STATE OF WISCONSIN PERSONNEL COMMISSION

STEPHEN B. TUPPER,

Appellant,

v.

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

Respondents.

Case No. 91-0009-PC

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(a), stats., of a decision regarding which register to use to fill a certain position. Shortly before the hearing on the merits, respondent DMRS (Division of Merit Recruitment and Selection) filed a motion to dismiss on the ground of untimely filing. This motion was taken under advisement and a plenary hearing was conducted on both the motion and the merits of the appeal.

FINDINGS OF FACT

1. Respondent DOC (Department of Corrections), acting on a delegated basis from DMRS pursuant to §230.05(2)(a), stats., announced on April 10, 1990, a departmental competitive exam for "Social Services Supervisor 3-Assistant Regional Chief - Madison (Area 8)" (SSS 3-ARC), Joint Exhibit 2. This announcement included the following statement under "LOCATION: Division of Probation and Parole; Madison. Persons who may apply at this time will be considered for this position only."

2. Appellant has been employed in the classified civil service 22 years and has been a supervisor since 1974. During his employment with the state he has taken approximately 3 or 4 exams and has passed 2 of them. As a supervisor, he has been involved in about 30 staffings. Appellant has been aware that exam registers are not perpetual but has not been aware that they have expiration dates per se.

3. Appellant took the aforementioned SSS 3-ARC exam, passed it with a rank in the top 5, and was on the register created June 7, 1990, as a result of the exam.

4. On August 10, 1990, DOC, again acting on a delegated basis, announced a departmental promotional exam for SSS 3-ARC with the first vacancy in Eau Claire. This announcement included the following information regarding location:

> Division of Probation and Parole. The first vacancy is in Eau Claire. Persons who apply at this time will be considered for similar vacancies which may occur for the next six to twelve months. Joint Exhibit 3.

5. Appellant saw this announcement and contacted Tomas Garcia of the DOC Bureau of Personnel and Human Resources, who was handling the exams, to inquire as to which register would be used to fill the Madison position. Mr. Garcia stated that the register generated by the second exam would not be used to fill the Madison position.[1] This conversation occurred in September, 1990.

6. In reliance on the aforesaid conversation with Mr. Garcia, appellant did not take the second SSS 3-ARC exam.

7. The first register expired on December 7, 1990, as a result of the operation of §ER-Pers 11.03(1), Wis. Adm. Code: "Eligibility on a register continues for 6 months from the date the register was established."

8. Shortly after the first register expired, Mr. Garcia spoke to Robert Boetzer of DMRS about which register to use to fill the Madison vacancy. Mr. Boetzer and Mr. Garcia made the determination that it would be appropriate to use the current register; i.e., the register which had been created October 31, 1990, as a result of the August 10, 1990 announcement, Joint Exhibit 3. This decision was based substantially if not entirely on the provisions of §ER-Pers 6.04 Wis. Adm. Code:

> **Employment register exception.** An existing appropriate register for a class shall be used to fill all vacancies in the class, except that the administrator may authorize new recruitment and examination leading to the establishment of a different register for some positions in the class when substantial

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[1] Mr. Garcia testified that he had no recollection of this conversation. Appellant's testimony that this conversation occurred was credible, and therefore the Commission makes this finding based on appellant's account.

> differences in the duties of those positions and the qualifications required for successful performance distinguish them from other positions in the same class. The administrator may also establish separate registers on the basis of geographic location or when program emphasis or other recognized employment considerations could be expected to attract new applicants who may be better qualified for "placement on the new register" to be established. Separate registers for different positions in the same class may also be established under s. ER-Pers 11.02.

9. Subsequent to the discussion between Mr. Boetzer and Mr. Garcia referred to in the preceding finding, appellant heard from another source within DHSS line management that a decision had been made to use the second register to fill the position in question.

10. Appellant on December 17, 1990, called Mr. Garcia, who confirmed what appellant had heard. Appellant told Mr. Garcia he wanted to file an appeal and inquired about the procedure involved. Mr. Garcia advised him that his appeal would be to this Commission and that the 30 day time limit for appeal would begin to run on the date they were having the conversation (i.e., December 17, 1990).

11. The appellant filed his appeal January 23, 1991.

CONCLUSIONS OF LAW

1. This appeal was not timely filed pursuant to §230.44(3), stats.

2. The Commission lacks subject matter jurisdiction over this appeal.

3. If the appeal were timely and the Commission had subject matter jurisdiction over this appeal, the elements of equitable estoppel would be present and respondent would be estopped from using the second register to fill the position in question in a way that would deny appellant his right to compete for the position.

DISCUSSION

The Commission will first address the motion to dismiss.

Section 230.44(3), stats., provides:

> 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 . . . .

Because this section uses the language "may not be heard," it has been construed as mandatory in nature and running to subject matter jurisdiction, so that the Commission does not have the discretion to hear an untimely appeal.

Richter v. DP, 78-261-PC (1/30/79); State ex rel DOA v. Personnel Board, 149-295 (Dane Co. Cir. Ct. 1976).

Appellant's appeal was filed on January 23, 1991, which is more than 30 days after he received notice[2] on December 17, 1990, that respondent had decided to use the second register to fill the position in question. The only way this position could be considered timely would be if it were determined that the effective date of the matter appealed was within the 30 day period preceding January 23, 1991.

In Cozzens-Ellis v. Personnel Commission, 155 Wis. 2d 271, 455 N.W. 2d 246, (Ct. App. 1990), the Court upheld a determination that the effective date under §230.44(3), stats., with respect to an appeal of a denial of a promotion, was "the date the decision was made not to promote" rather than "the date the person who was promoted began the new job." 155 Wis. 2d at 272-273. The Court held that: [i]f a person is denied a promotion, the 'action' appealed from is the denial, not a later event stemming from it. This interpretation is consistent with the focus of the appeal on the nonpromotion of the appellant rather than the promotion of another person." 155 Wis. 2d at 274.

In the instant case, respondent made a decision sometime after December 7, 1990, when the first register expired, and before December 17, 1990, when appellant received notice of the decision from Mr. Garcia, to use the second register to fill the position in question. While it could be argued that the effective date of that decision would be the date in the future that the second register actually comes into play in the staffing process,[3] presumably when a certification is made from the register. However, under the principle enunciated in the Cozzens-Ellis case, it is appropriate to focus on the effect of the appealed matter on the appellant. The decision to use the second register was, from the standpoint of how it affected appellant, more a decision not to extend the expired register containing his name and not to use this register to fill the position, rather than a decision to use the other register in the staffing process. As the Court stated in Cozzens-Ellis: "If a person is denied a promotion, the 'action' appealed from is the denial, not a later event stemming from

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[2] The Commission is unaware of anything in the statutes or administrative rules governing the civil service that would require that notice of this particular decision be in writing; therefore, verbal notice is effective under §230.44(3), stats., see Kriedeman v. UW & DER, 85-0048-PC (10/23/85).

[3] As of the date of hearing, it appeared that no certification had been made for the position due to a hiring freeze.

it." 155 Wis. 2d at 274. Similarly, in this case appellant in effect was denied the possibility of promotion when the decision was made to use a second register to fill the position, rather than to extend the expired register he was on, as opposed to a later date when the second register will be used to fill the position. Therefore, the effective date of the action appealed was prior to December 17, 1990, and this appeal was not timely filed. Notwithstanding this conclusion, inasmuch as there was a plenary hearing, this decision is being issued as a proposed decision and order pursuant to §227.46(2), stats., and this conclusion on timeliness is subject to possible reversal, the substantive merits of the appeal will be addressed.

Clearly, the decision to utilize the second register did not involve any per se illegality under the civil service code. There has been no showing that there were present any of the exceptions set forth in §ER-Pers 6.04, Wis. Adm. Code, to the requirement for the use of an existing register. The decision whether to reactivate a register under §ER-Pers 11.03(2), Wis. Adm. Code, is discretionary. Therefore, the only possible way appellant could prevail on the merits would be if respondent were equitably estopped from utilizing the second register in accordance with the provisions of the civil service code that are consistent with that course of action, or at least from using that register in a way that would cause appellant to be denied the opportunity to be considered for appointment.

In City of Madison v. Lange, 140 Wis. 2d 1, 6-7, 408 N.W. 2d 763 (Ct. App. 1987), the Court discussed the basic principles of equitable estoppel against the government as follows:

> Equitable estoppel has three elements: "(1) Action or non-action which induces (2) reliance by another (3) to his [or her] detriment." Before estoppel may be applied to a governmental unit, it must also be shown that the government's conduct would work a serious injustice and that the public interest would not be unduly harmed. Finally, the party asserting the defense of equitable estoppel must prove it by clear and convincing evidence. (citations omitted)

The Wisconsin Supreme Court also has held that:

> [I]n order to estop the government, the government's conduct must be of such a character as to amount to fraud. But this court has noted that the word fraud used in this context is not used in its ordinary legal sense; the word fraud in this context is used to

> mean inequitable. (citations omitted) State v. City of Green Bay, 96 Wis. 2d 195, 202-203, 29 N.W. 2d 508 (1980).

Additionally, the reliance by the party asserting the estoppel must be "reasonably justified." 28 AM JUR 2d ESTOPPEL AND WAIVER, §76.

The basic elements of equitable estoppel are present in this case. Appellant relied to his detriment on Mr. Garcia's representation that the first register would be used to fill the Madison position when he did not take the second exam, and thus was denied the opportunity to compete for the Madison position. Respondent's incorrect representation about register use can be characterized as inequitable conduct. Respondents infers, however, that appellant's reliance on Mr. Garcia's representative was not reasonably justified, because as a long-time supervisor with substantial experience in staffing, he should have realized that the first register would not remain in existence indefinitely and that a new register might be used depending on when the Madison position ultimately would be filled. On the face of the situation, it does not appear unreasonable for a line manager who happens to be competing for a promotion to another position to rely on the personnel manager handling the exam for information about what register would be used to fill the position, as appellant did here. There is nothing in this record to suggest that such reliance was unreasonable. While it is true that registers do not continue indefinitely, it also is true that registers can be extended. Finally, with respect to the other factors included in the Lange case, the government conduct would work a serious injustice against appellant, who would be denied the opportunity to compete for promotion due to his reasonable reliance on respondent's inaccurate representation. There also would be no undue harm to the public interest if estoppel is applied. While it is unclear exactly what course of action would occur if estoppel were applied, presumably the end result would be that appellant would be given the opportunity to compete for the Madison position. This could be perceived as disadvantageous to other applicants who would have to face additional competition, but they would be in no worse position than they would have been if respondent had not misinformed appellant on December 17, 1990, and he had taken the second exam.

ORDER

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

Dated: April 18, 1991 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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