

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JEFFREY H. ALLEN, *

Appellant, *

v. *

Secretary, DEPARTMENT OF *
HEALTH AND SOCIAL SERVICES, *
and Administrator, DIVISION OF *
MERIT RECRUITMENT & SELECTION, *

Respondents. *

Case No. 87-0148-PC *

* * * * *

INTERIM
DECISION
AND
ORDER

On August 25, 1987, appellant filed an appeal of an examination administered by the Division of Merit Recruitment and Selection (DMRS) for the Fiscal Supervisor 1 classification and of the selection of a candidate for a Fiscal Supervisor 1 position in the Bureau of Management and Budget, Division of Community Services, Department of Health and Social Services (DHSS). On October 23, 1987, respondents filed motions to dismiss the appeal for lack of subject matter jurisdiction as to both the examination and the selection decision and for lack of standing as to the examination. The parties were allowed to file briefs and the briefing schedule was completed on November 23, 1987. None of the parties requested an evidentiary hearing on the motions.

The following facts appear to be undisputed:

1. In January of 1987, a Servicewide Promotional Announcement was issued for a Fiscal Supervisor 1 position at the Department of Transportation. The announcement stated that, "The register established from this

recruitment may be used to fill similar positions in other agencies during the next 6 to 12 months."

2. An examination for the announced position was administered by DMRS and a register was established on or about March 6, 1987. Appellant took such exam. Appellant received a score of 99.43 and was ranked number 1 on the register. Notice of examination results were mailed to all who took the exam on May 7, 1987. Appellant received his notice in the mail a few days later.

3. DHSS used such register to fill a Fiscal Supervisor 1 position in its Bureau of Management and Budget, Division of Community Services. Appellant was certified for and interviewed for such position but was not selected.

The parties dispute the date upon which appellant was notified by phone that he was not the successful candidate for the subject DHSS position. Appellant filed his appeal with the Commission on August 25, 1987.

Timeliness

Section 230.44(3), Stats., provides, in pertinent part:

TIME LIMITS. 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 Commission has consistently held that such 30-day filing requirement is jurisdictional in nature, i.e., that the Personnel Commission does not have the authority to hear an appeal unless it is filed in accordance with such requirement. See, e.g., Richter v. DP, Case No. 78-261-PC (1/30/79).

In the instant appeal, appellant received notice of the results of the subject exam during the early part of May, 1987, but did not file his

appeal until August 25, 1987, more than 30 days later. Appellant argues in this regard that the operative date from which the 30 days should be measured should be the date that he was notified of his non-selection, not the date that he was notified of the exam results, since he was not actually injured by the inadequacy of the exam until such inadequacies resulted in his non-selection.

The alleged inadequacy of the examination and certification process upon which appellant is basing his appeal is that the exam contained questions which had been included on previous exams for the same classification and this resulted in the certification of an allegedly pre-selected candidate for the subject position.

When someone wishes to challenge the content or administration of an examination, the 30 day period set forth in §230.44(3), Stats., usually is considered to commence on the date of receipt of notice of the examination results. Schuler v. DHSS, Wis. Pers. Commn. No. 81-12-PC (4/12/81). It is at that point that the examinee is aware not only of the content of the exam and how it was administered, but also how that affected his or her score.

The instant case varies from the usual appeal because here the appellant is not complaining about how the examination process affected his score, but rather about how the exam process allegedly facilitated the certification and ultimate appointment of an allegedly pre-selected candidate.

In order to analyze the timeliness issue, it is necessary to look at both jurisdictional bases for the appeal, §§230.44(1)(a) and (d), Stats. To the extent appellant is challenging the exam on its merits -- i.e., that he is contending that it was not conducted properly under the civil service

code, and more specifically, §230.16, Stats., this is an appeal pursuant to §230.44(1)(a), Stats., of an action of the administrator of the Division of Merit Recruitment and Selection (DMRS). To the extent that he is challenging the appointment itself, this is an appeal pursuant to §230.44(1)(d), Stats.

Looking first at the §230.44(1)(a), Stats., aspect of this appeal, there could be debate about what was the effective date of the examination. However, it was not any later than the date of the certification for the position in question. As of that date, or shortly thereafter, and well before he got notice of his rejection, appellant had notice not only of the certification, but also of the exam content and manner of administration, and of his score. Therefore, this appeal is untimely to the extent it challenges exam content and administration per se pursuant to §230.44(1)(a), Stats.

To avoid possible future confusion, it should be noted that it does not follow from the foregoing that all of appellant's contentions concerning the examination are necessarily out of the case. For example, appellant appears to be contending that the exam was repeated as part of a deliberate attempt by respondents to facilitate the appointment of a pre-selected candidate. Evidence relating to this aspect of the case arguably would be relevant to the §230.44(1)(d), Stats., non-selection appeal, even though presumably appellant could not use such evidence to argue a violation of §230.16, Stats., due to the untimeliness of his appeal as to the exam per se.

The operative date for purposes of timeliness with respect to the §230.44(1)(d), Stats., appeal, would be the date appellant received notice of his nonselection for the position in question. In its brief on

timeliness, respondent DMRS asserts appellant admitted at the prehearing conference that he received notice on a certain date. In his brief, appellant disputes having made such an admission. Under these circumstances, the Commission cannot reach any conclusion as to the date of notice, but must schedule a hearing to take evidence on this question.

Standing

Because the Commission has already concluded that the appeal as to the exam per se is untimely, it is unnecessary to determine whether the appellant would have standing to pursue such an appeal under s. 230.44(1)(a), Stats.

It does not appear that the respondent has raised an issue of standing as to an appeal under s. 230.44(1)(d), Stats., of the non-selection decision. However, to the extent the respondent may have raised such an issue, the Commission finds the appellant does have standing as to the non-selection decision. He was injured by the non-selection decision and his interest is recognized by law. Wood v. DER & DNR, 85-0008-PC-ER, 7/11/86. Within the scope of a non-selection appeal, the appellant may contend that the examination procedure is evidence of an attempt to appoint a "pre-selected" candidate. The appellant may offer any evidence relevant to the non-selection decision, including, possibly, the evidence relating to the examination.

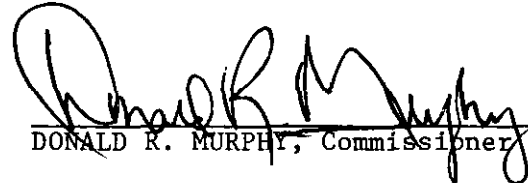
Because appellant has standing as to the non-selection decision, no further analysis of appellant's standing would be appropriate as to specific arguments that may be raised in the context of a non-selection appeal.

ORDER

Respondent's' motion to dismiss for lack of standing is denied. The Commission will not decide the motions to dismiss for lack of subject matter jurisdiction until a record is developed relating to the disputed factual issue or until the factual issue is resolved by stipulation or some other action of the parties.

Dated: February 12, 1988 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. MCCALLUM, Commissioner

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