

**PAUL F. ERNST,**  
*Appellant,*

v.

**Secretary, DEPARTMENT OF  
AGRICULTURE, TRADE AND  
CONSUMER PROTECTION,**  
*Respondent.*

**RULING ON  
RESPONDENT'S  
MOTION TO DISMISS**

Case No. 97-0152-PC

A prehearing conference was held on February 12, 1998, at which time respondent raised questions regarding the Commission's jurisdiction to consider the matters raised in the appeal. The Commission received the final brief on June 12, 1998.<sup>1</sup> The facts recited below appear to be undisputed.

**FINDINGS OF FACT**

1. Appellant contests two of respondent's hiring transactions. Both involved vacant positions as a Weight and Measures Inspector (WMI) and were filled at the entry level, which is assigned to pay range 10. The positions are covered by a bargaining agreement with the Security and Public Safety (SPS) bargaining unit.

2. The background information concerning the first hire (hereafter, referred to as the "Stobb Position") is described in this paragraph. The Stobb Position had been vacated on January 24, 1997. Respondent's personnel director authorized recruitment on February 4, 1997. A notice of contractual transfer opportunity was posted on February 12, 1997, with the sole applicant indicating he was not interested in the position. The Division of Merit Recruitment and Selection (DMRS) provided respondent with a certification list of ten candidates eligible to interview by virtue of examination scores, pursuant to §ER-MRS 12.02, Wis. Admin. Code and, as part of the same process, supplemented the list with the names of 10 additional candidates eligible to interview on the basis of discretionary transfer or voluntary demotion,

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<sup>1</sup> The final brief received by the Commission on June 12, 1998, was appellant's brief dated June 6, 1998.

pursuant to §ER-MRS 12.02(3), Wis. Adm. Code.<sup>2</sup> Only one of these twenty candidates, Mr. Stobb, was interested in the position and could begin employment before June 1, 1997. Respondent hired Mr. Stobb, effective May 25, 1997.<sup>3</sup> Mr. Stobb previously had been employed by the Department of Corrections as a Psychiatric Care Technician 2; a position which had the same pay range as the Stobb Position and was covered under the same bargaining unit (SPS). Mr. Stobb's hire into the WMI position was as a transfer candidate from a different agency. Inter-departmental transfers are possible under the SPS contract, but the mechanisms for such transfers are not specified in the SPS contract.

3. Appellant currently works at the Department of Commerce as a Flammable/Combustible Liquids Inspector 2 (Petroleum Inspector), a position at a higher pay range than the Stobb Position but in the same bargaining unit. Appellant would have been eligible to apply for the Stobb Position under the same circumstances as Mr. Stobb, e.g., as an inter-departmental transfer. Appellant would have applied for the Stobb Position if he had known about it. He did not see the contractual posting.

4. Respondent did not post the Stobb Position for inter-departmental transfers. There is no written contract provision that would require respondent to do so. Respondent, however, has filled inter-departmental transfers pursuant to a long-standing oral agreement with the union, which includes the SPS bargaining unit. The agreement has existed for about 9 years and is reflected in respondent's employee handbook. Respondent is not required under the oral agreement to provide notice of vacancies to the union so long as respondent includes for interview these individuals who have filed transfer requests and who are eligible for the position. Respondent followed the terms of this oral agreement. Appellant did not file a transfer request with respondent.

5. The headquarters for the Stobb Position changed after Stobb was hired. Flexibility in location of the headquarters was not noted in the contractual posting. The

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<sup>2</sup> The text of the referenced administrative rule is set forth below in pertinent part:

ER-MRS 12.02 Action by the [DMRS] administrator. The administrator shall certify eligible applicants as provided in the law and rules . . .

(3) The administrator may submit the names of persons interested in transfer, reinstatement or voluntary demotion along with a certification or, at the request of the appointing authority, in lieu of a certification.

<sup>3</sup> Whether this appeal was filed timely is not a question before the Commission.

Conference report (dated April 30, 1998) included a discussion of appellant's concern, as noted below in pertinent part (p. 4):

[Appellant's] concern, however, is that if he would have known of the opening and if he made an inquiry as to the headquarters city and said he was not interested based on the planned headquarters location, then he would feel disadvantaged later if, in fact, there was lee-way in establishing the headquarters city . . .

6. The background information concerning the second position (hereafter, referred to as the "Dingman Position") is described in this paragraph. The Dingman Position was vacated on June 13, 1997. Ultimately, Mr. Dingman was hired for the position. Appellant would not have applied for the Dingman position even if appellant had been aware of the vacancy.

7. The only SPS contract language concerning inter-departmental hires is shown below:

7/3/3 An employe who transfers BETWEEN AGENCIES OUTSIDE THE PROVISIONS OF THIS LABOR AGREEMENT [emphasis added] and is placed on a permissive probationary period . . .

#### OPINION

The potential jurisdictional basis for the Commission to hear this case is §230.44(1)(d) Stats., the text of which is shown below:

(1) APPEALABLE ACTIONS AND STEPS . . . the following are actions appealable to the commission . . .

(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.

Mr. Ernst's first concern regarding the Stobb Position was that respondent did not post the vacancy for inter-departmental hires. Respondent addressed this concern in a brief dated March 12, 1998 (p. 3), as noted below:

The only actions which are covered are actions "after certification" and "related to the hiring process." The phrase "after certification" refers to a specific point in the hiring process, *Kelly v. DILHR*, 93-0208-PC, 2/23/94. The Commission's jurisdiction does not extend to pre-

certification decisions made by the appointing authority, *Schmidt v. DHSS*, 89-0079-PC, 4/5/90.

Decisions regarding the scope of posting for a vacancy are made prior to certification. Accordingly, Mr. Ernst's first concern is not an "action after certification," and is not cognizable under §230.44(1)(d), Stats.

Mr. Ernst's second concern regarding the Stobb Position was that the headquarters city changed after Mr. Stobb was hired. The potential scenario supporting Mr. Ernst's concern is hypothetical in nature. (Refer to ¶5 of the Findings of Fact.) He has not been faced with the scenario he fears could develop. In short, Mr. Ernst has suffered no injury in fact and, accordingly, lacks standing to raise the issue at this time. See e.g., *Taylor v. DMRS*, 90-0279-PC, 11/1/90; *Larson v. DHSS*, 86-0152-PC-ER, 7/8/87; and *Pullen v. DILHR*, 79-72-PC, 5/15/80.

Mr. Ernst lacks standing to present concerns related to the Dingman Position because he would not have applied for the position even if he had been aware of the vacancy. He has suffered no injury in fact.

Based on the foregoing concerns, the Commission concludes this case should be dismissed. It is unnecessary, therefore, for the Commission to reach the additional question raised by the parties as to whether §111.93(3), Stats., would operate to supersede the Commission's jurisdiction.

ORDER

Respondent's motion to dismiss is granted and this case is dismissed.

Dated: July 1, 1998.

STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson

JMR  
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JUDY M. ROGERS, Commissioner

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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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.)

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