

STATE OF WISCONSIN

PERSONNEL COMMISSION

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ERIC R. THOMPSON,
Appellant,
v.
Administrator, DIVISION OF
MERIT RECRUITMENT & SELECTION,
and Secretary, DEPARTMENT OF
NATURAL RESOURCES,
Respondents.
Case No. 87-0204-PC
* * * * *

INTERIM
DECISION
AND
ORDER

This matter is before the Commission on a motion to dismiss filed by respondent Division of Merit Recruitment and Selection (DMRS). The parties have been provided an opportunity to file briefs. In his initial brief, appellant advanced a motion for summary judgment. The facts set out below appear to be undisputed and are established solely for the purpose of deciding these motions.

FINDINGS OF FACT

1. On April 29, 1985, DMRS promulgated bulletin MRS-20 entitled "Civil Service Rank and Score Information for Certified Candidates." That bulletin read, in part, as follows:

Effective May, 1985, all agencies are to adhere to the following procedures regarding candidates certified as eligible for appointment. This policy is designed to reinforce the concept that all certified candidates are entitled to equal employment consideration.

Certification from Registers Held by DMRS

The Division of Merit Recruitment and Selection (DMRS) provides the agency personnel office with a ranked list of names which contains the civil service score, race and sex of each certified candidate as well as the certification option (if any) under which the person is

certified (e.g., Veterans Preference, HEC). DMRS also provides the agency personnel office with a randomly ordered list of names.

The agency personnel office is responsible for providing the random list of names for the position vacancy to the appointing authority. Race, sex, veterans points and handicapped status may also be included.

* * *

The agency personnel office may use the information on the ranked list provided by DMRS to monitor compliance with the agency's affirmative action hiring policy. In addition, this information is used to determine if there is any need for verification by the appointing authority of an applicant's claimed status relative to the certification option under which they were certified.

* * *

Certification from Registers Held by Agencies

The agency personnel office provides the random list of names to the appointing authority. This list includes the names of those persons eligible for employment consideration and may include information on applicants' race, sex, veterans points and handicapped status. This information may be used to monitor compliance with the agency's affirmative action hiring policy.

2. At all relevant times, the appellant has been employed by respondent Department of Natural Resources (DNR).

3. On May 20, 1987, DNR posted a lateral transfer and promotional announcement for the classification of Real Estate Agent 5 in the Department. The announcement directed applicants to submit their applications to Ruth Anderson of the DNR Personnel Office by June 10, 1987.

4. DMRS delegated the authority and responsibility for recruitment, examination, applicant notification, register establishment and certification of eligibles relative to the Real Estate Agent 5 opportunities, to DNR.

5. DNR's Personnel Office developed the (oral) examination for the applicants. DMRS approved the exam and set the passing point.

6. DNR's Personnel Office administered the examination on September 23 and 24, 1987. DNR then sent the applicants' raw scores to DMRS which

converted them to civil service scores. The civil service scores were then sent to DNR.

7. Appellant applied for and was examined for the Real Estate Agent 5 opportunity.

8. DNR Personnel Office created a register from the scores and issued each applicant a "Notice of Examination Results" which listed the applicant's final grade without veteran's preference and listed the applicant's ranking. The appellant was ranked third.

9. DNR Personnel Office created a certification of eligibles, randomly listing the certified applicants with no information as to examination scores or rankings. The appellant was one of those applicants who were on the certification list.

10. On September 28, 1987, the certification list was provided to the appointing authority in DNR's Bureau of Real Estate for use in filling two vacancies in Madison.

11. Although he was among those certified and was interviewed on October 20, 1987, appellant was not selected for either of the two vacancies and on November 3, 1987, he was notified orally of his non-selection.

12. On November 16, 1987, appellant filed a letter of appeal with the Commission, asking the Commission to rescind MRS-20 in light of his experiences relative to the Real Estate Agent 5 selection decisions.

OPINION

The conference report for a prehearing conference held on December 18, 1987 indicates that respondent moved to dismiss the appeal based on four contentions/issues:

1. Was there a decision made by DMRS as to the appellant?
2. Is that decision appealable to the Commission?

3. Does the appellant have standing?
4. Does the Commission have the authority to order rescission of bulletin MRS-20?

In its briefs, DMRS offered no arguments as to item 4, but did advance the argument that appellant's appeal of the decision not to provide the applicants' ranking as part of the certification, was untimely filed. The appellant identifies three decisions that he seeks to appeal: 1) The decision by DMRS to promulgate bulletin MRS-20; 2) the decision to create a random list of certified eligibles; and 3) the non-selection decision.

Decision by DMRS

DMRS contends that it "made no 'personal decision' relative to the Appellant's hire as a Real Estate Agent 5 at the Department of Natural Resources that may be appealed under s. 230.44(1)(a), Stats.," which provides:

s. 230.44, Stats. Appeal Procedures. (1) Appealable actions and steps. Except as provided in par. (e), the following are actions appealable to the commission under s. 230.45(1)(a):

(a) Decision made or delegated by administrator. Appeal of a personnel decision made by the administrator or by an appointing authority under authority delegated by the administrator under s. 230.05(2).

