STATE OF WISCONSIN PERSONNEL COMMISSION

THOMAS THORNTON,

Appellant,

v.

Secretary, DEPARTMENT OF NATURAL RESOURCES,

Respondent.

Case No. 88-0089-PC

INTERIM DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(d), Stats., of the denial of an appointment. This matter is before the Commission on respondent's motion to dismiss on the ground that the appeal was untimely filed pursuant to §230.44(3), Stats. Both parties have filed briefs and other documents.

DISCUSSION

Certain of the underlying facts relating to timeliness are undisputed, while others are disputed. It is undisputed that appellant was certified for, but not selected as, the Dodgeville Area Warden. The successful candidate was appointed on April 15, 1988, with an effective date of May 22, 1988, and appellant was notified of his nonselection by a memo from respondent dated April 14, 1988. However, the successful candidate withdrew his acceptance by memo dated May 16, 1988. Thereafter, respondent contacted the people remaining on the register, including appellant, to ascertain their interest in the position. Another candidate then was appointed by letter dated May 25, 1988, effective June 8, 1988. Respondent did not send letters to those remaining on the register, including

appellant, to advise them of this appointment. Appellant filed his appeal with the Commission on July 26, 1988.

What is disputed is when appellant may have had actual knowledge of the second appointment. Respondent has submitted an affidavit from Douglas W. Radke, District Staff Specialist in Law Enforcement for the DNR, which includes the following:

> " ... on or about May 25, 1988, in a telephone conversation between your affiant and Warden Thornton, Warden Thornton advised your affiant of his personal knowledge of the appointment of Thomas Wrasse as the Area Warden for the Dodgeville Area...."

Appellant's brief in opposition to the motion to dismiss includes the following with respect to the aforesaid telephone conversation:

> " ... The phone call was initiated for a different reason and during the conversation, Mr. Thornton asked Mr. Radke if he had heard the rumor that the Dodgeville position may have been filled. Mr. Radke responded 'no' he had not heard that. This was nothing more than a rumor and was left as such."

Given the factual dispute over when appellant had notice of the second appointment, and his own nonselection, the factual premise for the motion to dismiss is lacking. Therefore, the motion will be denied without prejudice to possible renewal in the event that the factual basis is provided by a hearing.

In the interest of saving time, the Commission notes that to the extent that appellant had information about the second appointment based only on rumor, office gossip, etc., this would not constitute effective notice under §230.44(3), Stats. Respondent cites Illinois Central R. Co. v. Blaska, 3 Wis. 2d 638, 646 (1958), where the Court cited Zdunek v. Thomas, 215 Wis. 11, 15 (1934), as follows:

> "It is a general rule of law sustained by the authority of many cases that whatever fairly puts a person on inquiry with respect to an existing fact is sufficient notice of that fact if the means of knowledge are at hand. If under such circumstances one omits to inquire, he is then chargeable with all the facts which, by proper

> inquiry, he might have ascertained. Melms v. Pabst Brewing Co. 93 Wis. 153, 165, 66 N.W. 518, 20 R.C.L. p. 346, sec. 7, and cases cited.
>
> "The matter of knowledge or means of knowledge is dealt with in the Restatement of the Law of Contracts, sec. 180, comment f:
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> "'A person has "reason to know" a fact when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.'
>
> "If a person confronted with a state of facts closes his eyes in order that he may not see that which would be visible and therefore known to him if he looked, he is chargeable with 'knowledge' of what he would have seen had he looked."

In the instant case, assuming appellant had heard a rumor about the second appointment, the Commission cannot conclude based on the apparent facts that he had some obligation under the foregoing rule to have made further inquiry to ascertain whether the rumor was true. It must be remembered that after the first appointment, respondent sent appellant written notice of his nonselection. It would appear reasonable for appellant to assume such notice would be forthcoming with regard to the second appointment.

The Commission will schedule a prehearing conference to consider further proceedings. Based on the record to date, it probably would be most appropriate to proceed with a hearing on the merits which also would provide an opportunity to take evidence on the timeliness issue. If either party has an objection to this manner of proceeding, he can raise this at the prehearing conference.

ORDER

Respondent's motion to dismiss is denied without prejudice.

Dated: January 12, 1989 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD HODDINOTT, Commissioner

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