

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 KATHLEEN SCHMIDT *
 *
 Appellant, *
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 v. *
 *
 Secretary, DEPARTMENT OF *
 OF HEALTH & SOCIAL SERVICES, *
 *
 Respondent. *
 *
 Case Nos. 88-0131-PC *
 89-0079-PC *
 *
 * * * * *

RULING ON
 MOTION TO
 DISMISS

NATURE OF THE CASE

The appellant in these cases invokes §230.44(1)(d), stats., which provides for appeal of a personnel action "after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion...." No. 88-0131-PC involves an appeal of a hiring transaction which occurred in October, 1988. Subsequent to filing this appeal, appellant sought to amend it, in part to cover certain subsequent transactions. In an order entered June 14, 1989, the Commission allowed certain of the amendments, denied others, and directed that other allegations concerning a February 1989 nonselection be filed as a new appeal (this was given No. 89-0079-PC) and consolidated with the initial appeal. On October 11, 1989, respondent filed a motion to dismiss so much of this matter as relates to the February, 1989, nonselection, and both parties have submitted briefs.

DISCUSSION

Appellant's allegations concerning the February, 1989 nonselection, which constitute the subject matter of No. 89-0079-PC, are set forth in

paragraphs sixteen, seventeen and (as relevant) nineteen of her proposed amended complaint as follows:

"16. Sometime in January or February, 1989, a third posting was made at the Winnebago Mental Health Institute for the position of Laundry Worker II. Appellant again submitted a letter of intent, and was again denied an opportunity to interview for the position. Appellant was notified on or after February 15, 1989, of said denial, the stated reason given was discretionary authority to exclude applicants who submitted letter of intent.

17. Appellant believes that Mr. Selner's refusal to interview individuals who submitted letters of intent for the third position, thereby excluding appellant from consideration for the position, was based on the motivation of retaliation for appellant's having filed a complaint with the Personnel Commission.

* * *

19. Respondent's refusal to interview appellant... [was] an abuse of discretion in violation of Wis. Stats. §230.44 in that the decision to exclude applicants who submitted letters of intent from the interview process was motivated by retaliation, and in that respondent's continued withholding of information concerning available methods of application was an abuse of discretion."

Respondent bases its motion to dismiss the foregoing claim on three contentions. Respondent's first ground is as follows:

"1 The appellant's amended complaint, so far as it involves allegations of retaliation by Respondent in its action of February 15, 1989, should be dismissed by the Commission because the Commission has no jurisdiction to hear claims of retaliation for filing an appeal under §230.44(1)(d), stats...."

To the extent respondent denied appellant an interview for the position in question because it was intent on retaliating against appellant because she had filed an earlier §230.44(1)(d), stats., appeal, this would constitute an abuse of discretion and hence would be cognizable under §230.44(1)(d), assuming the presence of the other jurisdictional elements of such a claim. The case cited by respondent, Henderson v. DHSS, Wis. Pers. Comm. No. 85-0045-PC (8/15/85), is inapposite, since it involved an appeal of a grievance under §230.45(1)(c), and not an appeal under §230.44(1)(d) of a personnel action after certification related to the hiring process in the classified service.

Respondent's second ground for its motion is:

2. The decision of the Respondent, reflected in its letter to Appellant dated February 15, 1989, only to interview off of the established register was a discretionary decision, as provided in §230.25(2), Stats., and ER-Pers. 12.02, Adm.Code. There is no basis for Personnel Commission review of that decision in this case.

"There is no provision under s. 230.44 or 230.45, Stats., which gives the Commission the authority to hear appeals of an appointing authority's decisions as to transfers...There also is no jurisdiction over the (decision of an appointing authority) to fill the position by open competition rather than by transfer of the appellant..." Witt v. DILHR & DER, 85-0015-PC, 9/26/85 at pages 3 and 5.

The Commission lacks subject matter jurisdiction over an appeal of the denial of an application for transfer. Olbrantz & Harring v. DHSS; 81-462, 468-PC, 3/4/82. See also Miller v. DHSS; 81-137-PC, 10/2/81. (A decision whether to fill a position by competition or transfer is not appealable.)


While the Commission lacks the authority to hear an appeal which involves only a decision to deny a request for transfer, this point does not resolve the kind of jurisdictional issue involved in the instant case where appellant is invoking §230.44(1)(d), stats., and arguing that respondent's decision to interview only off the established register, in effect denying appellant's transfer request, was a post-certification action related to the hiring process in the classified service and an abuse of discretion. The cases cited by respondent do not involve these kinds of circumstances where all the elements of a §230.44(1)(d) appeal were deemed present.

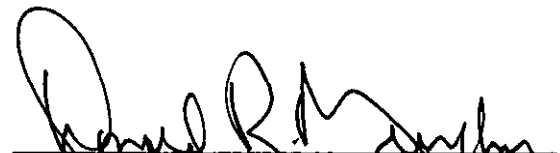
This brings us to the third ground for this motion, that the decision involved occurred before certification, and not after certification as required by §230.44(1)(d). This ground rests on a factual assertion regarding the date of certification that appellant disputes. Therefore, the motion cannot be granted on this ground and must be denied without prejudice.

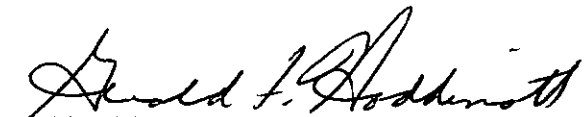
ORDER

Respondent's motion to dismiss filed October 11, 1989, is denied, without prejudice as to the third ground as discussed above. An evidentiary hearing will be scheduled if necessary to the resolution of the factual dispute with respect to the third ground.

Dated: November 15, 1989 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

AJT:gdt
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