STATE OF WISCONSIN PERSONNEL COMMISSION

JAMES J. GRIMES, JR.,

Appellant,

v.

Executive Director, WISCONSIN LOTTERY,

Respondent.

Case No. 91-0158-PC

DECISION AND ORDER

This matter is before the Commission on the respondent's motion to dismiss. The appeal arises from various decisions not to select the appellant for vacant positions within respondent agency. The letter of appeal was filed with the Commission on August 20, 1991, and states, in part, as follows:

> I have interviewed for the position of "ADM ASST 3 - FIELD SALES-REP," for the "Lottery." I interviewed (5) different times, for (5) different positions, in Madison, Milwaukee and Eau Claire. I noted on my application that I was willing to except [sic] employment anywhere in the state, fulltime or parttime, but I was never contacted by the Green Bay or Rhinelander districts. I had a very high test score, I had over ten years experience in route work and related fields.... So I was very disenchanted after the fifth interview, which, was held over the phone! But at the time I could not figure out, what, if anything, I was doing wrong. Now after reading the recent newspaper articles regarding the problems with the lottery, I think I understand why I wasn't selected. All of the interviews asked basically the same questions. One question in particular is the one I am referring to. They asked if you were working long hours and not being paid overtime would you (a.) be glad that you have the job and not say anything, or (b.) if you thought you had an idea to solve the problem would you mention it to your supervisor. There was also a third choice, but I don't recall it. This was oral, so I answered with the (B.) choice as follows. I stated I would be very happy to have the job, but if I thought I had a solution I would present it to my supervisor. It seems obvious to me now, that they would like you to say that you are so happy to have the job, you would work for "free." I realize there is a long time frame here, but, I couldn't see the whole "picture" until recently, when the newspaper printed the articles about the internal problems at the "lottery." Under these conditions, I feel that the "time-rule" should be over-looked.

It is undisputed that the appellant was informed by letter dated September 2, 1988, that he had not been selected by the respondent as a Lottery Field Sales Representative.

After the respondent filed its timeliness objection on September 11, 1991, the parties were provided an opportunity to submit written briefs. The appellant filed a Wisconsin State Journal newspaper article dated August 11, 1991 which bore the headline: "Lottery personnel problems persist." Within that article are allegations by Lottery sales personnel that management has "sharply restricted overtime claims" and hidden "the true length of their workdays." The article also refers to the conclusion by a U.S. Labor Department investigation that Lottery workers "had improperly been denied overtime pay." The appellant argues as follows:

> How was I to know that the Wisconsin Lottery was run by a "dictatorship," until it was exposed by present employees, thru the "news media." Now, lets use the date on this latest, Wi State Journal, article, because this is directly, related to my case. How could I have possible known at the time of the interviews that, to be hired by the "lottery," I should be prepared to wear a "muzzle" and "blinders."

The time limit for filing appeals is established by §230.44(3), Stats., which provides in part:

> 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[1] is mandatory rather than discretionary and is jurisdictional in nature. Richter v. DP, 78-261-PC, 1/30/79. 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. Here, that party is the appellant.

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[1] In its motion, the respondent incorrectly refers to the 300 day time limit which applies to allegations of discrimination filed with the Commission under the Fair Employment Act, subch. II, ch. 111, Stats. No charge of discrimination form has been filed with the Commission by Mr. Grimes. The instant appeal, if timely, would appear to fall within the scope of the Commission's authority pursuant to §230.44(1)(d), Stats. The time limit for all appeals filed under that paragraph is 30 days as set forth above.

It is undisputed that the appellant was informed of the decision not to hire him in September of 1988. The effective date of that decision was no later than the date of notification, because the subject decision was the decision not to hire the appellant rather than a decision to select someone else for the vacant position. See Cozzens-Ellis v. UW-Madison, 87-0085-PC, 9/26/88; affirmed by Dane County Circuit Court, Cozzens-Ellis v. Wis. Pers. Comm., 88 CV 5743, 4/17/89; affirmed, 155 Wis. 2d 271, 455 N.W. 2d 246, (Court of Appeals, 1990). Clearly, the appellant knew what questions were asked of him during the course of the various interviews. He ultimately concluded, some 3 years later, that one of the questions asked of him indicated an improper purpose. The Commission has previously held that the time for filing an appeal with respect to an examination process does not begin to run until the examinee receives notice of the results of the process. Schuler v. DP, 81-12-PC, 4/2/81. Applying the same theory here, the filing period did not begin to run until the appellant learned that he had not been selected for the vacancies. However, the Commission cannot accept the appellant's contention that the filing period did not commence until he read the newspaper article regarding personnel disputes within the respondent agency.

In Oestreich v. DHSS & DMRS, 89-0011-PC, 9/8/89, the Commission held that an appellant is precluded from using a date later than either the effective date or the date of notification even where it is not until after those dates that the appellant learns of something that suggests the underlying action was improper. In Oestreich the appellant had sought to overturn a selection decision which he argued was based upon an improper certification. The Commission then went on to conclude that ***even if*** the appellant in that case could utilize a standard of whether the facts which would support an appeal would have been apparent to a similarly situated person with a reasonably prudent regard for his or her rights, a standard which has been adopted for determining the timeliness of a discrimination complaint, the appellant would be charged with the obligation to make inquiry at the time he learned of his nonselection:

> Assuming, *arguendo*, that the same principles would apply to an appeal (versus a discrimination charge), the instant case does not involve a situation where respondent gave appellant misinformation about what occurred, or where... the underlying facts suggestive of discrimination were simply unknowable at the time the transaction occurred. Under these circumstances, appellant

> is charged with the obligation to make inquiry at the time he learned of his nonselection to determine whether respondent had effected the transaction in compliance with the civil service code.

Once the appellant in the instant appeal learned he had not been selected for the vacancies, he likewise had an obligation to determine whether the decisions were proper and to promptly file an appeal with the Commission if he wanted to obtain review of the decisions. The appellant took no action until nearly 3 years later, so his appeal must be considered untimely.

ORDER

This matter is dismissed as untimely filed.

Dated: October 31, 1991

STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

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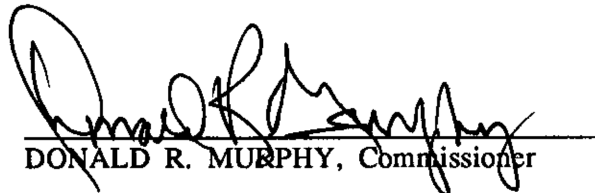

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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