

JOAN M. MORRIS,

Appellant,

v.

Administrator, DIVISION OF  
MERIT RECRUITMENT & SELECTION,  
and Secretary, DEPARTMENT OF  
TRANSPORTATION

Respondents.

Case No. 90-0232-PC

DECISION  
AND  
ORDER

This appeal arises from the action of not certifying the appellant for consideration for a vacant position in the Department of Transportation. During a prehearing conference on September 6, 1990, the respondents raised a timeliness objection and also contended the Commission lacked subject matter jurisdiction under either §230.44(1)(a) or (d), Stats. During the course of the briefing schedule, the appellant filed an amended appeal to which the respondent Department of Transportation (DOT) also raised jurisdictional objections. For the purpose of ruling on the jurisdictional issues, the following facts appear to be undisputed.

1. The appellant is employed by DOT.
2. The appellant took a promotional examination for the Motor Vehicle Supervisor 8 classification which is included in the classified service.
3. The register for Motor Vehicle Supervisor 8 was originally established on November 29, 1989. At that time, the appellant did not indicate an interest in positions in the Milwaukee area.
4. In the afternoon of Thursday, April 12, 1990, the Department of Employment Relations received a letter from the appellant in which she asked to have her application amended to show that she was now interested in being considered for positions in Milwaukee.
5. On April 19, 1990, DOT requested a register for a Motor Vehicle Supervisor 8 position in Milwaukee. DMRS issued the register to DOT that day.

6. The appellant's name was not included on the register because her records with respect to the selection process had not been updated to show that she was interested in positions in Milwaukee. Had the records been updated, the appellant's exam rank was high enough so that her name would have been included on the register. DMRS's records were updated to reflect the appellant's interest in positions in Milwaukee on or about April 24, 1990.

7. In a letter dated May 9, 1990, DOT appointed Gary Patterman to the vacant position. The appellant learned the same day that Mr. Patterman had been appointed to the position.

8. On May 15th, the appellant spoke with Christine Smith of DOT's Personnel Office about the certification list for the position. Ms. Smith referred the appellant to DMRS.

9. On May 23rd DOT and DMRS verified for the appellant that she had requested to be considered for the position and that her ranking would have qualified her for an interview.

10. On May 24th, Doug Thompson, Deputy Director for DOT's Bureau of Field Services contacted the appellant and offered her the opportunity to interview for the position. Mr. Thompson told the appellant she would be offered the position if she ranked higher than Gary Patterman at her interview, "providing a justification could not be made to prevent [appellant's] hiring." Mr. Thompson requested the appellant's decision regarding his proposal by May 29th.

11. On May 29th, the appellant advised Mr. Thompson that she was not ready to accept an interview for the position because she still had concerns and questions to be addressed.

12. The appellant declined the proposal because she felt she would not receive a fair and impartial interview.

13. On June 26th, Mr. Thompson informed the appellant that Mr. Patterman would still have been on the certification list even if the appellant's name had been on that list.

14. Appellant filed a letter of appeal with the Commission on June 27, 1990.

15. On September 6th, Jesse Garza of DMRS informed the appellant that Mr. Patterman would not have been on the certification if the appellant's name had been on that list.

DISCUSSION

The original appeal arises from the delay in processing the appellant's request to add Milwaukee to the geographical areas of interest and the resulting absence of her name from the certification list for the Milwaukee vacancy. In her amended appeal, the appellant alleges DOT acted inappropriately in supplying the appellant with false information (i.e., that Mr. Patterman would have remained on the certification list even if the appellant's name had been added to that list) and making offers of relief beyond their jurisdiction.

Original appeal

Respondents move for dismissal on the grounds the appeal is untimely and the Commission lacks jurisdiction over the subject of the appeal. In its brief, DOT also moves to dismiss for failure to state a claim on which relief can be granted.

The time limit for filing an appeal with the Commission is established in §230.44(3), Stats.:

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. . . .

This 30 day time limit is mandatory rather than discretionary and is jurisdictional in nature. Richter v. DP, 78-261-PC, 1/30/79.

The appellant contends the 30 day period should be calculated as starting on May 29th, the date "DOT ceased to offer relief to correct their previous error:"

To argue this complaint is untimely based on dates which I provided is having the expectation that people should file complaints with the Commission prior to the time they have the information to verify a wrong doing or illegal act and discourages any attempt to negotiate an acceptable resolution. Up until May 29 I tried in good faith to negotiate an acceptable resolution with DOT, represented by Mr. Thompson. On that date I informed Mr. Thompson I found the offer of an interview and the possible removal of Mr. Patterman as unfair and unacceptable and requested other options. Mr. Thompson did not respond to my requests until after the complaint had been filed and then no other options were offered. I view their lack of response as a method to defer the possibility of a complaint being filed. May 29th is the appropriate

date to start the 30 day time limit from, on that date DOT ceased to make any further attempt to rectify their error thus eliminating me from any further consideration.

It is clear the action not to certify the appellant for the vacant position was effective on April 19, 1990, the date the certification list was sent to DOT. The appellant had notice of the fact she had not been considered for the position when she learned on May 9th that Mr. Patterman had been selected. Both of these dates are clearly more than 30 days before June 27th when the complainant filed her appeal with the Commission. The findings also indicate that on May 24th, Doug Thompson, Deputy Director for DOT's Bureau of Field Services contacted the appellant and offered her the opportunity to interview for the position. Mr. Thompson told the appellant she would be offered the position if she ranked higher than Gary Patterman at her interview, "providing a justification could not be made to prevent [appellant's] hiring." Mr. Thompson requested the appellant's decision regarding his proposal by May 29th. Mr. Thompson's proposal was rejected by the appellant on May 29th. The issue raised in the appellant's brief is whether, by entering into what she refers to as "negotiations," the filing period was tolled during the pendency of those negotiations. The appellant has not identified any precedent for her argument, nor is the Commission aware of any such precedent. The Commission has previously rejected the argument that the 30 day time limit should be tolled by the employe's pursuit of a non-contractual grievance of the same transaction. Cleveland v. DHSS, 86-0133, 0151, 0152-PC, 7/8/87. Filing a grievance and initiating negotiations are similar in that they are both internal processes to obtain review of a decision.

The facts of the present case also have some similarity with those in Adams v. DHSS, 83-0050-PC, 8/17/83. In Adams, the appellant had been informed by letter of January 10, 1984 that he was not selected for a vacant position at a facility operated by DHSS. The appellant subsequently expressed concerns about the hiring process to the secretary of DHSS and asked to be placed back into the selection process. The appellant was asked to undergo a medical exam for the positions. By letter dated February 8th, the appellant was informed that, due to the medical exam, his candidacy would not be considered further. Three days later, the appellant sent a letter to the secretary of DHSS asking her to re-examine the appellant's situation. The secretary responded

by letter dated February 28th. The letter reviewed the appellant's concerns, summarized the results of an investigation carried out by DHSS and concluded that the facility had not acted improperly. Nearly 30 days thereafter, the appellant filed an appeal of the selection decision with the Commission. The Commission held that the appeal was timely because it had been filed within 30 days of the February 28th letter which represented the final decision of the agency. The Commission noted that there had been three decisions, one reflected in the January 10th letter from a personnel assistant at the facility, another reflected in the February 8th letter from the facility's personnel director and the third reflected in the February 28th letter from the agency secretary, and among those letters, the secretary clearly had the authority to render the agency's final decision.

Using the rationale in Adams, the most that can be said of the instant appeal is that if Mr. Thompson's conduct on May 24th can be viewed as constituting a new certification decision, i.e. a decision to add the appellant's name to the list of those certified so that she could be interviewed, then the appellant's appeal of that decision, filed with the Commission on June 27th, is untimely. If, on the other hand, Mr. Thompson's May 24th statement is properly viewed as merely a negotiation proposal or a conditional offer, and not as a reversal of the prior certification decision, the time period for appealing the failure to certify the appellant commenced no later than May 9, 1990 and the June 27th appeal is also untimely.

The appellant has attempted to focus on May 29th as the appropriate date for commencing the 30 day filing period and has described May 29th as the date "DOT ceased to make any further attempt to rectify their error." However, nothing occurred on May 29th in the nature of an appealable personnel transaction or decision under §230.44(1), Stats. It was the appellant who, on May 29th, declined the proposal that she interview for the position. Respondent simply did nothing further in terms of negotiation or replacing the prior certification decision. To the extent the respondent's conduct can be interpreted as more than one certification decision, the latest decision was on May 24th, so the appellant's June 27th letter of appeal must be dismissed as untimely filed.

The facts in the present appeal may also be distinguished from those in Schein v. DHSS, 79-370-PC, 5/15/80, where after the appellant had been noti-

fied of her non-selection for a vacant position, she wrote the personnel manager on two different occasions seeking directions on how to commence an appeal. The personnel manager responded in writing that he would be willing to discuss the interview process with the appellant and informed her:

... After our discussion, if you do not feel that we have responded to your concerns and wish to proceed with the appeal the procedure is as follows ....

The Commission concluded that the personnel manager's instructions raised the possibility that the matter was still pending until a future discussion between the parties and held that the appeal, filed a few days after the discussion with the personnel manager but more than 30 days after the original non-selection letter, was timely. In Schein, the appellant had made repeated requests for information about the appeal process and the response suggested to her that she should await the discussion with the personnel manager before deciding to pursue an appeal. The facts of the present appeal do not include any comparable suggestion that the appellant hold off until after "negotiations" had been completed. Therefore, the two cases must be distinguished.

#### Amendment to Appeal

In her amended claim, the appellant made the following allegations:

DOT acted inappropriately by supplying me with false information and making offers of relief beyond their jurisdiction. I contest that their actions were possibly illegal and an abuse of discretion.

The "false information" refers to the statements that Mr. Patterman would have been on the certification list even if the appellant's name had been included on the list. The "offers of relief" is a reference to Mr. Thompson's offer discussed in the preceding paragraphs. The respondent contends that this amended claim is untimely, that the Commission lacks the authority to grant any relief and that the Commission lacks subject matter jurisdiction.

The appellant's second allegation relates to Mr. Thompson's "proposal" to the appellant on May 24th and described in finding 10. As has been noted above, in order for an appeal of Mr. Thompson's proposal/decision to have been timely, it would have to have been filed within 30 days of May 24th. The

appeal was not filed until June 27th, so this allegation in the amendment is untimely.<sup>1</sup>

Of the various sources of Commission jurisdiction, the two which are arguably related to the subject matter of the appellant's first amended claim are §230.44(1)(a) and (d), Stats:

(a) Decision made or delegated by administrator. Appeal of a personnel decision under this subchapter made by the administrator [of the Division of Merit Recruitment and Selection] or by an appointing authority under authority delegated by the administrator under s. 230.05(2).

(d) Illegal action or abuse of discretion. 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 may be appealed to the commission.

The key question is whether the conduct appealed from can be considered either as "personnel decisions" or "personnel actions"

The statements to the appellant that Mr. Patterman would have been on the certification list even if the appellant's name had been included on the list do not rise to the level of a personnel action or decision. No personnel transaction took place as a consequence of the statements. DMRS never reissued the certification list. The statements merely described the speaker's understanding of the certification list and how it would be affected if the appellant's name were included. Therefore, the Commission lacks subject matter jurisdiction over this claim.

---

<sup>1</sup>The Commission has treated the appellant's amendment as relating back to the date she filed her original letter of appeal. §PC 3.02(2), Wis. Adm. Code.

ORDER

This matter is dismissed for lack of subject matter jurisdiction.

Dated: November 16, 1990 STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson

KMS:kms

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

Parties:

Joan M. Morris  
P.O. Box 271  
Elk Mound, WI 54739

Hugh Henderson,  
Special Assistant, DMRS  
P.O. Box 7855  
Madison, WI 53707

Ronald R. Fiedler,  
Secretary, DOT  
P.O. Box 7910  
Madison, WI 53707