

LEE JAMES STARCK,
Appellant,

v.

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

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

Case No. 99-0033-PC

The respondent filed a motion to dismiss by letter dated May 28, 1999 (hereafter, the First Motion); after which the parties were provided an opportunity to file briefs with the final brief due on August 6, 1999. The Commission denied respondent's First Motion by ruling dated August 25, 1999.

The respondent, by letter dated September 16, 1999, filed another motion to dismiss (hereafter, the Second Motion) contending that the Commission failed to address all issues raised in the First Motion.¹

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. These are the same findings used to resolve respondent's First Motion.

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,

¹ Respondent's Second Motion also requested Summary Judgment on a theory separate than the matters raised in this ruling. Since the appellant has not had an opportunity yet to submit written arguments, resolution of the summary judgment motion is deferred to a later ruling.

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.²

OPINION

The "Opinion" section of the Commission's ruling on the First Motion is shown below.

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

² 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.

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

Respondent perceives that the prior ruling was deficient because it "did not address Respondent's argument that the action Appellant was contesting was an action taken by DMRS and, therefore, that DMRS was properly the respondent in this case. The Commission explained in its prior ruling, however, that "respondent's request to remove complainant's name came after the initial certification and such request was related to the hiring process," within the meaning of §230.44(1)(d), Stats. Perhaps this statement could have been expanded upon but the clear intended meaning was that the appellant could maintain the present action against respondent under §230.44(1)(d), Stats., without having DMRS as a party. For example, if the appellant were to prevail after hearing, the Commission could issue a "cease and desist" order prohibiting respondent from requesting DMRS to remove his name from registers used to fill similar vacant positions in the future. DMRS is not a necessary party to the relief mentioned in the example.

ORDER

Respondent's Second Motion is denied.

Dated: October, 1999.

STATE PERSONNEL COMMISSION

Donald R. Murphy, Jr.
DONALD R. MURPHY, Commissioner

JMR:990033Arul2.doc

Judy M. Rogers
JUDY M. ROGERS, Commissioner

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