STATE OF WISCONSIN PERSONNEL COMMISSION

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Association of Career Executives (ACE), an unincorporated association, Wynn Davies and Lloyd Riddle,

Appellants,

v.

Secretaries, DEPARTMENT OF ADMINISTRATION, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DEPARTMENT OF TRANSPORTATION, DEPARTMENT OF EMPLOYMENT RELATIONS, DEPARTMENT OF CORRECTIONS, DEPARTMENT OF REVENUE, Administrators, DIVISION OF EMERGENCY GOVERNMENT, DIVISION OF MERIT RECRUTIMENT AND SELECTION, and Commissioners, OFFICE OF THE COMMISSIONER OF TRANSPORTATION, and OFFICE OF THE COMMISSIONER OF INSURANCE,

Respondents.

Case No 92-0238-PC

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RULING ON MOTION TO DISMISS

This matter is before the Commission on respondents' motion to dismiss on the grounds of mootness, standing, and failure to state a claim upon which relief can be granted, filed on October 26, 1992. The parties have filed briefs.

In their "Request for Relief" filed on July 13, 1992, appellants "ask the Personnel Commission to find that the Defendants' actions in appointing certain individuals to 'project positions' as defined by sec 230.27(1), Wis Stats., without applying merit and civil service principles and safeguards as set forth in Chap. 230, Wis. Stats., are contrary to law." Appellants go on to assert a "complaint for Declaratory Judgment" consisting of 11 counts plus an allegation of "Additional Facts" These counts allege that certain project positions were filled improperly, and, more particularly, that the use of project appointments was part of an effort "to create and maintain a patronage system in state government in Wisconsin by filling civil service positions on the basis of political affiliation rather than on the basis of merit as required by law," e.g , Para. 21 The "Additional Facts" include the allegation that some of these appointments involved DOA authorized exceptions to a hiring freeze,

and that by granting the exceptions, DOA "perpetuated" the violations involved in the appointments. Appellants further allege that respondents have caused the illegal expenditure of tax funds, and that respondents' actions have had a chilling effect on the free speech rights of ACE members. By way of relief, appellants ask that the Commission make certain conclusions as to the illegality of the transactions, order that the appointments are invalid, and order that respondents be "enjoined from further violations of Chap. 230 in the creation of project positions and in the creation of a patronage system in State employment."

The general rules for deciding motions of this nature were discussed in Phillips v DHSS, 87-0128-PC-ER (3/15/89), affirmed, Phillips v. Wisconsin Personnel Commission, 167 Wis. 2d 205, 482 N.W 2d 121 (Ct. App. 1992); as follows·

> "For the purpose of testing whether a claim has been stated... the facts pleaded must be taken as admitted. The purpose of the complaint is to give notice of the nature of the claim; and therefore, it is not necessary for the plaintiff to set out in the complaint all the facts which must eventually be proved to recover. The purpose of a motion to dismiss for failure to state a claim is the same as the purpose of the old demurrer -- to test the legal sufficiency of the claim. Because the pleadings are to be liberally construed, a claim should be dismissed only if 'it is quite clear that under no circumstances can the plaintiff recover.' The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted
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> ....A claim should not be dismissed... unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations." (citations omitted)

Additionally, since this matter is an administrative proceeding, pleading requirements are less stringent than in a judicial proceeding, and pleadings should be even more liberally construed than in a judicial proceeding. See Oakley v. Commissioner of Securities, 78-0066-PC (10/10/78); 73A CJS Public Administrative Law and Procedure §122

Turning to the first issue raised by the motion, respondents contend that appellants lack standing because they have not alleged that they actually were injured by the transactions in question In response, appellants first argue that respondents waived their right to challenge standing because "at the pre-hearing conference concerning this case, the respondents agreed not to contest the Commission's subject matter jurisdiction. Lack of standing

deprives a tribunal of subject matter jurisdiction." (citations omitted). However, to the extent that the question of standing involves an issue of subject matter jurisdiction, it cannot be waived, see e.g., Van Laanen v. Wettengel, Wis Pers Bd. 74-17 (1/2/75).

Appellants also contend that the Commission should decline to address the question of standing because it would be inconsistent with a court order entered in a related judicial proceeding pursuant to §806.04, Stats , involving some of these personnel transactions.[1] The defendants in that proceeding had moved to dismiss on four grounds which were summarized by the Court as follows:

> Defendants move to dismiss the action on four alternative grounds: (1) This court lacks subject matter jurisdiction because exclusive jurisdiction resides in the Personnel Commission; (2) Even if this court has concurrent jurisdiction, it should defer to the primary jurisdiction of the Personnel Commission; (3) In any event, the plaintiffs lack standing to bring a constitutional challenge; and (4) The plaintiffs fail to state a claim for relief against defendants Litscher, Lavigna, and Klauser Memorandum Decision dated February 11, 1992, p 2

The Court determined that it was unclear whether this Commission had subject matter jurisdiction, but that if it did have jurisdiction, the Court would defer to the Commission based on the theory of primary jurisdiction. The Court declined to reach the third and fourth grounds (lack of standing and failure to state a claim) because of its resolution of the jurisdictional objections, and ordered that:

> (1) Plaintiffs pursue relief before the Wisconsin Personnel Commission; (2) proceedings in this action are stayed pending the decision of the Wisconsin Personnel Commission regarding its jurisdiction over plaintiffs' claims; and (3) further proceedings in this court shall await the Wisconsin Personnel Commission's jurisdictional decision.

There is nothing in either the Court's decision or its order that is inconsistent with the Commission addressing the question of standing.

With respect to the substance of the standing issue, appellants assert that the appointments in question constituted an illegal expenditure of tax dollars and that "Davies and Riddle suffered an actual injury and should be granted taxpayer's standing to bring their claims," and cite §230 43(5), Stats.,

[1] ACE et al. v. Klauser et al., Dane Co Cir. Ct. No. 91CV1124

which refers to a taxpayer "action to restrain the payment of compensation to any person appointed ... in violation of this subchapter," as implicit legislative recognition that they have suffered a cognizable alleged injury. In their reply brief at p. 6, the respondents apparently concede that Davies and Riddle would have "standing to enjoin future compensation to these appointees," but point out that they have not sought such a remedy and argue that even if the complaint were to be amended the case is moot with respect to taxpayer standing. Given this apparent concession with respect to standing and the fact that appellants are seeking a declaratory ruling here after their related Circuit Court action was stayed, based in part on a primary jurisdiction approach, the Commission concludes that the appellants have standing. Pursuant to §227.41, Stats., a declaratory ruling may be issued "on petition by any interested person" (emphasis added) Appellants are "interested," if for no other reason, because of the allegation that an evasion of the civil service code has resulted in the improper expenditure of tax dollars.

Respondents argue with respect to mootness that many of the projects, positions and appointments undoubtedly have, or will have, expired, and that as to them, a Commission decision could not "have any practical effect upon a then existing controversy." Respondents' brief, p 7. Respondents contend that "the determination whether there was a violation in the past is uniquely fact-bound," id., and attempt to distinguish Milwaukee Police Assoc. v. Milwaukee, 92 Wis 2d 175, 183, 285 N.W. 2d 133 (1979), a case relied on by appellants, as follows:

> While emphasizing the rule that a case is moot when a determination is sought upon some matter which, when rendered, cannot have any practical effect upon a then existing controversy, the court on those facts found a determination that would have lasting value into the future. But this is not such a case. As stated, everyone knows they are not to violate the law. Respondents' reply brief, p. 8.

Even assuming that at the time a final decision is rendered in this case there are no existing projects, positions or appointments, it does not follow that this matter should be dismissed as moot. Appellants are seeking a declaratory ruling that respondents have engaged, in effect, in a pattern or practice of recurring activity designed to circumvent the protections of the civil service system and to create and perpetuate a political patronage system in state employment. They are not alleging simple misfeasance in failure to follow the

civl service code with respect to an isolated transaction. Even though it appears that determinations of whether the civil service code was violated with respect to individual personnel transactions will involve the development and analysis of complex specific factual situations, the larger issues involved are both significant and continuing in nature. This matter is somewhat analogous to Wis. Environmental Decade v. Public Service Comm., 79 Wis. 2d 161, 173, 255 N.W. 2d 917 (1977), where the Supreme Court declined to conclude that the case, involving a PSC natural gas curtailment priority order, had been mooted by the entry by the PSC of a superseding order. The Court noted that such orders are frequently modified due to changing circumstances, and concluded that: "the controversy in this case, which involves environmental issues of public importance, is continuing in nature, and, if the court declines to resolve it because the order was superseded, it will defy review." See also Watkins v. DILHR, 69 Wis. 2d 782, 793-796, 233 N.W. 2d 360 (1975). Therefore, the Commission concludes this matter is not moot.

Respondents contend that appellants have failed to state a claim upon which relief can be granted as to the allegation that respondents created additional unauthorized positions to increase the statutory allotment of unclassified positions

> This Commission can provide relief if there is a violation of the civil service merit principles or if the conditions for selecting project appointees to fill the positions were unmet. But exceeding an agency's authorized position allocations is not a violation of statutes administered by the Commission. Therefore, the complaint fails to state a claim upon which relief can be granted in respect to exceeding statutorily or otherwise authorized position allocations. Respondent's brief, p. 11.

In a somewhat related vein, they assert that appellants have failed to state a claim upon which relief can be granted with respect to the placement of positions in the unclassified service because this could not possibly have involved any violations with respect to the classified civil service. In their brief in opposition to the motion, appellants contend that because respondents exceeded their allotment of statutorily-authorized, unclassified positions, they avoided the requirement that these newly-created positions should have been in the classified service and should have been filled under merit system principles For example, at p 15 of their brief they argue:

> It is undisputed that Section 15.05(3), Stats., authorizes each department secretary to appoint one executive assistant outside the classified civil service to serve at the pleasure of the secretary. Hence, an additional executive assistant must be in the classified civil service. An appointment of such an additional executive assistant must be governed by the civil service principles set forth in Chapter 230.
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> The appellants have pled -- and this pleading must be assumed to be true for the purpose of the Respondent's motion -- that the Respondents violated the above civil service laws when they appointed William Jordahl to a newly-created position of Special Assistant to the Secretary of DOT.

The Commission does not agree that it must assume there have been violations of the civil service code in filling an unclassified position merely because this has been alleged In deciding a motion of this nature, "[t]he facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted." (citation omitted) Morgan v. Pennsylvania General Ins. Co., 87 Wis. 2d 723, 731, 275 N.W. 2d 660 (1979); Phillips v. DHSS, 87-0128-PC-ER (3/15/89); affirmed, Phillips v. Wisconsin Personnel Commission, 167 Wis. 2d 205, 482 N.W. 2d 121 (Ct. App. 1992). The claim that respondents violated certain civil service laws when they appointed Mr Jordahl to an unclassified position is a legal conclusion which does not have to be taken as true for the purpose of deciding this motion However, turning to the substance of appellants' argument, there is enough support for their claim to survive a motion to dismiss at the pleading stage.

Pursuant to §230.08(3)(a), Stats , the classified civil service includes "all positions not included in the unclassified service." Section 230.08(2), Stats., enumerates all positions in the unclassified service, including at §230.08(2)(fs). "executive assistants to department secretaries appointed under §15.05(3)." Section 15 05(3) provides that "[e]ach secretary may appoint an executive assistant to serve at his or her pleasure outside the classified service." Therefore, if an additional executive assistant position had been created, it apparently could not have been denominated an unclassified position consistent with §230.08, since it would have been outside the enumeration of unclassified positions. Accordingly, under these circumstances, and assuming for purposes of deciding this motion that appellants could prove everything they allege, the Commission cannot rule out the possibility of a violation of the civil service code (Subchapter II, Chapter 230, Stats., and the rules promulgated thereunder), since §230.08 is part of this

subchapter. Furthermore, the Commission cannot rule out the possibility that the placement of a project postion in the unclassified service in this manner, and in violation of §230.08, would have been part of an effort to evade the requirements of Ch. ER-Pers 34, Wis. Adm. Code, since the status of a position inside or outside of the classified service determines whether the civil service code, including Ch. ER-Pers 34, applies to the staffing of the position.

Respondents further contend that appellants fail to state a claim with respect to their allegation that respondents violated §ER-Pers. 34.03(1), Wis. Adm. Code, because they have not alleged the purported prerequisites for the application of the rule·

> This rule does not come into play unless two conditions are met. First, the project appointment must have been in excess of 18 months. Second, at the commencement of the appointment there must have been no probability that the appointment would continue past the established probable ending date, i.e , some time between 18 months and 4 years Respondents' brief, p. 13.

The Commission will not address the substance of this assertion, because it would be inappropriate in an administrative proceeding of this nature to dismiss a matter merely because a pleading does not aver the requisite elements necessary for liability under a statute or rule, see Oakley v. Commissioner of Securities, 78-66-PC (10/10/78) ("It is a general rule of administrative law that pleadings are liberally construed and are not required to meet the standards applicable to pleadings in a court proceeding." (citations omitted)). While a matter appealed to this Commission can be dismissed for failure to state a claim if "it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations," Phillips v. DHSS & DETF, this is not the situation with respect to the instant claim.

Respondents also contend that appellants have failed to state a claim against DER Section 230.27(2), Stats., provides that "[t]he administrator [of DMRS] may provide by rule for the selection and appointment of a person to a project position " Pursuant to this authority, the administrator has promulgated Chapter ER-Pers 34, Wis. Adm Code ("PROJECT APPOINTMENT"), which includes the provision at §ER-Pers 34.03, that: "[a] project position may be filled on a project appointment basis only if approved by the administrator." While DMRS is organizationally part of DER, the DMRS administrator is

appointed directly by the governor, §15.173(1), Stats., and has an independent statutory basis of authority, stated generally at §230.05, Stats. ("Powers and duties of the administrator"), and specifically as pertains to project appointments at §230.27(2), Stats. Therefore, any role by the DER secretary in these matters is not readily apparent. In their pleading, appellants allege generally that the secretary "is charged with the effective administration of Chap. 230, Wis. Stats." Para. 8. However, §230.04(3), Stats., provides:

> The secretary may issue enforceable orders on all matters relating to the administration, enforcement and effect of this chapter and the rules prescribed thereunder, <u>except</u> on matters relating to the provisions of subch. III or to those provisions of subch II for which <u>responsibility</u> is <u>specifically</u> <u>charged</u> to the <u>administrator</u>. (emphasis added)

Since §230.27(2), Stats., specifically vests rule-making authority "for the selection and appointment of a person in a project position" in the administrator, the secretary has no authority in this area. Furthermore, this statutory framework fatally undermines the somewhat more specific allegations in the complaint that, for example, the secretary (among others) "failed to comply with civil service merit principles when they selected and/or approved the selection of Ann Haney as Assistant Administrator for Public Health Services." Para. 22. The secretary simply has no authority with respect to this type of transaction, and therefore cannot be said to have "failed to comply with civil service merit principles" in this regard.

In their brief in opposition to the motion to dismiss, appellants cite §§230.09(1) ("The secretary shall ascertain and record the duties, responsibilities and authorities of, and establish grade levels and classifications for, all positions in the classified service....") and 230.04(10) ("The secretary may require all agencies and their officers to comply with the secretary's request to furnish current information pertaining to authorized positions, payroll and related items regarding civil service and employment related functions ") Appellants then point out that "the parties are in the discovery phase of this lawsuit, and the specific identities of all of the actors are not fully known." However, appellants have not suggested how any acts or omissions of the secretary under §§230 09(1) and 230 04(10), Stats., figured into any of these personnel transactions, and certainly none are apparent. Notwithstanding the liberal pleading requirements involved in administrative proceedings of

this nature, and the fact that discovery has not been completed, given the total absence of statutory authority in the secretary with respect to these personnel transactions and appellants' failure to have alleged any role whatsoever by the secretary other than failures of omission, there simply is no way it can be concluded that any potential claim has been pled against the secretary, or that he could have been involved in any potential violation of the civil service code.[2]

Respondents also argue that no claim is stated against the administrator of DMRS for "having failed to have participated in the approval process. For he had no legal duty to do so once that authority had been delegated." While appellants argue that pursuant to §230.05(2)(b), Stats., the administrator "is prohibited from delegating any of his or her final responsibility for the monitoring and oversight of the merit recruitment and selection program under this subchapter," it is unnecessary to address the issues raised by that provision. Section 230.05(2)(b) provides, _inter alia_, that: "[a]ny delegatory action taken under this subsection by any appointing authority may be appealed to the personnel commission under §230.44(1)(b). The _administrator shall be a party_ in such appeal." (emphasis added) Therefore, any claim stated against an appointing authority with respect to matters involving authority delegated by the administrator also runs to the administrator.

Finally, respondents contend that appellants fail to state a claim against the secretary of DOA, essentially because any DOA actions approving the transactions budgetarily and exempting them from a hiring freeze do not themselves implicate the provisions of the civil service code, including §230.27, Stats., which pertains to project positions and hiring. In opposition to the motion, appellants contend that DOA "appears to have played an integral role in the process of using legislatively budgeted classified position funds for payment to project employes. This conduct is clearly challenged as illegal." Appellants' brief, p. 19 However, appellants have not identified any provision of the civil service code, which marks the scope of the Commission's authority with respect to this case, which has allegedly been violated by DOA's budgetary actions with respect to the transactions in question. That is, if DOA makes an unauthorized or improper budgetary decision, that decision may constitute, for

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[2] If appellants develop appropriate evidence through discovery that suggests the secretary is a proper party, they conceivably could bring on an appropriate motion to reinstate this matter as to him.

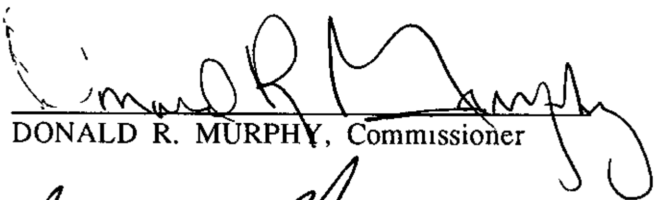
example, a violation of some provision in Chapter 20 ("Appropriations and Budget Management"). However, the Commission has no enforcement authority with respect to that area and therefore could not, consistent with §227.41(1), Stats., issue a declaratory ruling concerning an alleged violation of that chapter. The Commission's authority over this matter as an appeal (as opposed to a declaratory ruling proceeding) is limited to §230.44(1)(a), Stats., which provides for: "[a]ppeal of a personnel decision under this subchapter made by the administrator or by an appointing authority under authority delegated by the administrator under §230.05(2)." (emphasis added) This subsection provides no possible basis for the Commission to impose liability against the DOA secretary for having provided budgetary authorization for these transactions. Therefore, the Commission must grant respondents' motion to dismiss for failure to state a claim upon which relief can be granted as to the DOA secretary.[3]

ORDER

Respondents' motion to dismiss filed on October 26, 1992, is granted in part and denied in part, and so much of this matter as relates to the secretary of DER and the secretary of DOA is dismissed for failure to state a claim upon which relief can be granted.

Dated: January 12, 1993

STATE PERSONNEL COMMISSION



DONALD R. MURPHY, Commissioner

AJT:rcr

GERALD F. HODDINOTT, Commissioner

[3] Again, if appellants develop evidence that supports a cognizable claim against the DOA secretary, they presumably could bring on an appropriate motion.