STATE OF WISCONSIN PERSONNEL COMMISSION

LYNN L. OESTREICH,

Appellant,

v.

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

Respondents.

Case No. 89-0011-PC

DECISION AND ORDER

NATURE OF THE CASE

This appeal involves respondents' failure to have verified the handicapped status of an applicant prior to expanded certification under §230.25(1n)(a)3., Stats. Respondent DHSS (Department of Health and Social Services) has moved to dismiss the appeal as untimely filed, and both sides have filed briefs. Most of the underlying facts necessary to decide this motion do not appear to be in dispute. With respect to the factual assertion that does not appear to be undisputed, the Commission will assume the facts alleged in complaint's brief for the sole purpose of deciding this motion.

FINDINGS OF FACT

1. Following a promotional examination, a register for IRCD 2 (Institutional Residential Care Director 2) was established in November 1986. Appellant was sixth on the register.

2. This IRCD 2 register was used to fill a position at KMCI (Kettle Marine Correctional Institution) in November 1986 and another position at

WCI (Wisconsin Correctional Institution) in January 1987. The latter position was filled by an applicant with a lower score than appellant but who was certified under handicapped expanded certification pursuant to §230.25(1n)(a)3., Stats.

3. On April 13, 1987, complainant filed a complaint of discrimination (87-0038-PC-ER) on the basis (as relevant) of handicap with respect to promotion as to these two positions.

4. On December 21, 1988, the Commission issued an initial determination finding probable cause to believe respondents discriminated against complainant on the basis of handicap with respect to these promotions. This determination was based on the finding that respondents had failed to verify the appointee's handicapped status by a physician or other appropriate specialist prior to certification pursuant to §ER-Pers 12.05(2), Wis. Adm. Code.

5. On Tuesday, January 31, 1989, appellant filed a letter which the Commission has processed as the instant appeal. This letter included, in part, the following:

> The facts as shown in the states response give rise to a situation which is either a new set of facts upon which I wish to file at this time, or, change the timing of my filing from more than thirty days after knowledge to my having filed before I had the knowledge.
>
> The situation in question is the fact that WCI had no knowledge of whether Nickel was handicapped. If that knowledge is not sent out with the certification then the Employing Unit cannot comply with Policy and Procedure as set out in 232.053 (I & II) because they have no way to determine if they are interviewing all expanded certification list candidates, or, none at all.
>
> In attempting to cover any attempt by those state employees interested in promotion to discover the facts surrounding a particular appointment, the Bureau of Employment Relations has also withheld information from the employing unit which makes it impossible for them to make an informed decision in accordance with established policies and procedures.

6. Complainant asserts in a letter filed August 4, 1989, and the Commission will assume for the sole purpose of deciding this motion, as follows:

> The instant appeal was filed when the Appellant, Captain Lynn Oestreich, became aware that then Captain Thomas Nickel was not certified as handicapped. This occurred when Captain Nickel came into the Office of Mr. Oestreich with paperwork requesting that he (Nickel) be certified as handicapped. This occurred approximately three (3) months after he (Nickel) was already selected and appointed as Major. This office contact between Messrs. Oestreich and Nickel occurred sometime within the two week period proceeding [sic] the filing date of instant appeal...."

CONCLUSIONS OF LAW

1. This appeal was not timely filed in accordance with §230.44(3), stats., and must be dismissed.

DISCUSSION

In order for this appeal to have been timely filed, it must have been filed within 30 days of the effective dates of the action appealed or within 30 days after the appellant receives notice of the action, whichever is later. (§230.44(3), stats.)

Implicit in appellant's brief is the theory that his letter filed on January 31, 1989, constitutes a permissible amendment of his original complaint, which was filed on April 13, 1987, and pursuant to §PC 3.02(2), Wis. Adm. Code, relates back to the filing date of the original appeal. Assuming, arguendo, all of this to be the case, the question then is whether the April 13, 1987, filing date was within 30 days of the effective date of the action appealed or the date appellant received notice of the action.

There are two possible actions by respondent which could be considered the subject of this appeal. To the extent that this is considered an appeal pursuant to §230.44(1)(d), stats., 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" -- i.e., an appeal of respondent's failure to have promoted appellant to either of the positions in question -- the effective dates were November 1986 and January 1987, more than 30 days before the filing of the initial complaint. Furthermore, it appears to be conceded that appellant received notice of the non-promotions more than 30 days before April 13, 1987. He has not argued to the contrary in his brief, and also see the Commission's interim decision issued in Case No. 87-0038-PC-ER on June 29, 1988, at p.7.

In the context of a §230.44(1)(d), stats., appeal, appellant's contention that he learned about the non-verification of handicapped status only about two weeks before he filed his complaint cannot salvage the timeliness of the appeal. The time for appeal under §230.44(3), stats., runs from the effective date of the action or the date of notice of the action. This precludes the use of a later date where the appellant learns of something that suggests the action was improper. Bong & Seemann v. DILHR, Wis. Pers. Commn. No. 79-167-PC (11/8/79); Wickman v. DP, Wis Pers. Commn. No. 79-302-PC (3/24/80). In Sprenger v. UW-Green Bay, Wis. Pers. Commn. No. 85-0089-PC-ER (1/24/86), an age discrimination case, the Commission held that the 300 day period of limitations for discrimination cases set forth in §230.44(3) and 111.39(1), stats., would not begin to run on date of first notice of the transaction if "as of that date the facts which would support a charge of discrimination were not apparent and would not have been apparent to a similarly situated person with a reasonably prudent regard for his or her rights." (Footnote omitted.)

In Sprenger, the complainant was laid off and the employer told him at the time that his position was being eliminated. A number of months later,

complainant learned that his position had been "reinstated" and a younger person had been hired. Under these circumstances, at the time of the layoff the facts which would have supported a charge of discrimination were not apparent and would not have been apparent to a similarly situated person with a reasonably prudent regard for his or her rights.

The general rule is that when a "reasonably prudent" person is affected by an adverse employment action such as a disciplinary action, denial of reclassification, failure to promote, etc., he or she could be expected to make whatever inquiry is necessary to determine whether there is a basis for believing discrimination occurred. In Sprenger, there obviously was no way complainant could have known at the time of his layoff that his position would be filled later by a younger person. However, in most cases an employe must look into the transaction at the time it occurs. See, e.g., Welter v. DHSS, 88-0004-PC-ER (2/22/89).

Assuming, arguendo, that the same principles would apply to an appeal (versus a discrimination charge), the instant case does not involve a situation where respondent gave appellant misinformation about what occurred, or where, as in Sprenger, the underlying facts suggestive of discrimination were simply unknowable at the time the transaction occurred. Under these circumstances, appellant is charged with the obligation to make inquiry at the time he learned of his nonselection to determine whether respondent had effected the transaction in compliance with the civil service code.

To the extent that this appeal could be considered cognizable under §230.44(1)(a), stats., as an action of DMRS (Division of Merit Recruitment and Selection) making a handicapped expanded certification without first verifying the handicapped status of the applicant so certified, the same

considerations applies. Appellant either knew or should have known at the time he was turned down for promotion that there had been a certification for these appointments, and he had the obligation to have inquired at that time as to whether the certification had been properly effected.

ORDER

This appeal is dismissed for lack of jurisdiction as untimely filed.

Dated: September 8, 1989 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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