

ROGER B. AUGUSTIN,

Appellant,

v.

Administrator, DIVISION OF  
MERIT RECRUITMENT AND SELECTION,  
and Secretary, DEPARTMENT OF  
CORRECTIONS,

Respondents.

Case No. 90-0254-PC

INTERIM  
DECISION  
AND  
ORDER

This matter is before the Commission on a timeliness objection and a dispute as to one of the issues for hearing. The following facts appear to be undisputed.

1. On February 23, 1989, a promotional announcement was issued for the Officer 3 classification. The announcement read in part:

This is a competitive promotional examination open to any classified employe of the Department of Health and Social Services not serving on a limited term, project, emergency or provisional employment basis.

Therefore, according to the terms of the announcement, only Department of Health and Social Services [DHSS] employes were eligible to take the Officer 3 exam.

2. The appellant took the exam which was held on April 28, 1989.

3. The appellant was eligible to take the exam because he was employed as an Officer 1 at Waupun Correctional Institution.

4. On May 15, 1989, an Officer 3 register was established from the exam and the appellant's name was included in that register.

5. On October 29, 1989, the appellant transferred to a position at Lincoln Hills School.

6. On or about November 27, 1989, DHSS submitted to the Division of Merit Recruitment and Selection [DMRS] a "Request to Extend or Reactivate a Certification Register." DHSS asked to extend the Officer 3 register which had

been established on May 19, 1989 until March 19, 1990. DMRS approved the extension/reactivation of the register until April 2, 1990.

7. By letter dated May 20, 1990 from the Assistant Superintendent of the Marshall Sherrer Correctional Center in the Division of Adult Institutions, Department of Corrections, the appellant was asked to contact the Correctional Center to be interviewed for one and possibly a second Officer 3 vacancies.

8. The appellant interviewed for the positions on June 4, 1990.

9. After the interview but prior to the time the vacant positions were filled, the appellant's name was removed from the Officer 3 register. This action was explained to the appellant in a letter from Debra Schwab of DMRS as follows:

The Officer 3 register was created on May 19, 1989, as an agency-wide promotional register for the Department of Health and Social Services (DHSS). DHSS requested a certification from this register on November 28, 1989, to obtain a list of applicants to be contacted for interview for Officer 3 vacancies. It was at that time that your name was certified for interview. You originally indicated to DHSS that you were not interested in interviewing at that time.

On January 1, 1990, the Division of Corrections became the Department of Corrections (DOC). When DOC separated from DHSS, only employees of DOC remained eligible for certification for Officer 3 vacancies in DOC. Section ER Pers 6.10(1) allows for the removal of an applicant from a certification "who is found to lack any of the preliminary requirements established for the position." At the time DOC became a department, you were an employee of DHSS. Since you are not an employee of the agency holding the active certification (that is, DOC), you are no longer eligible for the DOC vacancy currently open.

If you would like to return to the Officer series, I suggest you contact the DOC personnel office regarding your eligibility for reinstatement into the Department of Corrections.

10. The appellant filed his letter of appeal with the Commission on July 6, 1990. His appeal includes the allegation that the decision by DMRS to limit the scope of competition for the Officer 3 exam that established the May, 1989 register which, in turn, was used in 1990 to fill the Officer 3 positions at the Department of Correction's Marshall Sherrer Correctional Center was improper.

## DISCUSSION

### Timeliness

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.

In its brief, the respondent argues the appellant's appeal of the decision setting the scope of competition was untimely:

[T]he decision to establish the May 1989 Officer 3 register as an agency-wide promotional was made sometime before February 23, 1989. Thus, the "effective date" of the decision to limit consideration for the Officer 3 promotional to "agency-wide" competition was made sometime before February 23, 1989. Mr. Augustin and all other potential applicants for the position were "notified of this decision" by the promotional announcement which was published on February 23, 1989. The 30 days in which to appeal the decision of scope of competition, therefore expired around the end of March 1989.

The difficulty raised by this argument is that it suggests the appellant could have appealed the scope of competition decision in February of 1989, even though that decision specifically permitted him to take the promotional exam because he was then employed by the Department of Health and Social Services. It wasn't until 1) the appellant transferred from Waupun Correctional Institution to Lincoln Hills School, 2) the Department of Corrections (DOC), which included Waupun Correctional but not Lincoln Hills School, separated from DHSS on January 1, 1990, and 3) DMRS chose to transfer the Officer 3 register so that it could be used to fill DOC vacancies rather than DHSS vacancies, that the appellant suffered any injury from the original decision setting the scope of competition. The appellant cannot be required to have had, in February of 1989, the foresight to have anticipated the events and decisions of both 1989 and 1990. Had the appellant filed, in February of 1989, an appeal of the scope of competition decision, the appeal would have been

subject to dismissal for lack of standing because the appellant was included in the group covered by the agency-wide opportunity. In the comparable case of Royston v. DVA & DMRS, 86-0222-PC, 6/24/87, the Commission held the appellant lacked standing to challenge the appointing authority's alleged failure to follow their policy regarding hiring preferences for veterans where the appellant was not a veteran and, as a consequence, had not suffered any "injury in fact."<sup>1</sup>

The result reached here is also consistent with the concept of accrual of a cause of action:

The word "accrue" in connection with the accruing of a cause of action means becoming complete so that the aggrieved party can begin and prosecute his action. This is important in determining whether an action has been prematurely commenced or whether it has been so tardily commenced as to be barred by the statute of limitations. The true test is to ascertain the time when the plaintiff could first have maintained his action to a successful result.... Generally, it may be said that a cause of action accrues at the moment of a wrong, default, or delict by the defendant and the injury of the plaintiff, although the actual damage resulting therefrom may not be discovered until some time afterward, if the injury, however slight, is complete at the time of the act. 1 Am. Jur. 2d *Actions* §88 (1962). (footnotes omitted)

Based on the facts described above, the appellant was not injured by DMRS's decision until DMRS decided to use the existing register to fill vacancies in DOC. The appellant was not notified of this injury until he received the letter from Debra Schwab of DMRS. Therefore, appellant's appeal of the scope of competition decision, which was filed within 30 days of Ms. Schwab's letter must be considered as timely.<sup>2</sup>

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<sup>1</sup>The facts of the instant appeal are distinguishable from those of Peabody & Disterhaft v. DILHR & DER, 85-0060, 0114-PC, 4/16/86, where the appellants were ruled to have standing to appeal the decision to reclassify a co-worker's position because of the effect of the reclassification on the appellants in the event of a future layoff. In that case, the reclassification was granted at a time the work unit was under a threat of staff reductions so the injury to the appellants was clearly foreseeable.

<sup>2</sup>In his brief, the appellant asks the Commission to "dismiss" DMRS's written arguments because they did not reach the appellant until October 19th. According to the schedule set forth in the conference report, respondent's brief was due on October 18, 1990. DMRS's brief was received in the Commission's office on the due date of October 18th. Because there was no express language in the conference report requiring receipt of the

Issue for hearing

During a prehearing conference held on October 1, 1990, the parties were unable to agree on a statement of issue arising from a second allegation included within the letter of appeal. The conference report set forth two alternatives which had been identified during the conference:

- a) Whether, once the Department of Corrections interviewed the appellant for the Marshall Sherrer vacancy, DOC and/or DMRS was estopped from not considering the appellant as eligible for the position.
- b) Whether, once the Department of Corrections interviewed the appellant for the Marshall Sherrer vacancy, DOC was estopped from considering the appellant as not eligible for the position.

The parties were provided an opportunity to offer written arguments. Respondent DMRS correctly notes that the Administrator has the statutory responsibility to determine eligibility for consideration for promotions in the classified service under §230.25(1), Stats. As a consequence, the Administrator should be specifically referenced in the statement of issue.

ORDER

The respondent's motion to dismiss appellant's allegation regarding the decision establishing the scope of competition for the 1989 Officer 3 promotional exam is denied.

This matter will proceed to hearing on the following issues:

1. Whether the respondent DMRS's decision reflected in the June 27, 1990, letter from Debra Schwab that the appellant was no longer eligible for the Officer 3 vacancy at the Marshall Sherrer Correctional Center was correct.
2. Whether, once the Department of Corrections interviewed the appellant for the Marshall Sherrer vacancy, DOC and/or DMRS was estopped from not considering the appellant as eligible for the position.
3. Whether the decision by DMRS limiting the scope of competition for the Office 3 promotional exam to agency-wide rather than service-wide was correct.

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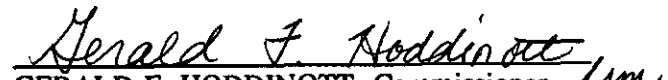
respondent's brief by the appellant by the 18th, and because service (but not filing) is considered complete on mailing, §PC1.05(2), Wis. Adm. Code, there is no reason not to consider respondent's brief.

The Commission will contact the parties for the purpose of determining the status of their attempts to reach a stipulation of facts and, as necessary, for scheduling a hearing.

Dated: November 28, 1990      STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson

KMS:kms

  
GERALD F. HODDINOTT, Commissioner *um*