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HERMAN L. GANDT,

Appellant,

v.

Secretary, DEPARTMENT OF
CORRECTIONS,

Respondent.

Case No. 93-0170-PC

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RULING
ON
MOTIONS
TO DISMISS

This matter is before the Commission on the respondent's motion to dismiss as untimely filed and respondent's motion to dismiss for failure to state a claim on which relief can be granted. The following facts appear to be undisputed.

1. At the time the Oneida State Farm was closed early in 1991, the appellant was working there as an Officer 3 and was on permissive probation.
2. Appellant subsequently began working at the Sanger Powers Center in a temporary Officer 3 vacancy which arose because another employe was on military leave. Later in 1991, when it became known that the other employe was about to return, the appellant was told he would have to vacate the position and was given the option of transferring to either the Green Bay Correctional Institution or to the Abode Correctional Center in Milwaukee.
3. The appellant opted to transfer to an Officer 3 position at Green Bay Correctional Institution (GBCI), effective June 30, 1991. In a letter dated June 19, 1991, the administrator of Sanger Powers, Gerald Berge, summarized the events which lead up to the appellant's transfer to GBCI and also stated:

It is understood that the next vacancy which occurs at the Sanger Powers Center, irrespective of the shift, will be made available to you as a transfer.

4. Subsequent events are described by the appellant in his letter of appeal as follows:

In the fall of 1992 a position almost came open at Sanger Powers Center when an Officer 3 accepted a position at Racine

Correctional Institution. A day or two later the Officer 3 changed his mind. In the meantime I received a letter from Marcy Lyons telling me of the vacancy at Sanger Powers Center. A couple of days after receiving the letter I called Marcy Lyons and she confirmed that the Officer 3 had changed his mind, and the vacancy was no longer available. Marcy Lyons said, "to disregard the letter, that everything would revert back and I would be offered the next position available."

Approximately the end of June 1993 an Officer 3 job was posted for Sanger Powers Correctional Center. Sgt. Henry McNally was retiring the end of July. I was not offered the position and contacted Marcy Lyons, I asked her why I was not offered Sgt. McNally's job as the Work Release Coordinator. Marcy Lyons stated that the position available would not necessarily be the same the Sgt. McNally had. I again asked why I was not offered Sgt. McNally's job. Marcy Lyons stated the first vacancy does not mean the first job open. What she meant by that, I do not know.

Marcy Lyons also stated that another Officer at Sanger Powers Center had put in a request for a reassignment to a different shift and that Sgt. McNally's job had to be posted at Sanger Powers Center first. After talking to Marcy Lyons I decided to call Mike Fraham. It was apparent by the time I reached Mr. Fraham that Marcy Lyons had already spoke to him. Mike Fraham stated that Marcy Lyons told him that I had already turned down a job and she did not have to offer me another one. This is not true, how could I turn down a job that was never available. I called Marcy Lyons back and she stated to me that she had it written down that I refused the job that was offered to me, when the Officer 3 was going to transfer to Racine Correctional Institution but then changed his mind, however she could not find the paper she had written it on. I informed her that I never turned that job down, that is why she can not find the paper.

On August 11, 1993 Mr. Bertrand the Superintendent from Sanger Powers Center offered me a third shift job at Sanger Powers Center. On August 13, 1993 I informed Mr. Bertrand that I would not accept the third shift job. Sgt. McNally had a 7:30AM to 4:30PM job Monday thru Friday. That is the job I should have been offered.

Also on August 11, 1993, Mr. Bertrand informed the appellant that the position formerly filled by Sgt. McNally was going to be given to Sgt. Van Ven Roy and that the appellant was being offered the position being vacated by Sgt. Van Ven Roy.

5. Appellant filed his letter of appeal with the Commission on September 8, 1993.

The appellant appears to be contending both that he should not have been required to transfer from Sanger Powers Center in June of 1991, and that the action of offering him the 3rd shift rather than the 1st shift position in August of 1993 was also improper.

The time limit for filing an appeal with the Commission is established in §230.44(3), Stats.:

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 is mandatory rather than discretionary and is jurisdictional in nature. Richter v. DP, 78-261-PC, 1/30/79. To the extent the appellant is attempting to have the Commission review the action in 1991 requiring him to transfer out of Sanger Powers, that claim is untimely.

It is not clear when the appellant was first notified that he would not be placed in the vacancy created by the departure of Sgt. McNally. However, given the other jurisdictional issues raised by the appellant's claim regarding the 1993 transfer action, it is not necessary to explore further the issue of the timeliness of that claim.

The Commission's jurisdiction over appeals of personnel actions is founded on the language of §230.44(1), Stats. Pursuant to §230.44(1)(d), Stats.:

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.

The Commission's jurisdiction may be affected by §111.93(3), which provides, in pertinent part:

[I]f a collective bargaining agreement exists between the employer and a labor organization representing employees in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes... related to wages, fringe benefits, hours and conditions of employment whether or not the matters contained in those statutes, rules and policies are set forth in the collective bargaining agreement.

In Taddey v. DHSS, 86-0156-PC, 6/11/87, the Commission interpreted the phrase "wages, fringe benefits, hours and conditions of employment" to refer to those subjects which were actually the subject of bargaining, as reflected in the bargaining agreement:

Clearly, §111.93(3) manifests a legislative intent to give effect to the collective bargaining process by having the *terms of the agreement* supersede the corresponding statutes. Since the legislature in SELRA has authorized bargaining on both mandatory and permissive subjects, both these subjects may be reflected in agreements. (emphasis in original)

The Commission takes official notice of the bargaining agreement between the Security and Public Safety bargaining unit and the State. That agreement shows that the Officer 3 classification is included within the bargaining unit and includes specific provisions relating to both transfers within employing units and transfers between employing units.¹ Because the agreement specifically deals with the issue of transfers, both within and between employing units, the provisions of the agreement supersede the statutes pursuant to §111.93(3), Stats. Any authority over this matter by the Commission is usurped by the provisions of the bargaining agreement.

Given that there is no possibility of liability on the part of respondent under §230.44, Stats., respondent's motion to dismiss the second aspect of the appeal for failure to state a claim must be granted.


¹The agreement also lists employing units approved by the Administrator of the Division of Merit Recruitment and Selection. Green Bay Correctional Institution has a separate employing unit number, but the "notes and interpretations" in the agreement indicate it is to be treated as part of respondent's Division of Adult Institutions employing unit for transfer purposes. The agreement lists Sanger Powers Correctional Center as part of the separate Wisconsin Correctional Center System employing unit.

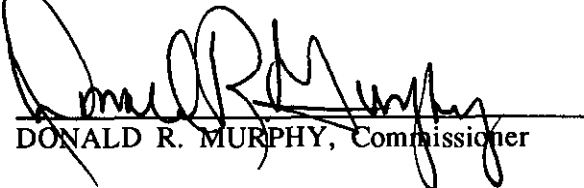
ORDER

This matter is dismissed for lack of jurisdiction.

Dated: January 11, 1994

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner

KMS:kms

Parties:

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing.

Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)