

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 BEN L. MARTIN, *
 *
 Appellant, *
 *
 v. *
 *
 DEPARTMENT OF INDUSTRY, LABOR, *
 AND HUMAN RELATIONS and *
 DIVISION OF PERSONNEL, *
 *
 Respondent. *
 *
 Case No. 78-240-PC *
 *
 * * * * *

DECISION
AND
ORDER

This appeal relates to several personnel transactions. The respondents filed a motion to dismiss for lack of subject matter jurisdiction, and the parties have filed supporting documents and argued the motion before the commission. The findings which follow are limited to the purpose of deciding the motion and are based on undisputed matter appearing in the record to date.

FINDINGS OF FACT

1. The appellant's original appeal letter was received by the commission on October 19, 1978. For the purpose of deciding this motion the contents of this letter, a copy of which is attached, are incorporated by reference as if fully set forth.

2. The appellant's second appeal letter was received by the commission on November 22, 1978, and was signed not only by Mr. Martin but also by a number of other individuals. For the purpose of deciding this motion, the contents of this letter, a copy of which is attached, are incorporated by reference as if fully set forth.

3. Mr. Martin had notice of the transfer or lateral movement of

to the commission."

do not apply here:

"From its face, it is apparent that this section is generally intended to refer to actions by appointing authorities in the course of the competitive hiring process after certification. In the case of a lateral movement, about which appellant complains, there was no certification of a list of candidates because none was required, nor was there a 'hiring process' in the sense acquiring a new employe which the statute appears to be intended to cover."

While this argument has some persuasive force, the appellant argued, among other things, that Mr. Rodriguez had in fact been certified for the position in question. Depending on all the facts and circumstances the commission can envision a situation where a lateral movement might fall within the purview of §230.44(1)(d), Stats.

The appellant made a number of other arguments, on other jurisdictional issues, which contained factual allegations which were not specifically contained in the appeal letters. For example, the respondents argue that there were no transactions which would have required decisions of the administrator of the division of personnel and that respondent is not a proper party. The appellant argues that the administrator was in fact personally involved.

This appeal is further complicated by the facts that there are apparently three separate transactions involved and there are allegations of a pattern or practice of racial discrimination, which might fit under the commission's equal rights jurisdiction pursuant to §230.45(1)(b), Stats., but at this point there has not been filed any verified complaint of discrimination. In the opinion of the commission the appellant should be permitted a period of 30 days in which to decide whether to proceed with a discrimination complaint in place of this appeal, to proceed with

Mr. Rodriguez to a position directing the Job Service Division equal employment opportunity programs, the central matter of complaint in the October 19, 1978, letter, no earlier than September 21, 1978.

4. The transfer or lateral movement of Mr. Rodriguez occurred when he was serving a probationary period in his original position.

CONCLUSIONS OF LAW

1. The appeal letter filed October 19, 1978, was not untimely.
2. The record is insufficient to provide a basis for a decision on the other parts of respondent's motion to dismiss.

OPINION

The respondents indicated that they would not contest the date of notice submitted by the appellant in a notarized statement submitted to the commission on January 5, 1979. The earliest possible date of notice set forth in that statement is September 21, 1978. The appeal was received on October 22, 1978, which is within the 30 days permitted by §230.44(3), Stats.

As to the other jurisdictional matters raised by respondents in the commission's opinion the record is not sufficient to permit a final decision. For example, the respondents argue that the movement of Mr. Rodriguez to the position in question was a "lateral movement" pursuant to §Pers. 13.07, W.A.C., and that there is no basis for appeal of this type of transaction under any provision of §230.44. The respondents argue that the provisions of §230.44(1)(d):

"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

a discrimination complaint and to continue to pursue this appeal, to simply continue with this appeal, or to pursue such other course as he may feel is appropriate. In any event, if he wishes to continue this appeal, he shall file an amended appeal document setting forth with specificity those facts upon which he relies in opposition to respondents' motion.

ORDER

The respondents' motion to dismiss filed December 18, 1978, is denied as to that part which is based on the ground that the letter filed October 19, 1978, is untimely, and a decision is deferred on all other parts of the motion. The appellant is directed, if he wishes to continue this appeal, to file with the commission and serve on respondents' attorney within 30 days of the date of this order an amended appeal setting forth with specificity those factual allegations on which he relies in opposition to respondents' motion.

Dated: Jan 26, 1979.

STATE PERSONNEL COMMISSION

Joseph W. Wiley
Joseph W. Wiley, Chairperson

Edward D. Durkin
Edward D. Durkin, Commissioner

Charlotte M. Higbee
Charlotte M. Higbee, Commissioner

October 19, 1978

2040 Shore Drive
Beloit, Wisconsin

RECEIVED

53511

Personnel Commission
State of Wisconsin
131 West Wilson St., Room 202
Madison, Wisconsin 53702

OCT 19 1978

**Personnel
Commission**

Dear Mr. Joseph Wiley

Please be advised that I wish to appeal a personnel action taken by Job Service Administrator William Grenier and Acting Administrator Verne Knoll of the Division of Personnel. I believe Mr. Grenier violated the intent of Chapter 230 of the Wisconsin Statutes concerning Employment Relations, when he transferred Vidal Rodriguez, a recently appointed supervisor of DILHR Migrant Services, to the position of Supervisor of the Job Service Equal Opportunity Unit.

I further charge that Mr. Knoll knew or should have known that the requirements for the two positions were quite dissimilar. Using transfer from Migrant Services as the sole method of filling the EO Supervisor position was therefore inappropriate. Such a transfer from a bi-lingual, single-purpose position serving one ethnic constituency to a multi-purpose position serving "all the protected groups" constitutes an arbitrary violation of equal access. Mr. Grenier and Mr. Knoll knew or should have known that members of non-Hispanic protected groups are not, as a rule, bi-lingual, and were therefore arbitrarily excluded by the method (transfer rather than examination) used to fill the EO Supervisor position.

Mr. Grenier and Mr. Knoll knew or should have known that Blacks have been excluded from the Job Service Equal Opportunity Unit since July 1972. That exclusion coincides with the EO Unit's clear record of anti-Black attitudes and policies. Further, Hispanics outnumber Blacks 4 to 1 in professional positions within Job Service Administration. In this context, Mr. Grenier and Mr. Knoll knew or should have known that the personnel action in question could not but create additional strife and distrust among Blacks, Hispanics and Indians.

Mr. Grenier and Mr. Knoll knew or should have known that the Equal Opportunity Unit Supervisor position was under adjudication by the Wisconsin Personnel Commission at the time of the disputed transfer. In the original complaint, Job Service and DILHR had been charged with circumvention of the merit hiring system through racial discrimination.

Mr. Grenier and Mr. Knoll resorted to an unusual procedure, in violation of established personnel practices, to transfer a probationary supervisor to a highly important position, thereby excluding other employees from equal access. I charge that, in so doing, they violated the following subchapters of Chapter 230: .01(2), .09(1-2), .14, .145, .15(1-4), .16(1-4), .18, .19(1-3), .20(1-3), .25, and .28(1a,3). These violations occurred from 3/6/1978 through 9/15/78 and constitute an abuse of trust and authority, and arbitrary and capricious conduct.

In view of these violations, I ask that Mr. Rodriguez be removed from the EO Supervisor position for which he has not been examined.

I ask that the EO Supervisor position and the Monitor Advocate position not be pooled because of inherent differences between them.

I ask that an examination for the disputed position be held subject to the disposition of the case, Ben Martin vs. Knoll and Hart 74-132.

I ask that injured employees be compensated for all loss of wages and benefits resulting from the denial of access to the disputed position.

I ask that the Personnel Commission investigate these charges of abuse and arbitrary and capricious conduct.

Sincerely

Ben L. Martin



November 22, 1978

Personnel Commission
State of Wisconsin
131 West Wilson Street, Room 202
Madison, Wisconsin 53703

RECEIVED

NOV 22 1978

**Personnel
Commission**

Dear Chairperson Joseph Wiley

Subsequent to my filing racial discrimination appeal case number 78-240-PC, other appealable violations have occurred which are clearly related.

On or about November 6, 1978, I learned that Job Service had succeeded in changing the Job Service Specialist 5-Monitor/Advocate position to a bi-lingual-Spanish position. I view this personnel transaction as yet another means of excluding Black and other minority groups from the Equal Opportunity Unit. This position had been non-bi-lingual since its inception in 1974. The first Monitor/Advocate was Black.

On or about November 14, 1978, I learned that Job Service was petitioning DILHR to announce its third Equal Opportunity Unit position - EO Specialist 4. I later learned that Job Service was on record requesting an Indian female for the job, again eliminating Blacks and other protected groups.

I suggest to the Commission that these last two episodes could have been predicted when Job Service acted to circumvent the examining process through fear and bias.

I ask the Commission to combine these two issues with case number 78-240-PC in order for me to prove racial discrimination on the part of Job Service. I charge Job Service with violation of the following sections of Chapter 230: .01, .02, .14(1-2), .09, .16(2), .18, .20(1).

I ask that the Monitor/Advocate be returned to non-bi-lingual status.

I ask that Job Service refrain discriminating against Blacks and other protected groups.

I ask that Job Service be restrained from causing conflict among protected groups by sowing distrust through ambiguity, fear and bias.

I ask that the Job Service Supervisor 5-Equal Opportunity, the Job Service Specialist 5-Monitor/Advocate, and the Equal Opportunity Specialist positions be filled under the law and appropriate union contracts.

Additional signatures appear below. These individuals request to join this appeal, as amended.

Sincerely

Barbara J. Stull
Michelle Studd
Sheila McKee
Al Ford

Robert Flippen
James D. Britts
Merrill A. Johnson III
Gregory Bridger

Ben L. Martin

cc: Vern Knoll
Kathryn Anderson
Maureen McGlynn