

STATE OF WISCONSIN

PERSONNEL COMMISSION

DENNIS L. MORVAK,
Appellant,

v.

**Secretary, DEPARTMENT OF
TRANSPORTATION and Administrator,
DIVISION OF MERIT RECRUITMENT
AND SELECTION,**
Respondents.

**RULING ON
RESPONDENTS'
MOTION TO NARROW
HEARING ISSUES**

Case No. 97-0020-PC

BACKGROUND

This appeal arises from appellant's competition for a Real Estate Specialist position in the Department of Transportation (DOT) and DOT's decision to hire someone other than appellant. The Commission initially opened the file with DOT as the sole respondent. The Division of Merit Recruitment and Selection (DMRS) was added as a party by the presiding examiner at a prehearing conference held on March 26, 1997, when the facts of the case were discussed (as memorialized in the Conference Report dated March 27, 1997) as shown below:

Mr. Morvak applied for vacancies at the entry level classification of Real Estate Specialist, and was certified for an interview at DOT's Wisconsin Rapids office. The interview was conducted on February 6, 1997. He telephoned DOT on March 5, 1997, and was informed that DOT had requested certification of additional names. He questions whether it was necessary for DOT to make such request and whether such request was legal or an abuse of discretion within the meaning of §230.44(1)(d), Stats.

This entry level classification was included for recruitment purposes under §230.22, Stats., and DMRS' related administrative rule (Ch. ER-MRS 8, Wis. Adm. Code). Under §ER-MRS 8.05, Wis. Adm. Code, DOT chose to request that DMRS certify the names of ten candidates. The initial candidate pool included the 10 certified names, plus one transfer candidate. One of the certified individuals failed to respond to DOT's request for an interview and one other indicated disinterest in proceeding to interview. Interviews were then held for the remaining 9 candidates (8 by certification and 1 by transfer).

Two certified candidates indicated after interviews that they were not interested in the position. DOT then requested that DMRS certify

additional names. DMRS certified the three remaining names on the list of eligible candidates. DOT contacted all three newly-certified candidates. Two were not interested in the position but the remaining candidate went through the interview process.

Based on the foregoing, the hearing examiner conducting the prehearing proposed the following statement of hearing issues which ultimately was adopted by the parties:

1. Whether respondent DOT committed an illegal act or abuse of discretion on or about March 1997, in failing to hire appellant for the vacant entry level position of Real Estate Specialist in DOT's Wisconsin Rapids office.
2. Whether respondent DOT or DMRS committed an illegal act or abuse of discretion on or about March 1997, in requesting (DOT) and providing (DMRS) additional certified names beyond the initial 10 names requested.

Respondent DOT indicated at the prehearing conference that jurisdictional issues might exist. The hearing examiner set a deadline of April 25, 1997, for respondents to file jurisdictional motions. Respondents filed a joint motion by the stated deadline. All parties were provided an opportunity to file written arguments with the final document received by the Commission on May 23, 1997.

OPINION

Respondents contend that the hearing should not go forward on the second hearing issue because the Commission lacks jurisdiction to review the subject matter of the second issue. Appellant disagrees.

This appeal was brought under §230.45(1)(a), Stats., which authorizes the Commission to conduct appeals under §230.44, Stats. The subject of appeals authorized under §230.44, Stats., is summarized below:

1. §230.44(1)(a), Stats., authorizes the Commission to hear appeals of a "personnel decision" made (or delegated) by the DMRS Administrator.
2. §230.44(1)(b), Stats., authorizes the Commission to hear appeals of a "personnel decision" made (or delegated) by the DER Secretary.

3. §230.44(1)(c), Stats., authorizes the Commission to hear appeals challenging a demotion, layoff, suspension or discharge if certain conditions are met.
4. §230.44(1)(d), Stats., authorizes the Commission to hear appeals of a “personnel action after certification which is related to the hiring process” and which is alleged to be illegal or an abuse of discretion.
5. §230.44(1)(f), Stats., authorizes the Commission to hear appeals from certain employees of the Department of Corrections (DOC).
6. §230.44(1)(g), Stats., authorizes the Commission to hear some appeals from certain employees of the University of Wisconsin Hospitals and Clinics Authority (UWHCA).

Items 5 and 6 above are irrelevant to appellant’s situation as he was not an employee of DOC or UWHCA. Nor is appellant challenging a demotion, layoff, suspension or discharge under item 3 above. Nor is appellant challenging a decision made or delegated by the DER secretary under item 2 above. The remaining possible bases for jurisdiction would be under items 1 and 4 above. An additional potential issue remains if jurisdiction is found under §230.44(1)(a), Stats. (item 1 above), in that appeals filed under this section are subject to payment of a filing fee, pursuant to §230.45(3), Stats., and no such fee has been tendered by appellant.

Does Subject Matter Jurisdiction Exist?

The text of §230.44(1)(a) and (d), Stats., are shown below in relevant part.

(1) . . . the following are actions appealable to the commission . . .

(a) Decision made or delegated by administrator. Appeal of a personnel decision under this subchapter made by the administrator. . .

(d) 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 intent of section 230.44(1)(d), Stats., is to grant the Commission authority to hear appeals of appointment decisions. *Kelley v. DILHR*, 93-0208-PC, 2/23/94 *Wing v. DER*, 84-0084-PC, 4/3/85. This statutory grant, however, extends only to the hiring authority. This distinction was explained in *Seep v. DHSS*, 83-0032-PC, 83-0017-PC-ER, 10/10/84 (p. 8) as shown below:

The point of certification marks the extent of the administrator's legal authority in the selection process. The appointing authority is generally responsible for actions in the selection process which occur after the point of certification. Actions which occur at or prior to certification, and which typically concern the examination process, are appealable pursuant to §230.44(1)(a) or (b) as actions of the administrator [or secretary]. Actions which occur after the point of certification (and which meet the other criteria set forth in §230.44(1)(d)) are appealable pursuant to §230.44(1)(d), Stats.

The Commission has determined in prior cases that there is nothing intrinsically wrong with a hiring authority requesting and DMRS providing additional certified names when candidates on the initial certification list withdraw from consideration. *Toigo, Tower et al. v. UW & DP*, 80-206-PC, 6/3/81 Such determination is consistent with general policy concerns, as noted in *Seitter v. DOT & DMRS*, 94-0021-PC, 3/9/95 (p. 6):

[I]t would be contrary to the underpinnings of the merit recruitment and selection system to require an employer with a vacancy to forego the opportunity to have a full slate of certified candidates from which to choose . . .

Since hiring authorities have the right to request certification of additional names an appellant must establish something more than the request itself in order to prevail in a claim under §230.44(1)(d), Stats. This "something more" was discussed by the Commission in *Ransom v. UW-Milwaukee*, 87-0125-PC, 7/13/88 (p. 5) as follows:

Appellant is contending that UW-Milw.'s decision to request further certification after his initial certification and interview was a means to the end of not appointing him to the position. This action of respondent in failing or refusing to hire appellant can be characterized as a "personnel action after certification which is related to the hiring process in the classified service which is alleged to be illegal or an abuse of discretion . . ." §230.44(1)(d), Stats. Evidence that would tend to show that UW-Milw. requested an additional, or a particular type of certification for the purpose of undermining appellant's chances for the appointment apparently would be relevant to the issue framed by respondents. Also relevant to this issue would be evidence as to whether respondent improperly relied on recommendations in violation of §230.20, Stats.

The above-noted analysis is different somewhat from the traditional analysis used in appeals of hiring decisions under §230.44(1)(d), Stats. The traditional analysis

was described in *Kesterson v. DILHR & DMRS*, 85-0081-PC & 85-0105-PC-ER, 12/29/86 (p. 20), as shown below:

In *Lundeen v. DOA*, 79-208-PC, 6/3/81, the Commission defined abuse of discretion as “a discretion exercised to an end or purpose not justified by and clearly against reason and evidence.” The question before the Commission is not whether it agrees or disagrees with the appointing authority’s decision, in the sense of whether, based on the record, the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather, it is a question of whether, based on the record, the appointing authority’s decision was “clearly against reason and evidence.” *Harbort v. DILHR*, 81-74-PC, 4/2/82.

Based on the foregoing, it appears to the Commission that two issues remain for hearing pursuant to §230.44(1)(d), Stats., regarding DOT as a respondent. The first involves the traditional analysis described in *Kesterson* (as quoted in the prior paragraph), and the second involves the more specific analysis described in *Ransom* regarding DOT’s decision to request additional certified names. DOT does not contest inclusion of the traditional analysis under the first proposed hearing issue. DOT appears to acknowledge the additional *Ransom*-type of analysis (Respondents’ brief, p. 8) but contends the second proposed hearing issue should be eliminated. It could be that DOT feels the first hearing issue encompasses both the traditional analysis as well as the *Ransom*-type of analysis necessitating only a single hearing issue. However, no error occurs by stating the issues separately and, in fact, such practice may be considered preferable as providing clearer notice to the parties of the matters to be litigated.

The next question for resolution is whether the Commission has jurisdiction to review DMRS’ action of complying with DOT’s request for additional certified names. No such jurisdiction exists under §230.44(1)(d), Stats., because the provision was intended to create a right of appeal regarding the hiring authority’s actions. (See discussion above regarding the *Kelley*, *Wing* and *Seep* cases.) Jurisdiction might exist under §230.44(1)(a), Stats., but a proceeding under that provision requires payment of a \$50.00 filing fee which has not been tendered by appellant. Even if appellant wishes to pay the filing fee and proceed against DMRS, in order to prevail he would have to show more than the fact that DMRS provided the names to DOT at DOT’s request. This conclusion is based on the Commission’s prior case rulings (described previously) which discussed the certification process and approved the procedure whereby

additional names are certified to replace candidates who have withdrawn from consideration.

It is unclear whether appellant would have the right to pay a filing fee at this late date if he chooses to proceed against DMRS under §230.44(1)(a), Stats. If appellant wishes to continue to pursue his claim against DMRS, he must indicate this in writing to the Personnel Commission in sufficient time for the Commission to receive the document by 4:30 p.m. on June 26, 1997. If appellant does not meet this deadline, the case will proceed to hearing on July 22, 1997, at which time both hearing issues will be heard but with the second issue modified to read as follows:

Whether respondent DOT committed an illegal act or abuse of discretion on or about March 1997, in requesting DMRS to certify additional names beyond the initial 10 names received.

ORDER

That respondent DOT's request for elimination of the second hearing issue is denied. That respondent DMRS' request for elimination of the second hearing issue and, by corollary, dismissal of itself as a party remains unresolved pending the June 26th deadline established for appellant as detailed in this ruling.

Dated: June 19, 1997.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner