STATE OF WISCONSIN PERSONNEL COMMISSION

MICHAEL CHADWICK,

Appellant,

v.

Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION, and Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondents.

Case No. 91-0177-PC

INTERIM
DECISION
AND
ORDER

This matter is before the Commission on a motion by respondent Department of Health and Social Services (DHSS) to be dismissed as a party. The parties have been provided an opportunity to file briefs.

The appeal arises from a decision to remove the appellant's name from a certification list and register of eligibles for the classification of Resident Care Technician 1. The appellant was informed by letter dated August 15, 1991, from Alan Bell of the Division of Merit recruitment and Selection, as follows:

> At the request of Gerald Dymond, Director, Wisconsin Central Center, an appointing authority of the Department of Health and Social Services, and in accordance with subsection ER-Pers 6.10 (1), Wisconsin Administrative Code, Rules of the Administrator, we are removing your name from certification and the register of eligible candidates for the classification of Resident Care Technician 1.
>
> Subsection ER-Pers 6.10 (1), Wisconsin Administrative Code, provides for the removal of an applicant from certification "who is found to lack any of the preliminary requirements for the position."
>
> According to the agency request, you did not meet the required medical or physical standards for these positions.

The letter of appeal stated in part:

> I would like to appeal the decision to remove my name from the certification and register of eligible candidates for the classification of Resident Care Technician 1 by the Department of Health and Social Services and the Department of Employment Relations.

The respondent argues that even though the request to remove the appellant's name from the certification list was made by an appointing authority of DHSS and this request "precipitated the final determination," the actual decision to remove the appellant's name was made by DMRS, rather than by DHSS on a delegated basis from DMRS.

The jurisdictional basis for this appeal is found in §230.44(1)(a), Stats.:

> (1) APPEALABLE ACTIONS AND STEPS. Except as provided in par. (e), the following are actions appealable to the commission under s. 230.45(1)(a):
>
> (a) *Decision made or delegated by administrator.* Appeal of a personnel decision under this subchapter made by the administrator or by an appointing authority under authority delegated by the administrator under s. 230.05(2).

DHSS correctly cites the Commission's decision in Pflugrad v. BVTAE & DP, 82-207-PC, 12/29/82, as holding that where there is no indication that the appointing authority was exercising a delegated function of the Division of Personnel (the predecessor agency to DMRS) in requesting the removal of the appellant's name from a certification, there is no basis on which the Commission can exercise jurisdiction to review the appointing authority's action. In Taylor v. DMRS, 90-0279-PC, 11/1/90, the Commission reached a comparable conclusion in an examination appeal. There, the appellant sought to add the Department of Public Instruction (DPI) as a party in an appeal arising from the decision to find the appellant "not eligible" for a position within DPI. The appellant had not passed the "resume screen" stage of the examination process and was therefore deemed ineligible for further consideration in that process. The Commission held:

> Because the resume screen process, including the adoption of the criteria and the application of those criteria to individual applicants, was part of the examination for the subject position and DMRS did not delegate its responsibility for the examination, DPI cannot be considered a necessary party to a review of that examination unless DPI is a necessary party to any relief which might be awarded to the appellant. The only requested relief identified by the appellant is that he be "selected for the position." DPI contends that if the appellant were to prevail as to the merits of his appeal, the Commission would have no authority to have him placed in the position because the vacancy has been filled. The Commission has previously declined to drop an agency as a party

> to a proceeding where the petitioner has contended he should be employed by that agency as a remedy to the action. In Prill v. DETF & DHSS, 85-0001-PC-ER, 1/23/89, reconsideration denied, 1/30/89, the complaint arose from a decision relating to retirement benefits. The complainant's former employing agency was retained as a party in addition to the Department of Employe Trust Funds even though the complainant had conceded that his former employing agency had not discriminated against him where the complainant contended he should be reinstated to his former position as the remedy upon a finding of discrimination .... For the same reasons, DPI will be added as a respondent in the present matter.

In the instant appeal, and for the reasons explained in Pflugrad , the Commission lacks the authority to review DHSS's decision to request removal of the appellant's name in the present case. The remaining question is whether DHSS is a necessary party for purposes of awarding relief. The letter of appeal is silent on the issue of relief and the appellant did not offer any response to DHSS's motion to dismiss it as a party. However, DMRS responded to that motion by stating, *inter alia*:

> Appellant seeks as indicated in his letter and at the prehearing: (1) the return of his name to the register; and (2) a job and/or consideration for a job.

The Commission notes that its authority to award relief in this matter is limited by the language of §230.44(4)(d), Stats:

> The commission may not remove an incumbent or delay the appointment process as a remedy to a successful appeal under this section unless there is a showing of obstruction or falsification as enumerated in s. 230.43(1).

The appellant does not appear to be alleging obstruction or falsification. However, the materials in the file do not indicate precisely when in the selection process the appellant's name was removed from the certification. If the removal was accomplished after the candidates had been interviewed and appellant rated as the top candidate on the certification, if the position in question remains vacant and if the appellant were to prevail after a hearing before the Commission, the Commission could presumably direct DHSS to appoint the appellant to the vacancy in question. Because the Commission cannot rule

out this scenario based on the record before it, DHSS's motion to dismiss it as a party must be denied at this time.

In its brief in this matter, DER suggested that the Commission's decision in Pflugrad (*supra*) is inconsistent with the decision in Taylor (*supra*) as well as with Vollmer v. UW & DER, 89-0056-PC, 4/12/90, and Lott v. DHSS & DP, 79-160-PC, 3/24/80. DER suggested the Commission "take this opportunity to reconcile those decisions for future guidance." As noted above, the Pflugrad and Taylor decisions are not inconsistent in terms of their determination as to whether the employing agency had a role in the decision which served as the basis for the Commission's assertion of jurisdiction. However, in Taylor, the Commission went on to consider whether the employing agency was an appropriate party with respect to any relief which might be awarded. The Vollmer and Lott decisions addressed the question of appropriate parties in classification appeals. In Lott, the Commission declined to dismiss DHSS as a party even though there was no dispute that the Division of Personnel[1] had not delegated its classification authority for what appears to have been the requested classification. The Commission's decision to retain DHSS as a party appears to have been premised on the following finding of fact:

> Appellant alleges participation by the Department in decisions affecting his classification which include more involvement in the reclassification process than merely making a recommendation to the Division of Personnel.

In its decision, the Commission merely stated that DHSS should remain a party "in order to give the appellant the opportunity to prove his allegations and to show the responsibility, if any, of the Department for the denial of the reclassification." The value of the Lott decision as precedent appears to be limited by both the cryptic nature of the finding of fact which serves as the underpinning to the decision and by various other decisions where the Commission has held that it may not review an employing agency's classification action where the agency lacks delegated authority with respect to the decision. Cernohous v. UW & DER, 89-0131-PC, 9/13/90; Schiffer v. DOT, 81-4, 342-PC, 2/18/82. Also, *see* Seefeldt v. DOR & DER, 87-0143-PC, 12/17/87. The other case cited by DER,

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[1] At the time of the Lott decision, the classification functions currently assigned to the Secretary of the Department of Employment Relations were assigned to the Administrator of the Division of Personnel.

Vollmer, arose from the decision by DER to establish July 31, 1988, as the effective date for the appellant's reclassification. The appellant in that case contended that the effective date should have been as early as March 13, 1980, and she alleged that UW staff acted to interfere with or delay her efforts to obtain reclassification of her position. The Commission noted that the appellant's allegations were relevant to a review of the effective date decision and declined to accept UW's contention that it lacked jurisdiction over such allegations:

> Over the years, the Commission has issued several decisions addressing the merits of appeals in which the appellants have sought to advance the effective date of a reclassification due to alleged inappropriate conduct on the part of the personnel office or supervisor. For example in Warda [v. UW-Milwaukee & DER, 87-0071-PC, 6/2/88] the Commission held that the respondent was estopped from arguing that an earlier effective date was precluded by the fact the appellant did not submit an earlier written reclass request where the appellant had repeatedly voiced her concerns about the classification of her position, she had written a letter to her department head and management gave every indication that the appellant's concerns would be addressed and never suggested a need to submit a written request.
>
> In the present case, the appellant's answers to the DER's interrogatories show that she is making very similar arguments to those considered by the Commission in Warda. The allegations are clearly relevant to the review of a decision establishing an effective date for a reclassification, a decision which falls within the scope of §230.44(1)(b), Stats.

The above explanation of the holdings in the various cases cited by DER in its brief suggest that these cases are consistent in terms of their analysis of the employing agency's role in a decision actually made by a second agency. In Lott and Vollmer, the appellants appeared to advance contentions that the employing agency was acting as an agent vis-a-vis the other named respondent and on that basis the Commission included the employing agencies as proper parties. In contrast, the decisions that were the subjects of the appeals in both Pflugrad and Taylor were made without a comparable role by the employing agency. The Commission clearly decided the Warda case, which was relied upon in Vollmer, in terms of the conduct of a personnel office or supervisor acting as an agent for DER with respect to processing a reclassification request. That agency relationship cannot be said to exist where DMRS decides to remove a candidate from a certification.

ORDER

DHSS's motion to dismiss it as a party is denied without prejudice.

Dated: October 21, 1991 STATE PERSONNEL COMMISSION

Laurie R. McCallum, III
LAURIE R. MCCALLUM, Chairperson

KMS:kms

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner