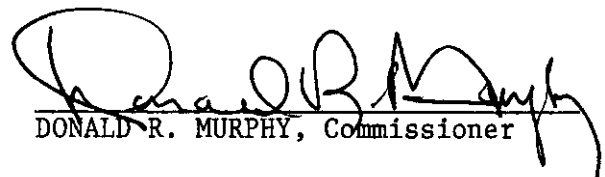
3. Appellant's proposed issue for hearing is rejected, and this matter is to proceed to hearing on the basis of the second of respondents' proposed issue, to wit:

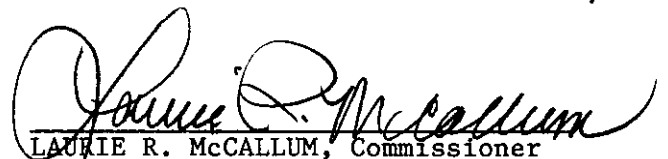
Was UW-Milwaukee's decision not to appoint appellant to the Laborer-Special position illegal or an abuse of discretion?

(If appellant does not wish to proceed to hearing on the basis of the statement of issue determined by the Commission, he should notify the Commission as soon as possible.)

Dated: July 13, 1988 STATE PERSONNEL COMMISSION

DRM/AJT:jmf
JMF09/4


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner