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GERARD RAMSDEN,  
 Appellant,

v.

Secretary, DEPARTMENT OF  
 HEALTH AND SOCIAL SERVICES,  
 Respondent.

Case No. 92-0826-PC

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INTERIM  
 DECISION  
 AND  
 ORDER

This matter is before the Commission on the respondent's motion to dismiss for lack of subject matter jurisdiction. The parties have filed briefs.

1. At all relevant times, the appellant has been employed by respondent's Division of Economic Support, Bureau of Field Operations (BFO).
2. Prior to July of 1992, the appellant filled position #021281 which was assigned to pay range PR 01-15, classified at the Administrative Assistant 5 level and denominated the Assistant Area Administrator.
3. In July of 1992, the respondent took position #021281, assigned it a different set of duties, denominated it the Area Administrator position for BFO's Southern Regional Office at PR 01-16, and filled it with a PR 01-16 incumbent whose previous position (#008606) was being eliminated. At the same time, respondent reassigned or transferred the appellant to position #319844, a vacant child support position in BFO's Southern Regional Office at PR 01-15 and classified at the Administrative Assistant 5 level.
4. By letter from the Secretary of DHSS and the Administrator of the Division of Economic Support dated July 23, 1992, the appellant was notified as follows:

As you are aware from a previous discussion with your supervisor, your Administrative Assistant 5 position as an Assistant Area Administrator is being redeployed. Therefore you are being transferred to the Administrative Assistant 5 position in the Bureau of Field Operations, Division of Economic Support in the Department of Health and Social Services, effective July 19, 1992.

With this transfer, you will retain your current pay rate of \$19.838 per hour. You will not be required to serve a permissive probationary period.

5. On August 4, 1992, the appellant filed a non-contractual grievance relating to respondent's actions.

6. On October 13, 1992, the respondent returned the appellant's third step grievance, stating that appellant's complaints were "directly appealable" to the Commission.

7. On November 9, 1992, the appellant filed an appeal with the Personnel Commission.

#### OPINION

The respondent initially raised a timeliness objection but subsequently withdrew it. Respondent's remaining contention is that the Commission lacks subject matter jurisdiction over those personnel transactions which the appellant seeks to have reviewed.

The appellant's contentions were identified in an attachment to his first step grievance as follows:

On July 6, 1992 I was verbally informed by BFO Director, Joe Stafford that my position and its authorizing number had been taken by the appointing authority, upgraded from a range 15 to range 16, and reassigned to another person. I believe the appointing authority acted arbitrarily and capriciously and directly against the best interest of Wisconsin taxpayers by mismanaging and abusing resources and authority. My reasons are:

1. In deciding which of two identically classified positions (AAA5) DES took the most senior by many years to reassign. Recent position eliminations in BFO did designate the least senior position for elimination (Ashland, Eau Claire).

2. The reconstituted position (Area Administrator-Madison) had previously existed for many years but was eliminated due to budget cuts on 6/30/91. Yet less than a year after such cuts DES has remade this position in direct violation of legislative and DOA intent.

3. This recent action has not been contributed to equal allocation of workload throughout the Bureau of Field Operations. Number of staff, number of counties assigned, and additional duties remain unequal around the state.

4. The Area Administrator (AA) position in Madison was announced, tested for, and a register developed in 1991 which should have been used to fill any AA position in Madison. Although I finished in the top five on the test I was not given an interview or otherwise allowed to compete for a position I currently was occupying. DES chose not to use a register which existed for the position they were filling (the announcement listed vacancies in Madison and Rhinelander) This register was not used elsewhere so the list was fresh DES has authority to extend lists for up to three years but did not in this case.

5. The actual job duties in the official position description (PD) used to recreate the AA-Madison position were much the same as my current duties which I had been performing for many years. Given that the former AA position was vacant for over two years these duties were being performed by the other AAA5 and myself in an independent fashion. My duties and performance of them made me more qualified to perform the duties of the AA position than the duties and experience of the person appointed. I request copies of all three PD's to go over at the hearings.

6. Since the budget cuts in the BFO (approximately 40%), DES management has failed to adequately plan and reallocate remaining resources to concentrate on a reduced mission and adjusting of geographic areas. If DES management had taken appropriate action following these cuts the present situation would not exist as positions would have been moved or filled in keeping with the best interest of Wisconsin citizens.

7 The current action by DES management was taken to cover up a previous mistake in allowing a position to be filled on an acting basis for two years. Although here again after doing a good job in a position for two years the person was not appointed to the position permanently. So through delays within its control DES made another long term employee doing a good job an employe without an authorized position. Therefore they took my assigned position and reassigned it at a higher pay range to this person. In doing so DES piled one mistake on another and certainly did not act in the best interest of the public.

8. I have not received any written notification from the appointing authority properly informing me of the decision and the reasons for it. Subsequent to filing this complaint at step one a letter was received from Secretary Whitburn and Administrator Rogers, however the letter implied acceptance of the position which I am currently appealing through this process.

9. Grievance forms are not readily available in the field offices and this complaint process is not adequate for non-represented employees.

The appellant seeks to obtain review of the decision by the respondent to reassign his former position and to transfer him to another position.

The Commission has two possible jurisdictional bases for this matter. The first is as a non-contractual grievance. The Commission's jurisdiction over non-contractual grievances is based on §230.45(1)(c), Stats., which provides that the Commission shall: "Serve as final step arbiter in the state employe grievance procedure established under s. 230.04(14)." According to §230.04(14), Stats., the Secretary of the Department of Employment Relations "shall establish, by rule, the scope and minimum requirements of a state employe grievance procedure relating to conditions of employment."

The Secretary of DER has established the scope of the grievance procedure in §ER 46.03, Wis. Adm. Code.

(1) Under this chapter, an employe may grieve issues which affect his or her conditions of employment, including any matter on which the employe alleges that coercion or retaliation has been practiced against the employe except as provided in sub. (2).

(2) An employe may not use this chapter to grieve:

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

Section ER 46.04, Wis. Adm. Code, provides:

(1) Nothing in this chapter is intended to interfere with the sole right of the employer to carry out its statutory mandate and goals.

(2) For the purpose of this chapter, the management rights of the employer include, but are not limited to, the following:

(a) Utilizing personnel, methods and means to carry out the statutory mandate and goals of the agency

(b) Determining the size and composition of the work force.

(c) Managing and directing the employes of the agency.

(d) Hiring, promoting, transferring, assigning or retaining employes

(e) Establishing reasonable work rules.

(f) Taking disciplinary action for just cause against an employe.

(g) Laying off employes due to lack of work or funds or organizational changes.

The respondent's reassignment/transfer action falls within the scope of "management rights" as described in §ER 46.04, so the Commission has no jurisdiction over this matter under the grievance procedure.

The second general category of potential jurisdiction is as a direct appeal pursuant to the provisions of §230.44(1), Stats., which grants the Commission the authority to hear appeals from specified personnel transactions. It is clear that the above described action was attributable to the appointing authority,<sup>1</sup> so the question is whether the actions fall within either §230.44(1)(c) or (d), Stats:

(c) *Demotion, layoff, suspension or discharge.* If an employe has permanent status in class... the employe may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.

(d) *Illegal action or abuse of discretion.* A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.

Neither a reassignment nor a transfer decision fall into either of these two categories. However, in his brief, the appellant specifically alleges that the personnel transaction in question "violated Pers. rules 22 and 15" and that "[n]ormal prelayoff procedures were not followed." To the extent the appellant is able to show that the respondent's actions triggered the requirements set forth in ch. ER-Pers 22, Wis. Adm. Code, so that the respondent was required to follow layoff procedures and failed to do so, his contention would clearly fall within the scope of the Commission's jurisdiction under §230.44(1)(c), Stats. This is true even though the respondent has denominated the personnel transactions as a reassignment and transfer. In order to make the factual determination as to whether the respondent was required to have followed layoff procedures, the Commission requires a more extensive record.

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<sup>1</sup>Certain decisions by the Administrator of the Division of Merit Recruitment and Selection and the Secretary of the Department of Employment Relations are made appealable under §§230.44(1)(a) and (b), Stats.

Therefore, the Commission will contact the parties for the purpose of scheduling a prehearing conference.

ORDER

Respondent's motion to dismiss is denied without prejudice and the Commission will contact the parties for the purpose of scheduling a prehearing conference.

Dated: February 25, 1993      STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

KMS:kms  
K:D:temp-2/93 (Ramsden)

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner