



Subsequently, an improper examination process was done ! Let it hereby be known that I wish to appeal that process so that I can exercise my rights to compete for the position in a fair and forthright manner."

2. On October 5, 1977, Achievement History Questionnaires had been sent to the candidates, including the Appellant, but Appellant did not complete and return the questionnaire and was not considered for the position.

3. In a letter dated December 9, 1977, Verne H. Knoll, Deputy Director of the Bureau of Personnel, informed the Appellant that Mr. Percy Julian was former chairperson of the State Personnel Board, but that the letter was received in Knoll's office and that he (Knoll) was having a staffing specialist look into the examination process Appellant had challenged.

4. In a letter dated March 2, 1978, Knoll again wrote to the Appellant and advised him that, based on a review by one of his staff members, he had come to the conclusion that the Respondent, DHSS, had "acted properly" in regard to both the examination and Appellant's status as a candidate. Knoll also advised that his decision could be appealed to the State Personnel Commission within 30 days.

5. On March 8, 1978, Appellant filed a letter with the Personnel Board appealing the Administrator's ruling on the test validity and circumstances surrounding his elimination from the Social Service Specialist position.

6. At a prehearing conference held on October 2, 1978, the Appellant iterated the issue as whether or not it was valid and proper to use the Personal Achievement History Questionnaires as the sole instrument for selecting candidates for Social Service Specialist I positions in DHSS's Mutual Agreement Program, but the Respondent moved to dismiss the case on the following jurisdictional grounds:

A. The appeal was not timely as it was filed more than 15 days after certification of the candidates for the position.

B. The appeal was misdirected - Under 16.03(2) it should have been filed directly with the Personnel Board.

C. The appeal cannot legally be heard by the Personnel Commission. Since the transaction occurred prior to February 16, 1978, the matter would come to the Commission only under the transfer provisions of Ch. 196 of the Laws of 1977.

D. The issue is moot. The appointments to the positions in question have been made and cannot be undone. Moreover, there is a current announcement of similar position which the appellant could apply for if he desires.

#### OPINION

The objection that the appeal was not timely presupposes:

1. that the issue before the Commission is the issue set forth in the undated letter to "Mr. Julian Percy";

2. that the matter was being appealed pursuant to Section 16.05(1), Wis. Stats. 1975; and

3. that the applicable 15-day statutory period would have been computed from the October 5, 1977, announcement of the examination procedures.

However, the facts indicate that the subject matter in the undated letter has already been dealt with under Section 16.03(4), and, notwithstanding the Appellant's failure to comply with the filing period in subsection (d), the Director (now "Administrator") did render a decision in the matter on March 2, 1978. That decision, by the Administrator's own admission, is appealable within 30 days under Section 230.45(1)(a), Wis. Stats., 1977. The Appellant did appeal that decision and the appeal was timely.

As to the second objection, it is immaterial whether or not the appeal was misdirected. The Administrator did not redirect the Appellant's letter

at the time it was received. Instead, he chose to act upon it as if it rightly should have been referred to his office. Having done so, he cannot now claim that the matter was not properly before him.

The third objection, like the first, presupposes that it is the examination process, rather than the propriety of the Administrator's decision, that is before the Commission. It is clear from the language of the Appellant's March 6, 1978, letter and from his statement of issue at the prehearing conference that the matter being appealed is the Administrator's determination that "the agency acted properly" in regard to the exam and Appellant's candidacy that is before us.

In the fourth objection, the Respondent has contended that the issue is moot. The Appellant acknowledges that by not submitting a questionnaire he eliminated himself from consideration and therefore could not justifiably appeal his nonselection. However, it does not follow that a decision in this matter would be moot and of no practical benefit to the Appellant.

The mootness question here is not unlike that posed in the discrimination case Watkins v. DILHR, 69 Wis. 2d 782 (1975), in which the agency argued that the case was moot because the complaining party could not be transferred nor awarded money damages since she had already been transferred to the position she was seeking and there was no difference in pay. The Court concluded that inasmuch as Watkins was still employed by the same employer and still a member of the same union, it could not be claimed that a finding in her favor would be useless. On the contrary, the Court determined that if discrimination were found, the agency could enter orders which would have "a practical, legal effect upon the relation of the parties to this case," 69 Wis. 2d at 796.

In the case before the Commission, if we were to find that use of the Personal Achievement History Questionnaire as the sole instrument for selection of Social Service Specialists is not proper, we could enter an order that would have definite practical legal effects with regard to future selection processes for Social Service Specialists and the Appellant's status as a potential candidate for such positions. The Commission's remedial powers in this kind of appeal are set forth in Section 230.44(4)(c) and include inter alia the authority to "remand the matter to the person taking the action for action in accordance with the decision."

Finally, in reply to the Appellant's brief on the motion to dismiss on the grounds discussed above, the Respondents have put forth two additional bases for dismissal:

1. the Appellant lacks standing to appeal, and
2. the issue is not a proper subject for appeal.

With respect to standing, the Respondent cites the administrative standard in Wisconsin Environmental Decade, Inc v. PSC, 69 Wis. 2d 1 (1975). The Commission agrees that the two-step analysis propounded in that case is applicable here, but we believe that the Respondent, in dealing with the first step (i.e., whether the decision caused injury to the Appellant), construed "injury" too narrowly. Even though the Administrator's decision by its terms ran to other parties (namely those who submitted questionnaires), it does not follow that the Appellant and others who were not immediately directly affected by the decision cannot claim injury. According to Wisconsin Environmental Decade: " ... 'directly affected' ... includes injuries that are brought about because of a series of events initiated by the agency action in question ... "; Ibid at page 14. Under that rationale,

we believe that the Appellant's status as one whose candidacy could be affected by the Administrator's decision in the future is sufficient to give him standing.

Regarding the Respondent's contention that the issue is not a proper subject for appeal because it requests a prospective remedy, the Commission disagrees. The appropriate test here is whether or not the issue is "a personnel decision of the administrator" within the meaning of Section 230.44(1)(a), and we believe that it is.

#### CONCLUSIONS OF LAW

1. The Appellant has standing to pursue this appeal.
2. The appeal was timely filed.
3. The Commission has jurisdiction over the subject matter.

#### ORDER

The Respondent's motions to dismiss are denied and the matter will be set for hearing at 131 West Wilson Street, Madison, Wisconsin, on a date to be determined by the Commission in consultation with the parties. This will be a class 3 proceeding with jurisdiction pursuant to Section 230.44(1)(a), Wis. Stats., and this order will be the sole and statutory notice of the proceedings. The issue is whether or not the Administrator was correct in determining that the agency acted properly in using the Personal Achievement History Questionnaire as the sole instrument for selecting candidates for Social Service Specialists I positions in DHSS's Mutual Agreement Program.

Kaeske v. DHSS & Div. of Pers.  
Case No. 78-18-PC  
Page Seven

Dated: Nov 22, 1978

Joseph W. Wiley  
Joseph W. Wiley  
Chairperson

Dated: Nov 22, 1978.

Edward D. Durkin  
Edward D. Durkin  
Commissioner

Dated: Nov. 22, 1978.

Charlotte M. Higbee  
Charlotte M. Higbee  
Commissioner