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EDWARD W. LENTZ,

Appellant,

v.

UNIVERSITY OF WISCONSIN -
SYSTEM and DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondents.

Case No. 93-0217-PC

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RULING ON
RESPONDENTS'
MOTION TO DISMISS
FOR LACK OF SUBJECT
MATTER JURISDICTION

Respondents raised a jurisdictional issue at the prehearing conference held on May 26, 1994. Each party was provided an opportunity to file written arguments. The final written argument was received by the Commission on July 28, 1994.

The "Findings of Fact" section of this decision is taken from undisputed information provided by the parties .

FINDINGS OF FACT

1. On October 26, 1993, Mrs. Betty Powers, Mr. Lentz's supervisor, sent him a letter which stated as follows:

I was informed on Friday at around 4:00 pm of NA III [Nursing Assistant 3] classes starting Tuesday October 26 at 8:00 a.m. With such short notice it was not possible for me to make a determination of appropriateness of your attendance at these classes.

2. On November 15, 1993, the Commission received Mr. Lentz's appeal letter dated November 10, 1993. The appeal contested Mrs. Powers' denial of his attendance at the NA III training session which began on October 26, 1993.

3. Successful completion of the NA III training is a required prerequisite for interview eligibility for promotional NA III opportunities.

3. Respondent, by memo dated July 15, 1994, notified Mr. Lentz that he has been scheduled to take the NA III training course, starting August 25, 1994.

DISCUSSION

Brief Statement of the Parties' Arguments

Respondents' motion to dismiss is based upon two arguments. First, respondents contend the Commission lacks jurisdiction over an appeal which contests denial of training. Second, respondents contend the appeal is moot now that the training opportunity has been provided.

Mr. Lentz contends the Commission has jurisdiction over his appeal pursuant to s. 230.15 and 230.44(1)(d), Stats.; as well as pursuant to the W.S.E.U. contract, article X 10/0/1. He did not provide further explanation for his contentions. He did not provide a copy of the referenced article of the union contract. Respondents disagree with all arguments raised by Mr. Lentz.

The Commission Lacks Jurisdiction Under Ch. 230, Stats.

The Commission's jurisdiction is conferred by statute. Jurisdictional authority is described in s. 230.44(1), Stats., which states, in pertinent part, as shown below. The emphasis noted below appears in the original.

(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).

(b) *Decision made or delegated by secretary.* Appeal of a personnel decision under s. 230.09(2)(a) or (d) or 230.13(1) made by the secretary or by an appointing authority under authority delegated by the secretary under s. 230.04(1m).

(c) *Demotion, Layoff, suspension or discharge. . . .*

(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.

(e) *Discretionary performance awards. . . .*

(f) *Corrections employe rights. . . .*

Mr. Lentz does not claim that paragraphs a, b, c, e or f apply to his case. Nor does the Commission find them applicable.

Mr. Lentz claims that paragraph (d) of s. 230.44(1), Stats., applies to his case. Paragraph (d) provides Commission jurisdiction over personnel actions related to the hiring process taken "after certification". An argument could be made that the training denial was a personnel action related to the hiring process because successful completion of the training was required before he could interview for NA III positions. Such an argument would be insufficient to confer Commission jurisdiction because Mr. Lentz failed to show that such denial occurred "after certification".¹

The Commission Lacks Jurisdiction Under Mr. Lentz's Union Contract

Mr. Lentz did not provide the Commission with a copy of the union contract provision referenced in his arguments. The Commission, however, believes he is relying on the following provision²:

The Personnel Commission may at its discretion appoint an impartial hearing officer to hear appeals from actions taken by the Employer under Section 111.91(2)(b) 1 and 2 Wis. Stats. . . .
(Omitted contract's restatement of those statutory sections.)

The statutory sections cited in the union contract are part of the State Employment Labor Relations statute, Subchapter V of Ch. 111, Stats. The current text of s. 111.91(2)(b) 1 & 2, Stats., is shown on the following page.

¹ The certification process normally begins when a vacancy exists and the hiring authority requests from DER a certification list of candidates eligible for interview. There is no indication that a NA III vacancy even existed when Mr. Lentz's training request was denied.

² The union contract provision quoted in this decision is Article X, section 10/0/1 which was taken from the WSEU contract covering the period from November 3, 1991 to June 30, 1993. The contested action in Mr. Lentz's case occurred after the contract expired. The Commission does not have a copy of the more current contract, but believes the provision cited by Mr. Lentz remained essentially the same.

(2) The employer is prohibited from bargaining on:

* * *

(b) Policies, practices and procedures of the civil service merit system relating to:

1. Original appointments and promotions specifically including recruitment, examinations, certification, policies with respect to probationary periods and appointments, but not including transfers between positions allocated to classifications that are assigned to the same pay range or an identical pay range in a different pay schedule, within the same collective bargaining unit or another collective bargaining unit represented by the same labor organization.

2. The job evaluation system specifically including position classification and reclassification, position qualification standards, establishment and abolition of classifications, and allocation and reallocation of positions to classifications; and the determination of an incumbent's status, other than pay status, resulting from position reallocations.

Mr. Lentz's appeal does not fall within the language of the statutory provisions cited in the union contract. He is not contesting the promotional policy which requires successful completion of NA III training prior to interview eligibility for promotional opportunities. Rather, he is contesting the denial of his request for the NA III training session which began on October 26, 1993.

Even if the denied training session could be found to fit within the language of the statutory sections cited in the union contract, the result in Mr. Lentz's case would be the same. See, Board of Regents v. Wisconsin Personnel Commission, 103 Wis. 2d 545, 309 N.W. 2d 366 (Ct. App. 1981). The decision rationale of the court of appeals was re-analyzed, found to have continuing applicability, and was, therefore, followed in a recent Commission decision. Wilson v. DOC, 94-0065-PC (7/8/94).

Moot Issue Is Not Reached In This Decision

Respondents' alternative argument for dismissal was based upon the UW System's notice to Mr. Lentz that he could attend the NA III training session which started on August 25, 1994. Mr. Lentz has not confirmed that he received such notice or that he attended training as suggested in the notice.

The Commission declines to address this alternative argument because the case is fully disposed of under the jurisdictional issue already discussed.

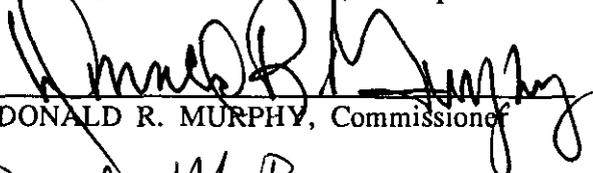
ORDER

The respondents' motion to dismiss based upon the lack of subject matter jurisdiction is granted and this appeal is dismissed.

Dated September 9, 1994.


LAURIE R. McCALLUM, Chairperson

JMR:jmr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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.)