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SANDRA DURAN,

Appellant,

v.

Secretary, DEPARTMENT OF
CORRECTIONS,

Respondent.

Case No. 94-0035-PC

* * * * *

RULING
ON
MOTION
TO DISMISS

This matter is before the Commission on respondent's motion to dismiss for lack of jurisdiction. The parties filed briefs and the following findings appear to be undisputed.

FINDINGS OF FACT

1. The appellant has been an employee of the State since 1984.
2. She was promoted, effective November 15, 1992, to the position of Program Assistant Supervisor 1 with the respondent's Division of Probation and Parole. Appellant was placed on one year probation, due to the acquisition of supervisory responsibilities.
3. The Division of Probation and Parole has the authority to waive a portion or all of the second six months of a supervisory probation period.
4. In August of 1993, the appellant accepted a promotion to a Program Assistant Supervisor 2 position.
5. Appellant requested that the remaining 2 1/2 months of her probation as a Program Assistant Supervisor 1 be waived so that she could receive a three-step pay increase associated with the promotion. Appellant's supervisor supported the request.
6. The appellant was told verbally that her request had been denied but never received written notification.
7. On September 3, 1993, appellant wrote Jo Winston, respondent's Affirmative Action Officer, to appeal the apparent denial of the waiver.

8. The appellant's appointment to her new Program Assistant Supervisor 2 position was effective September 5, 1993.

9. By letter dated November 29, 1993, Ms. Winston wrote the appellant:

The Department of Corrections, Affirmative Action Office has forwarded your Probationary Request for Waiver to Eural Jordan, Administrator, Department of Probation and Parole. As agreed to by you on November 15, 1993, this action constitutes the culmination and dismissal of your complaint alleging Unfair Treatment from Supervisor/Management.

DISCUSSION

Appellant's allegations are described in her brief (page 2) as follows:

Ms. Duran's Amended Appeal alleges that a series of actions by DOC constitute an abuse of discretion, including: 1) the appointing authority's failure to provide her with a nine month evaluation as part of her probation; 2) the failure to waive a portion of her permissive probation when her performance met all criteria for such a waiver; 3) refusal to give her accurate probationary evaluations because of arbitrary and capricious actions by Jan Shorts and individuals in the Regional Office; and 4) failure to provide an exit interview when the Appellant voluntarily transferred to another Division to escape the harassment and arbitrary treatment she was receiving.

In addition, Ms. Duran alleges harassment and retaliation, and retaliation by a particular supervisor, and retaliation by members of the Regional Office because of Ms. Duran's criticism of certain Division procedures, and her contacts with the Madison office of DOC's Division of Personnel and Human Resources concerning the extremely arbitrary work situation she had been placed in.

The second of the two paragraphs set forth above relate to the appellant's companion complaint under the whistleblower law, Case No. 94-0005-PC-ER. That matter is not subject to the respondent's jurisdictional objection.

Section 230.44(1)(d), Stats., provides for appeals of:

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....

The key requirement in the above provision is that the personnel action must be "related to the hiring process." In Board of Regents v. Wis. Personnel Comm., 103 Wis.2d 545, 309 N.W.2d 366 (Ct. App., 1981), one of the issues considered by the court was whether the Commission had authority under §230.44(1)(d) over an appeal of a probationary termination. The court offered the following analysis:

The hiring process cannot be reasonably construed to embrace the acquisition of permanent status in class.... We believe it unreasonable to conclude that an employe has not been hired until he has successfully completed a... probationary period.

That the hiring has been completed as to a probationer who attains that status is shown by the employe rights accorded to the probationer.... 103 Wis.2d 545, 559

In subsequent cases, the Commission has held that it lacks jurisdiction over the decisions denying a pay increase upon the successful completion of probation (Ruck v. DNR, 86-0007-PC, 12/29/86), adding duties (Metzig v. DHSS, 90-0383-PC, 1/24/91), and denying a medical insurance application (Cleasby v. DOT, 82-227-PC, 12/29/82). The Commission has held that it does have jurisdiction under this paragraph over a decision by an appointing authority establishing an employe's starting rate of pay upon appointment. In Coulter v. DOC, 90-0355-PC, 1/24/91, the Commission explained why this authority should be extended to include an employe's allegation that his starting rate of pay upon appointment should have included add-on pay for certain college course credits he had earned:

Respondent's argument that, since appellant claims jurisdiction pursuant to §230.44(1)(d), Stats, his failure to file his appeal within 30 days of the appointment decision renders his appeal untimely, is not persuasive. Not all decisions "related to the hiring process" are rendered prior to or contemporaneous with the appointment decision and the failure of the appointing authority to render related decisions at that time should not operate to deprive an employee of his or her right of appeal. In the instant case, respondent failed to render a decision on appellant's add-on pay prior to or at the time of appellant's appointment to the subject position despite appellant having raised the issue with respondent at that time. To permit respondent to avoid review of this add-on pay decision by simply delaying this decision until after 30 days had passed from the date of appellant's appointment would frustrate the goals of the civil service system and would lead to an inequitable and absurd result.

None of the decisions which are the subject of the instant appeal were made, or could have been made, at the time of the appellant's appointment to the Program Assistant Supervisor 1 position. The appellant's appeal relates to decisions that were not only made subsequent to the hiring decision, they are also unrelated to the hiring decision. The appellant was placed upon a 12 month probationary period when initially hired. Nearly ten months into that period, appellant requested a waiver of the remaining 2 months. The resulting decision was a new decision, i.e. a decision not to waive the final months of the probationary period. Similarly, the allegations relating to the accuracy of probationary evaluations and the decision not to provide an exit interview involve new decisions made during the probationary period. They cannot be said to relate to the "hiring process" which in Ruck, supra, was described as involving "the appointing authority's decision as to whom to appoint to a vacancy, and, at least arguably, the determination of the employee's initial incidents of employment -- e.g., starting salary, whether to require a permissive probationary period, etc."

Appellant also suggests that the Commission has jurisdiction over this matter pursuant to §230.44(1)(a), Stats., because the administrative rules governing the actions were issued by the Administrator of the Division of Merit Recruitment and Selection. Section 230.44(1)(a), Stats., provides for the appeal of a personnel decision "[m]ade by the administrator or by an appointing authority under authority delegated by the administrator under s. 230.05(2)." The appellant has made no showing that any of the decisions she seeks to appeal were made by the Administrator or that respondent's authority to make the decisions was delegated by the Administrator. The decision not to waive the final months of appellant's probationary period was a decision by the Department of Corrections and did not reach the stage of seeking approval from the Administrator.¹ Appellant also contends that the provisions of ch. ER

¹Pursuant to §ER-Pers 13.02(5), Wis. Adm. Code:

In the case of initial original or promotional appointments to positions designated as supervisory or managerial as defined under s. 111.81, Stats., all probationary periods shall be for one year duration unless the last 6 months or a portion thereof is waived by the administrator at the request of the appointing authority.

45, Wis. Adm. Code, relating to employe performance evaluations during the probationary period, were not met. The specific rule² cited by the appellant is a rule of the Secretary of the Department of Employment Relations, rather than the Administrator, and again there was no decision by the Administrator involved.

The Commission does not address the second basis for respondent's motion, the contention that this appeal was untimely filed.

²Section ER 45.05, Wis. Adm. Code, provides:


The requirements set forth in this chapter shall also apply to evaluate the performance of any employe serving a probationary period as defined in ch. ER-Pers 13, except that:

- (1) An employe serving the first 6 months of a probationary period normally shall receive at least 2 formal performance evaluation reviews prior to the end of the probationary period.
- (2) An employe serving a probationary period of longer than 6 months normally shall receive at least 2 formal performance evaluation reviews for each additional 6 month period or fraction thereof.
- (3) Where a portion of a permissive probationary period is waived, the employe shall receive at least one formal performance evaluation review during the probationary period.

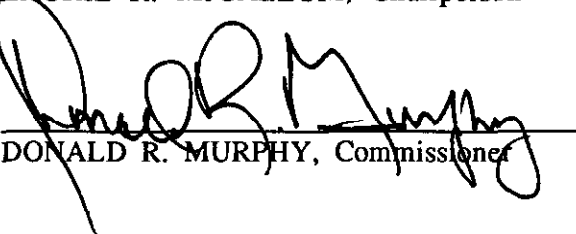
ORDER

This matter is dismissed for lack of subject matter jurisdiction.

Dated: June 21, 1994 STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson



DONALD R. MURPHY, Commissioner

KMS:kms
K:D:temp-8/94 Duran

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.)