

STATE OF WISCONSIN

PERSONNEL COMMISSION

LEE JAMES STARCK,
Appellant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM,**
Respondent.

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

Case No. 99-0033-PC

This case is before the Commission to resolve respondent's motion to dismiss. The findings of fact recited below are made solely for the purpose of resolving the present motion. The findings recited below appear to be undisputed by the parties unless specifically noted to the contrary.

FINDINGS OF FACT

1. The appellant applied for the vacant position of Financial Specialist I, located at the UW-Milwaukee campus. His name was certified to respondent as an eligible candidate for interview (certification #286-0107537).

2. After respondent received the certification list with the appellant's name listed, respondent requested that the Administrator of the Division of Merit, Recruitment and Selection (DMRS) remove appellant's name, pursuant to §§ER-MRS 6.10 (4) [dismissal from state service for cause] and (8) [unsatisfactory work record], Wis. Adm. Code. DMRS implemented this request and, by letter dated March 11, 1999, informed the appellant that his name was removed from the certification list.

3. The appellant filed an appeal under §230.44(1)(d), Stats., contending that respondent's request for DMRS to remove his name was either illegal or an abuse of discretion.

4. The appellant declined to file an appeal under §230.44(1)(a), Stats., to add DMRS as a party in regard to DMRS' removal of his name from the certification list.¹

OPINION

Respondent moved to dismiss this appeal for failure to state a claim. The motion is reviewed here under the standard described in *Phillips v. DHSS & DETF*, 87-0128-PC-ER, 3/15/89), aff'd *Phillips v. Wis. Pers. Cmsn.*, 167 Wis.2d 205, 482 NW2d 121 (Ct. App. 1992), as follows:

[T]he pleadings are to be liberally construed, [and] a claim should be dismissed only if "it is quite clear that under no circumstances can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.

Potential jurisdiction over this case is under §230.44(1)(d), Stats., the text of which is shown below:

(1) Appealable Actions and Steps . . . [T]he following are actions appealable to the commission under s. 230.45(1)(a) . . .

(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.

At a prehearing conference respondent's counsel thought respondent asked DMRS to remove appellant's name prior to respondent's receipt of any certification list. (See conference report dated May 18, 1999.) Respondent's formal motion, however, appears to indicate that respondent received a certification list with the appellant's name on it and then respondent asked DMRS to remove the appellant's name.

Presuming that the Commission's understanding of the formal motion is correct (as noted in the prior paragraph), respondent's request to remove complainant's name

¹ The appellant would have been required to file either a \$50 filing fee or a hardship affidavit to add DMRS as a party. See §230.45(3), Stats., and §PC 3.02, Wis. Adm. Code.

came after the initial certification and such request was related to the hiring process. Accordingly, respondent's motion to dismiss is denied.

ORDER

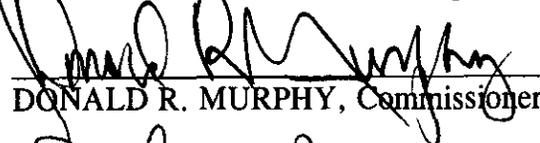
Respondent's motion to dismiss is denied. The parties will be notified by separate mailing of the date and time of a telephone status conference at which time the issue for hearing will be defined and a hearing date selected.

Dated: August 25, 1999.

STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson



DONALD R. MURPHY, Commissioner



JUDY M. ROGERS, Commissioner

JMR:990033Arul1.doc

Parties:

Lee James Starck
135 Plummer Court
Neenah, WI 54956-2368

Katharine Lyall
President, UW System
1720 Van Hise Hall
1220 Linden Dr.
Madison, WI 53706