While it is true that the decision not to select the appellant for the Real Estate Agent 5 vacancies was made by DNR rather than DMRS,¹ DMRS was a part of the certification decision to the extent that DMRS delegated its responsibility to perform the certification:

s. 230.25, Stats. Certification, appointments and registers. (1) Appointing authorities shall give written notice to the administrator of any vacancy to be filled in any position in the classified service. The administrator shall certify, under this subchapter and the rules of the administrator, from the register of eligibles appropriate for the kind and type of employment, the grade and class in which the

¹ The non-selection decision is appealable to the Commission under s. 230.44(1)(d), Stats.

position is classified, the 5 names at the head thereof if the register of eligibles is less than 50. If the register is more than 50, the top 10%, with any fraction rounded to the next whole number, up to a maximum of 10 names, shall be certified.

(lm) After certifying names under sub. (1), additional names shall be certified in rank order of those who with the combination of veterans preferences points awarded under s. 230.16(7) and examination score earn a total score equal to or higher than the lowest score of those certified on the basis of examination only. The number of veterans added to the list may not exceed the number of names certified under sub. (1).

Delegating a personnel decision, such as a certification action, does nothing to remove the decision from the scope of the Commission's review under s. 230.44(1)(a), Stats.

Timeliness

Pursuant to s. 230.44(3), Stats., appeals must be 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....

To the extent this matter is an appeal under §230.44(1)(d), Stats., of the non-selection decision, it was timely filed because it was filed just 13 days after notification of the underlying decision. To the extent it is an appeal under §230.44(1)(a), Stats., of that part of the certification process that resulted in the appointing authority receiving a random-ordered list of names as a certification, it is not disputed that appellant had no notice of this until after he had received notice of his non-appointment. Since he filed his appeal within 13 days of his non-appointment, the appeal must be considered timely. The Commission cannot perceive how appellant could somehow be charged with a duty to have inquired into the nature of the certification prior to the time (notice of his non-selection) that he knew of (via the notice of his non-selection), or apparently had any reason to suspect, an adverse employment action against him.

To the extent the appellant seeks to appeal the promulgation of MRS-20, per se, the appeal is untimely because it was filed over two years after the effective date of the policy and there is no indication that the appellant was entitled to any special notification of the promulgation of the policy. However, to the extent that the policy has an adverse affect on an employe in connection with a specific transaction, it in effect can be reviewed for compliance with the civil service code (subch. II, ch. 230, Stats.; chs. ER-Pers 1-34, Wis. Adm. Code) in that context. That is, every certification made pursuant to the policy is appealable as a separate transaction and will permit review of the underlying policy.

Standing

Respondent contends that appellant suffered no "injury in fact" at the hands of DMRS, citing Wisconsin's Environmental Decade v. PSC, 69 Wis. 2d 1, 10 (1975). While the appellant presumably had an opportunity to refer to his examination score and ranking during the course of his post-certification interview, he was never in a position to inform the interviewers how he ranked relative to each of the other candidates under consideration. To the extent that the examination scores can be shown to be an appropriate factor for consideration in a selection decision, the failure to consider the scores would cause an injury to the appellant who was among those certified. This would not be the case had the appellant not been certified as an eligible.

Authority to Order Recision

Because the respondent did not reference this contention in the briefs filed relative to the motion to dismiss, the respondent appears to have withdrawn the argument. The Commission notes that in Paul v. DHSS & DMRS, 82-PC-ER-69, 82-156-PC, 10/11/84, it held that the Commission had authority

to consider the validity of a rule. Furthermore, the policy in question was not promulgated as a rule.

Summary Judgment

In his brief, appellant stated, in part:

As an alternative, in the interest of expediency, Appellant believes there may be enough of a substantiated argument here for the Commission to make a "Summary Judgment" in favor of the Appellant, if it is within the Commission's authority to do so. If so, and the Commission concurs, Appellant so moves.

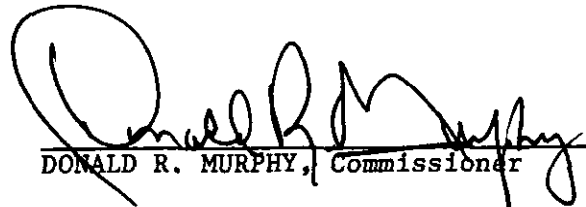
There is no basis, on this record, to grant summary judgment in favor of appellant. Summary judgment is appropriate only when there is no genuine issue to all material facts, and this cannot be said with regard to the merits of this appeal.

ORDER

Respondent's motion to dismiss is denied. Appellant's motion for summary judgment is denied.

Dated: June 29, 1988 STATE PERSONNEL COMMISSION

KMS:rcr
DPM/3


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner