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GARY BROCKINGTON,

Appellant,

v.

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

Respondents.

Case No. 91-0031-PC

* * * * *

DECISION
AND
ORDER

This matter is before the Commission on a question of subject matter jurisdiction. This case involves an appeal following the denial of a third step noncontractual grievance. As stated in the grievance and attached documents, appellant (Mr. Brockington) was promoted to Civil Engineer 5 (CE 5) - Transportation Supervisor (Design) in 1975. Subsequently, he transferred twice to other CE 5 - Transportation Supervisor positions. In 1980 he transferred voluntarily to a construction position and in 1984 he was involuntarily transferred to a district bridge maintenance supervisor position. As a result of the recent survey, in July, 1990, his position was reallocated to Civil Engineer - Transportation Supervisor 3, while his two previous positions in design and construction were reallocated to the Civil Engineer - Transportation Supervisor 4 level. Following the survey reallocations, appellant was denied the right to transfer to a position that previously had been at the CE 5 - Transportation Supervisor level but which had been reallocated to the Civil Engineer - Transportation Supervisor 4 level — i.e., it was at a higher pay range than the appellant's position at the time of the transfer request.

This matter comes to the Commission as an appeal of a non-contractual grievance. Section 230.45(1)(c), stats. This section provides that the Commission shall "[s]erve as final step arbiter in the state employe grievance procedure established under s. 230.04(14)." The latter subsection provides: [t]he secretary of the Department of Employment Relations (DER)] shall establish, by rule, the scope and minimum requirements of a state employe

grievance procedure relating to conditions of employment." The Wisconsin Administrative Code rules governing the noncontractual grievance procedure provide at §ER 46.03(2):

An employe may not use this chapter to grieve:

(a) A personnel action or decision of the administrator or the secretary that is directly appealable to the personnel commission under s. 230.44, Stats.,

* * *

(j) A condition of employment which is a right of the employer as defined in s. ER 46.04.

Section ER 46.04(2)(d) includes in the definition of non-grievable management rights: "[h]iring, promotion, transferring, assigning or retaining employes." (emphasis added).

The appointing authority (here, the Secretary of DOT) has the power to make decisions regarding transfers, §230.06(1)(b), stats.; §ER 46.04(2)(d), Wis. Adm. Code, subject to the requirement that transfers must be authorized by the Administrator of DMRS (Division of Merit Recruitment and Selection), §230.29, stats.; §ER-Pers 15.02, Wis. Adm. Code. Because the power to transfer is a non-grievable management right pursuant to §ER 46.04(2), Wis. Adm. Code, the appointing authority's role in the transfer process is specifically non-grievable. To the extent appellant's grievance is construed as running to any role the Administrator, DMRS, may have played (either directly or on a delegated basis to DOT pursuant to §230.05(2)(a), stats.) in failing to approve appellant's transfer, this cannot be grieved because §ER 46.03(2)(a), Wis. Adm. Code, excludes from the grievance procedure "[a] personnel action of the administrator . . . that is directly appealable to the Personnel Commission under §230.44, stats.," and the administrator's action presumably could have been directly appealed to this Commission pursuant to §230.44(1)(a), stats. However, to the extent that this appeal could be construed as a direct appeal pursuant to §230.44(1)(a), stats., of any role the administrator may have played in this transfer transaction, it is untimely filed. It reached the Commission on March 1, 1991, and the denial must have occurred prior to January 3, 1991, which was the date the first step grievance was submitted. This is more than 30 days before the date of filing of the appeal, and therefore it is untimely

pursuant to §230.44(3), stats. Also, see Cleveland v. DHSS, No. 86-0133, 0151, 0152-PC (7/8/87) (time limit for filing appeal not tolled by employee's pursuit of noncontractual grievance of same transaction).

Even if the Commission had jurisdiction over this matter, it would appear Mr. Brockington could not prevail on the merits of his claim. A transfer is defined as "the permanent appointment of an employe to a different position assigned to a class having the same or counterpart pay rate or pay range as a class to which any of the employe's current positions is assigned." §ER-Pers 1.02(33), Wis. Adm. Code. This would preclude a transfer from a position classified as Civil Engineer - Transportation Supervisor 3 to a position classified as Civil Engineer - Transportation Supervisor 4. It arguably would have been possible to have considered Mr. Brockington for appointment to the latter position by reinstatement pursuant to §ER-Pers 1.02(29), Wis. Adm. Code:

'Reinstatement' means the act of permissive re-appointment without competition of an employe or former employe under §§230.31, 230.33 or 230.34, Stats., to a position:

(a) In the same class in which the person was pre-
viously employed. (emphasis added)

However, any possible reinstatement eligibility would have been limited to three years pursuant to §230.31(1), stats., and §ER-Pers 16.025, Wis. Adm. Code. Mr. Brockington apparently has been in his current position since his last transfer in April 1984, which is more than three years.

As a final note, it appears that a good part of the problem underlying this matter is that Mr. Brockington requested a re-review by DOT of his reallocation which occurred in August, 1990, and that re-review has not yet been completed. In the meantime, Mr. Brockington is being denied the opportunity to transfer into jobs he used to perform but which were reallocated as a result of the survey to a higher level than Mr. Brockington's current position. Obviously, this situation could be alleviated to some extent if the re-review were completed.

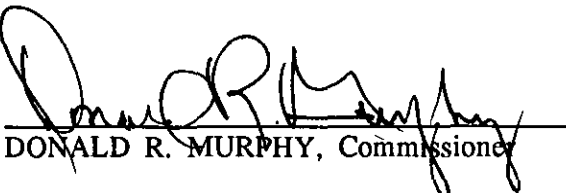
ORDER

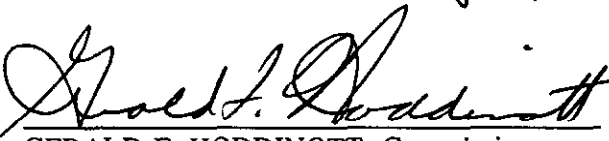
This appeal is dismissed for lack of subject matter jurisdiction and, alternatively, as untimely filed.

Dated: May 29, 1991 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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