

STATE OF WISCONSIN

PERSONNEL COMMISSION

SANDRA NELSON,
Appellant,

v.

**Director, STATE HISTORICAL
SOCIETY OF WISCONSIN,**
Respondent.

**RULING
ON MOTION
TO DISMISS**

Case No. 00-0026-PC

This matter is before the Commission on the respondent's motion to dismiss. Respondent argues the Commission lacks subject matter jurisdiction, the appeal was not timely filed and the appellant has failed to state a claim. The parties have filed briefs and the following findings appear to be undisputed.

FINDINGS OF FACT

1. Appellant has worked for the State Historical Society of Wisconsin since September of 1989 in a position classified as Staffing Specialist. Her pay rate is approximately \$18.50 per hour.
2. In September of 1998, the position of Human Resources Manager for the Historical Society became vacant. The pay rate for the Human Resources Manager position is approximately \$27.00 per hour.
3. Appellant began performing the Human Resources Manager duties on an acting basis in September of 1998. Appellant did not receive additional pay for these responsibilities.
4. Appellant was never notified of any requests to extend her acting assignment, nor was she notified that the Administrator of the Division of Merit Recruitment and Selection, Department of Employment Relations, had approved an extension.
5. Appellant filed both a civil service appeal and a discrimination complaint with the Personnel Commission on March 17, 2000. In addition to filing a complaint

form, appellant submitted a cover letter that included a section entitled "Civil Service Appeal" and a section entitled "Discrimination Complaint." The "Civil Service Appeal" section reads as follows:

Ms. Nelson is filing a civil service appeal due to the fact that she held the position of acting director for 16 months without an increase in compensation. In fact, during this period of time she performed and had the responsibility of three positions. We are requesting that Ms. Nelson be compensated commensurate with the position and work performed.

The section entitled "Discrimination Complaint" related to the decision by the Historical Society to hire Alice Jackson to fill the vacant Human Resources Manager position on a permanent basis.¹

CONCLUSION OF LAW

The Commission lacks subject matter jurisdiction over this appeal.

OPINION

I. Pay rate during the acting assignment

The original letter of appeal clearly describes the action being appealed as the appellant's rate of pay during the period in which she performed, on an acting basis, the duties of the Human Resources Manager position. The Commission has previously held that it lacks subject matter jurisdiction over such an appeal. In *Bauer v. DATCP & DER*, 91-0128-PC, 4/1/92, the Commission held:

¹ As noted, the initial letter of appeal clearly states that appellant's rate of pay while she performed the acting assignment is the subject of the appeal. Appellant's brief on respondent's motion recast the matter as an appeal of a failure to notify appellant that the acting assignment had been extended.

Appellant's brief also includes a section dealing with respondent's contention that her appeal was not timely filed. In that section, appellant contends that her appeal is timely because it was filed within 30 days of when she received formal notification that Alice Jackson had been hired as Human Resources Manager. The Commission does not construe this language as a claim under §230.44(1)(d), Stats, regarding the decision not to select the appellant to fill the Human Resource Manager position on a permanent basis.

The appellant's third allegation relating to the alleged acting assignment is that the respondent failed to compensate him in accordance with assigning him added duties. Again, the Commission lacks subject matter jurisdiction over an appeal arising from the level of pay awarded to an employe, except to the extent it might arise as part of the hiring process after certification pursuant to §230.44(1)(d). Here there was no certification associated with the acting assignment, so there is no jurisdictional basis on which the Commission can review the appellant's pay level during the period of the acting assignment.

Only certain personnel actions of an appointing authority may be appealed to the Commission. Those actions include disciplinary decisions for certain employes, §230.44(1)(c), Stats., and non-selection decisions under §230.44(1)(d), Stats. The respondent's decision not to modify appellant's rate of pay while appellant was performing the Human Resources Manager duties on an acting basis does not fit within any of the various categories of actions appealable to the Commission.

II. Duration of acting assignment

In her response to respondent's motion to dismiss, appellant contends that respondent failed to comply with §ER-MRS 32.02, Wis. Adm. Code. The applicable provisions of the Wisconsin Administrative Code regarding acting assignments read as follows:

ER-MRS 32.01 Acting assignments. When a position is vacant and the needs of the service require the performance of the duties of that position, a permanent employe may be temporarily assigned to perform those duties.

ER-MRS 32.02 Approval of the administrator. The appointing authority shall submit a written request to make acting assignments which exceed 45 calendar days in length to the administrator for approval. This request shall state the anticipated duration of the acting assignment and provide such additional information as the administrator requires. Acting assignments not to exceed 45 calendar days shall be made at the discretion of the appointing authority.

ER-MRS 32.03 Duration of acting assignments.

(1) The acting assignment shall not exceed a total of 6 months, except as provided in sub. (2).

(2) If the appointing authority is unable to make a permanent appointment to that position within that 6-month period, a written request for approval to extend the acting assignment shall be submitted to the administrator. The extension request shall indicate the expected date by which a permanent appointment shall be made.

ER-MRS 32.04 Letter of notification. The appointing authority shall give written notice to the employe of the acting assignment. This letter of notification shall identify the nature of the duties to be assigned, the planned duration and other conditions of the acting assignment, including the fact that no adjustment in pay shall be made. The appointing authority shall send a copy of the notice of the acting assignment to the administrator.

Appellant argues that "the facts will show Respondent failed to comply with the procedures of Wis. Admin. Code §ER-MRS 32.01 et seq., and was in violation of its statutory duties granted under Wis. Stats. Ch. 230."

The Commission has previously held that it lacks the authority to review a contention that an appointing authority violated the provisions of ch. ER-MRS 32, Wis. Admin. Code, by failing to seek and obtain approval from the Administrator of the Division of Merit Recruitment and Selection (DMRS) for an acting assignment. *Bauer v. DATCP & DER*, 91-0128-PC, 4/1/92; *Hagman v. DNR*, 84-0194-PC, 1/30/85.

There is no indication in the case materials as to whether the Historical Society obtained approval from the Division of Merit Recruitment and Selection for the appellant's acting assignment. Whether or not such approval was obtained, the appellant's contention relates to the possible conduct on the part of the Historical Society rather than by the Administrator of the Division of Merit Recruitment and Selection. Only certain actions by an appointing authority may be appealed to the Personnel Commission under §230.44, Stats. A possible failure on the part of the Historical Society to request approval of an acting assignment that extended beyond 45 days is not among the reviewable actions.

III. Other bases for motion to dismiss

Because the Commission concludes it lacks subject matter jurisdiction over this appeal, it does not address respondent's other contentions raised in its motion to dismiss: 1) that the appeal of the decision not to increase appellant's pay was untimely, and 2) that the appellant fails to state a claim with respect to her appeal of the decision not to increase her pay for performing duties on an acting basis.

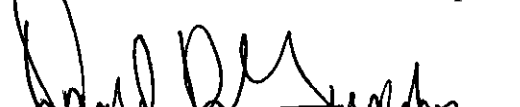
ORDER


Respondent's motion is granted and this appeal is dismissed for lack of subject matter jurisdiction.

Dated: May 31, 2000 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

KMS:000026Arul1


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Sandra Nelson
4438 Meadowwood Circle
DeForest, WI 53535

George L. Vogt, Director
State Historical Society
816 State Street
Madison, WI 53706-1482

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.

2/3/95