

DALE JELLINGS,

Appellant,

v.

Attorney General, DEPARTMENT OF JUSTICE, and Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

[DOJ + DER]

Respondents.

Case No. 90-0369-PC

DECISION  
AND  
ORDER

This matter is before the Commission on respondents' timeliness objection. Upon the conclusion of a briefing schedule, there appeared to be a dispute as to the underlying facts. The Commission, therefore, scheduled an evidentiary hearing on the issue of timeliness. One week prior to the hearing, the appellant informed the Commission that he had decided not to ask witnesses to testify on his behalf and requested the Commission to render a decision "based upon the written information submitted previously by both parties." The respondent agreed to the procedure suggested by the appellant.

FINDINGS OF FACT

1. At all times relevant to this proceeding, the appellant has been employed by the Department of Justice (DOJ) as a limited term employe in DOJ's State Prosecutor Education and Training (SPET) program.
2. In 1989, the legislature created a full-time, permanent position for SPET. DOJ initially believed that the position would be classified as a Legal Assistant 1.
3. In June of 1990, the appellant took the legal assistant examination and was placed on the eligibility register.
4. Gary Martinelli, DOJ's personnel director, decided to classify the SPET program position at the Program Assistant 2 classification prior to July 18, 1990.

5. Prior to July 18, 1990, Robert Hillner, an employe of DOJ's Legal Services Division informed the appellant of Mr. Martinelli's decision to classify the position at the Program Assistant 2 level.

6. The effective date for Mr. Martinelli's decision was July 25, 1990, the date he signed the certification request for the position.

7. The appellant took the Program Assistant 2 examination in August of 1990. The appellant's rank on the register did not qualify him to be certified for the new position.

8. On September 7, 1990, Mr. Hillner informed the appellant that his employment with DOJ would be severed.

9. Appellant filed a letter of appeal with the Commission on September 28, 1990. In the letter, the appellant alleged that the decision by Mr Martinelli to change the classification of the position to Program Assistant 2 was an abuse of discretion, appealable under §230.44(1)(d), Stats.

10. Appellant's appeal was not filed within 30 days of either the effective date or the date of notification of the classification decision made by Mr. Martinelli.

#### OPINION

The time limit for filing an appeal of a classification decision under §230.44(1)(c), Stats., 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 the present case, the sole dispute is focused on the date on which the appellant was notified of the decision to classify the SPET position at the Program Assistant 2 level.

In a dispute as to jurisdiction, the burden of proof is on the party asserting jurisdiction. Allen v. DHSS & DMRS, 87-0148-PC, 8/10/88. That party is the appellant. The Commission has found that prior to July 18, 1990, Robert Hillner, an employe of DOJ's Legal Services Division, informed the appellant of Mr. Martinelli's decision to classify the position at the Program Assistant 2

level. This finding is based on identical language in Mr. Hillner's affidavit. In his brief, the appellant states that he "differs" with Mr. Hillner's view:

During the meeting to which I believe he is referring, Mr. Hillner asked several times what I thought about the possibility of the job being reclassified. He inferred that my input and my reaction to the possibility of the reclassification might carry some weight in the eventual decision.

While the appellant's statements are sufficient to raise a question as to the exact nature of the conversation between Mr. Hillner and the appellant, the appellant has failed to prove by the preponderance or greater weight of the evidence sufficient to overcome Mr. Hillner's affidavit that he informed the appellant of Mr. Martinelli's decision to classify the position at the Program Assistant 2 level prior to July 18, 1990.

The appellant also argues:

[I]t is apparent that Mr. Hillner is unsure of the exact time or date [of the notification]. It also seems to reaffirm my contention that even if Mr. Hillner discussed this matter with me he did so in terms suggesting no definite decision had been made. This seems also to be proven true by Mr. Martinelli's affidavit giving the reclassification date as July 25, 1990, at least a week after my supposed "official" notification. Therefore, although Mr. Hillner may have been informed later of the certification signed by Mr. Martinelli, as far as what was relayed to me, I was still being fed information that suggested that the decision was still in the discussion stage. Why else would meetings involving high level Justice Department personnel be held regarding the position?

The respondent correctly notes that there is no discrepancy between the affidavits of Mr. Hillner and Mr. Martinelli. Mr. Martinelli's affidavit includes the following paragraphs:

2. He [Mr. Martinelli] decided to classify the SPET program position as a Program Assistant 2 prior to July 18, 1990.
3. The effective date of the classification of the SPET program position as a Program Assistant 2 was July 25, 1990, the date when he signed the certification request for the position.

The affidavits of Mr. Hillner and Mr. Martinelli establish that the classification decision was made and communicated to the appellant before the effective date of the decision. Therefore, the appellant has failed to sustain his burden of

establishing that his appeal of the classification decision was filed within 30 days of July 25, 1990, the later of the effective date of the classification decision and the date the appellant was notified of that decision.

Because the appellant has failed to sustain his burden of proof, the Commission issues the following


ORDER

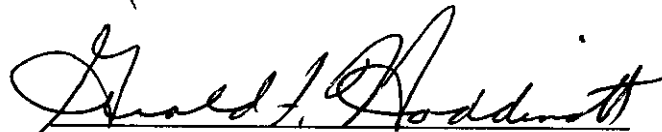
This matter is dismissed as untimely filed.

Dated: January 24, 1991 STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson

KMS:kms  
k:d:temp-2/91 Jellings

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

Parties:

Dale Jellings  
5014 Starker Avenue  
Madison, WI 53716

James Doyle  
Attorney General  
P. O. Box 7857  
Madison, WI 53707

Jon Litscher  
Secretary, DER  
P.O. Box 7855  
Madison, WI 53707