STATE OF WISCONSIN PERSONNEL COMMISSION

WILLIAM R. TAYLOR, JR.,

Appellant,

v.

Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION and Secretary, DEPARTMENT OF PUBLIC INSTRUCTION,

Respondents.

Case No. 90-0279-PC

INTERIM DECISION AND ORDER

This matter, arising from the decision to find the appellant "not eligible" for the position of School Administration Consultant - Private Schools, is before the Commission on the Department of Public Instruction's petition for reconsideration of the Commission's Interim Decision issued on November 1, 1990, and on DPI's motion for summary judgment. In its November 1st interim decision, the Commission established an issue for hearing and granted appellant's motion to add DPI as a party respondent.

The issue for the hearing scheduled for December 13 and 14, 1990, reads as follows:

> Whether the examination for the position of School Administration Consultant--Private Schools was conducted in accordance with sec. 230.16(4) and (5), Stats., and s. ER-Pers 6.05, Wis. Adm. Code.

In establishing this issue and granting the appellant's motion to add DPI as a party, the Commission relied on certain undisputed facts, including the following:

> 6. DPI has no delegated authority pursuant to §230.05(2), Stats., to finally approve Exam Plan Checklists, the High Importance Job Content Questionnaire, or résumé screening criteria. These were only recommended by DPI and were finally approved by Kathy Knudson of DMRS.
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> 7. Resume screening in this case was performed by Amza Vail, DPI bureau director, who formerly supervised the position at issue here.

8. The position for which the appellant applied has been filled.

9. DMRS retained full and complete responsibility to ensure that the examination was job-related, valid and approved by the administrator of DMRS, under sec. 230.16(4), Stats.

The Commission explained its decision to add DPI as follows:

> [Section] 230.05(2)(b), Stats., provides:
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> > The administrator is prohibited from delegating any of his or her final responsibility for the monitoring and oversight of the merit recruitment and selection program under this subchapter.
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> Because the résumé screen process, including the adoption of the criteria and the application of those criteria to individual applicants, was part of the examination for the subject position and DMRS did not delegate its responsibility for the examination, DPI cannot be considered a necessary party to a review of that examination unless DPI is a necessary party to any relief which might be awarded to the appellant. The only requested relief identified by the appellant is that he be "selected for the position." DPI contends that if the appellant were to prevail as to the merits of his appeal, the Commission would have no authority to have him placed in the position because the vacancy has been filled. The Commission has previously declined to drop an agency as a party to a proceeding where the petitioner has contended he should be employed by that agency as a remedy to the action.

The Commission then went on to rely on the following language from its decision in Prill v. DETF & DHSS, 85-0001-PC-ER, 1/30/89:

> Inclusion of DHSS in the matter is supported by the decision in U S v. Pabst Brewing Co., 183 F. Supp. 220 (E.D. Wis., 1960). There, two defendants were retained as parties pending determination of the relief to be granted, even though the plaintiff conceded that they had been charged with no offense, where the plaintiff contended that they were proper parties for the purposes of relief. The court ruled that their argument that "no conceivable remedy could ... be granted against them" was premature: "[T]he question of whether any effective relief can be granted against the movants must await the determination of the substantive issues."

In its petition for reconsideration, DPI contends that the Commission incorrectly interpreted and applied the Pabst decision. Specifically, DPI argues that the principle derived from Pabst is "so broad that it could be the

grounds for retaining any party to any lawsuit" and that there is no set of facts which would support the granting of any relief against DPI.

In response to DPI's petition,[1] the appellant stated in part: "I do feel that DPI engaged in "Obstruction or Falsification of Examinations" under 230.43." The appellant, who is appearing pro se, has not indicated the basis for this allegation. However, the facts set out above indicate that an employe of DPI performed the résumé screening even though DMRS retained final responsibility for the examination process. Section 230.43(1), Stats., provides, in part:

> (a) Any person who wilfully, alone or in cooperation with one or more persons, defeats, deceives or obstructs any person in respect of the rights of examination or registration under this subchapter or any rules prescribed pursuant thereto, or
>
> (b) Who wilfully, or corruptly, falsely marks, grades, estimates or reports upon the examination or proper standing of any person examined, registered or certified, pursuant to this subchapter, or aids in so doing ....

According to §230.44(4)(c), Stats.,

> The Commission may not remove an incumbent or delay the appointment process as a remedy to a successful appeal under this section unless there is a showing of obstruction or falsification as enumerated in s.230.43(1).

The appellant has clearly alleged conduct which, if established at hearing, could result in an order requiring DPI to remove the person who is currently filling the position in question. The potential for this relief means that DPI is appropriately included as a party respondent in this appeal. Respondent DPI argues that appellant's assertion "is wholly legally conclusory and is therefore legally insufficient." Given that this is an administrative proceeding, that appellant is proceeding without counsel, and that the date of hearing is imminent, in the Commission's view the most appropriate course is

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[1]This response, dated December 1, 1990, was due December 3, 1990, but was not filed until December 6, 1990. The deadline for filing was not mandatory. In light of this, the record blizzard that occurred during this period, the fact that appellant is proceeding without counsel, and the absense of any asserted prejudice to respondent, the Commission will consider the response.

to allow appellant the opportunity to put his case in and to attempt to prove up his allegations.

Alternatively, DPI moves for summary judgment and suggests that there are no contested issues of fact. Appellant's allegation that DPI engaged in "obstruction or falsification" indicates that there are material issues of fact in dispute, making it inappropriate to rule on a motion for summary judgment. Southwick v. DHSS, 85-0151-PC, 8/6/86. Again, while appellant's conclusory allegations might not pass muster if presented by a lawyer in a judicial proceeding, this is not the situation here.

ORDER

DPI's petition for reconsideration of the Commission's November 1, 1990, interim decision and DPI's motion for summary judgment are denied.

Dated: Dec 11, 1990 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner