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WILLIAM J. DEPPEN,

Appellant,

v.

Secretary, DEPARTMENT OF
INDUSTRY, LABOR AND HUMAN
RELATIONS, and Secretary,
DEPARTMENT OF EMPLOYMENT
RELATIONS,

Respondents.

Case No. 91-0083-PC

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DECISION
AND ORDER
ON MOTION TO
DISMISS

This matter is before the Commission pursuant to a Motion to Dismiss filed by respondent on November 7, 1991, contending that the Commission does not have subject matter jurisdiction over this appeal. The following Findings of Fact appear to be undisputed and are made solely for the purpose of deciding this Motion.

1. Appellant applied and was interviewed for but was not selected by respondent for an Environmental Specialist 6-Industrial Hygienist position in the Waukesha office of respondent's Safety and Buildings Division.

2. Subsequent to receiving notification that he had not been selected for this position, appellant, on or around April 29, 1991, directed a written request to respondent, pursuant to the Open Records Law, for documents relating to: "my consideration for, interview for, and basis for denial for" the position in question.

3. In a letter dated May 13, 1991, respondent responded to appellant's request as follows, in pertinent part:

Although the state open records law covers most records maintained by state agencies, examination scores and ranks "and other evaluations of applicants" are closed records under 230.13 of the Wisconsin Statutes. For this reason, we cannot provide the records that you have requested involving your consideration and the "basis of denial for" the Environmental Specialist position.

4. On June 3, 1991, appellant filed with the Commission an appeal of respondent's decision denying his open records request.

5. In a July 23, 1991, prehearing conference in relation to this appeal, respondent agreed to provide the information requested by appellant subject to a Protective Order to be issued by the Commission. This Protective Order was issued by the Commission on August 8, 1991.

6. The instant appeal does not challenge the subject selection decision but only respondent's denial of appellant's open records request relating to such selection decision.

DISCUSSION

Appellant asserts that the Commission has jurisdiction over this appeal pursuant to §230.44(1)(d), Stats., i.e., that the denial of the subject open records request was a "personnel action after certification which is related to the hiring process in the classified service." In a series of decisions [Ruck v. DNR, 86-0007-PC (12/29/86); Taddey v. DHSS, 86-0156-PC (6/11/87); Siebers v. DHSS, 87-0028-PC (9/10/87); Meschesfske v. DHSS, 88-0057-PC (7/13/88)], the Commission has held that the "hiring process" involves the appointing authority's decision as to whom to appoint to a vacancy and the determination of the employee's initial incidents of employment, e.g., starting salary.

The action of respondent appealed here does not relate either to the decision as to whom to appoint to the subject position or to the determination of the initial incidents of employment of the individual selected for and appointed to the position. Although the documents requested by appellant relate to the "hiring process" referenced in §230.44(1)(d), Stats., the action which appellant is appealing, i.e., the denial of access to these documents, does not. The Commission concludes that this appeal does not fall within the scope of the Commission's jurisdiction under §230.44(1)(d), Stats.

Section 230.44(1)(b), Stats., provides for an appeal of a "personnel decision under . . . s. 230.13 made by the [DER] secretary or by an appointing authority under authority delegated by the [DER] secretary under s 230.04(1m)." Section 230.04(1m), Stats., provides that the secretary may delegate "any of his or her functions set forth in this chapter to an appointing authority Any delegatory action taken under s. 230.13 by an appointing

authority may be appealed to the personnel commission under s. 230.44(1)(b)." Section 230.13, Stats., provides in part: "the [DER] secretary and the [DMRS] administrator may keep records of the following personnel matters closed to the public: (1) Examination scores and ranks and other evaluations of applicants." (emphasis supplied).

In order for the commission to have jurisdiction over this appeal under §230.44(1)(b), Stats., it is necessary to be able to conclude that DILHR's action in refusing appellant's records request not only was taken under §230.13, Stats., but also that it was taken under authority delegated by the secretary of DER as opposed to the administrator of DMRS, since §230.44(1)(b) only allows appeals of personnel decisions under "§230.13 made . . . by an appointing authority under authority delegated by the secretary under s. 230.04(1m)."

DILHR's action clearly was taken under §230.13, Stats., on which it explicitly relied, and which provides a basis for the particular authority exercised. DILHR had to be acting under authority delegated either by the administrator or the secretary, since §230.13, Stats., provides explicit authority only to the secretary and administrator to withhold the enumerated records. With respect to the question of which official's delegated authority was being exercised, it must be concluded in deciding this motion that it was that of the DER secretary. While §230.13 does not delineate which official is responsible for withholding which records, since the authority of the DMRS administrator runs to the examination and certification processes, and appellant's records request ran to the post certification process, this suggests the authority legally was the secretary's. In any event, if it were concluded¹ that the delegated authority exercised were the administrator's, the transaction then would be appealable under §230.44(1)(a), Stats., which provides for appeals of any personnel actions made by, or under delegated authority from, the administrator.

It appears there may have been some confusion about jurisdiction engendered by the fact that appellant styled his document demand as an open records law request. The Commission has no jurisdiction under the open records law, which provides at §19.37, Stats., for judicial remedies. Appellant in his appeal also alleges a violation of §103.13, Stats., which is another statutory provision with respect to which the Commission lacks jurisdiction. Since the Commission has jurisdiction over this matter under §230.44, Stats., it is immaterial that it lacks jurisdiction under either the open records law or

§103.13, Stats. However, it does appear that this case, as a §230.44 appeal, has been rendered largely if not completely moot by the subsequent release of the documents. Most of the other relief appellant seeks in his appeal is outside the Commission's remedial authority,¹ except that the Commission conceivably could award costs under §227.485, Stats., if appellant prevailed on the merits, if the circumstances called for an award of costs under §227.485, and if appellant had any compensable costs.² A status conference will be convened to address further proceedings.

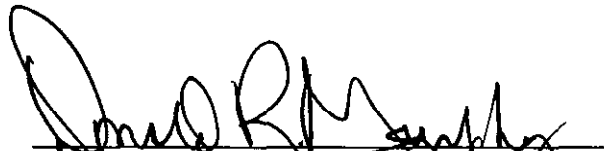
Order

The Motion to Dismiss is denied.

Dated: March 5, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

¹ For example, appellant seeks a fine of not less than \$10 nor more than \$100 for each day of failure to comply with §103.13. The Commission has no authority over appeals of failure to provide an employee access to his or her personnel records, and could not provide such a remedy.

² Appellant has appeared in this matter pro se.