

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 LINDA R. PULLEN, *
 *
 Appellant, *
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 v. *
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 DEPARTMENT OF INDUSTRY, LABOR, *
 AND HUMAN RELATIONS, *
 *
 Respondent. *
 *
 Case No. 79-72-PC *
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 * * * * *

DECISION
 AND
 ORDER

NATURE OF THE CASE

This matter is before the Commission on respondent's motion to dismiss for lack of subject-matter jurisdiction on the ground that the appeal was not timely filed. The facts relating to jurisdiction do not appear to be in dispute. The findings which follow are based on material filed by the parties.

FINDINGS OF FACT

1. In a letter dated May 23, 1978, to Verne Knoll, then Deputy Administrator, State Division of Personnel, the appellant stated, in part:

" ... for the past fourteen (14) months, I have acted as a Job Service Specialist 3 ... The positions have recently been filled, and I wasn't one of those chosen ... I mentioned all of the above to get to my next point. Talmadge Wilson ... has been acting as a Job Service Supervisor for over twelve (12) months. He failed the exam for same and is now being given the same job he acted in. It's supposedly a trainee - type job. I should be promoted to a Job Service Specialist 3, because I have proven I can assume all responsibilities and duties of this classification, and I did pass the exam ... I know its just a matter of paperwork to get this done. And in the past, I've seen persons reallocated, reclassified, or promoted

to positions without competing in an examination. It's for this reason I'm requesting a review of my position."

2. The appellant subsequently was sent a copy of a letter dated August 30, 1978, from Mr. Knoll to Mr. Grenier, Administrator, Wisconsin Job Service, which contained the following:

"As you are aware, the Department of Employment Relations has received a complaint from Ms. Linda Pullen, an employe of the Milwaukee Job Service.

Ms. Pullen recently competed in an examination for several similar Job Service Specialist 3 positions, one of which she had been functioning in an acting capacity. She passed the examination but was not in certifiable range for selection. Her complaint is that she feels that she should have been selected for this or a similar vacancy and appointed in a manner similar to that of Mr. Talmadge Wilson.

Mr. Wilson competed in an examination for a Job Service Supervisor 2 position in which he also had been functioning in an acting capacity. In this instance, Mr. Wilson failed the examination; and your agency subsequently downgraded the position to the Job Service Supervisor 1 classification level ("for training purposes") and transferred Mr. Wilson into it with the intent of reclassifying the position back up to the Job Service Supervisor 2 level at a later date. I recognize that the agency defends this action as a necessary affirmative action tool. However, I also note that Ms. Pullen is a minority employe; and one of the positions she competed for was filled with a white male."

Existing Divisional policy allows agencies to downgrade positions for recruitment and training purposes. This can be a very effective management tool when it is doubtful that experienced applicants are available to fill positions at the objective level. However, we are now faced with the situation where one employe passed an exam but was neither certified nor appointed; and another employe did not pass an exam, but was eventually appointed to the position at a lower level. I cannot condone this action. This type of inequity leads me to believe that our policy must be further delineated and additional controls developed which will prevent future abuse.

Consequently, as a result of Ms. Pullen's complaint and in response to several management inquiries, a proposed policy

statement has been drafted which addresses this problem (see attached).

The Bureau of Collective Bargaining and the Bureau of Human Resources have reviewed this proposed policy and are in basic agreement with it. Additionally, a subcommittee of the Personnel Management Council has also reviewed this proposed policy. They basically agree that based upon the circumstances evident in the appointment of Mr. Wilson, this type of transaction should be prohibited.

I am aware that, unfortunately, I do not have the authority to rescind the appointment in regard to Mr. Wilson's position (i.e., the downgrade and transfer was not a clear violation of any Civil Service Statute or Administrative Code Provision), but I strongly suggest that you transfer Mr. Wilson to a Job Service Supervisor 2 vacancy at the objective level. With the proposed policy change, future downgrade actions of this type will not be allowed to happen."

3. The appellant's appeal letter, received March 12, 1979, contained in part the following:

"Talmadge Wilson has recently or will soon be reclassified to the position Job Service Supervisor for which he didn't pass the examination ... I took the exam for Job Service Specialist 3 twice and passed it. I also took the exam for Job Service Supervisor and passed it. It's for the reason that I'm requesting a hearing before the board....

* * *

As you can see, William Grenier has been made aware of what happened but chooses to do nothing. And adopting a proposed policy change does little for me at this time. Enclosed is a copy of a letter Verne Knoll sent to William Grenier ..."

4. At the prehearing conference held July 17, 1979, Ms. Pullen stated that she was appealing the appointment of Talmadge Wilson to a position for which she had competed and passed the examination, but for which Wilson had failed the examination.

CONCLUSIONS OF LAW

1. This appeal was not timely filed with respect to the transfer of Mr. Wilson to the position in question following the downgrading of its classification from Job Service Supervisor 2 to Job Service Supervisor

1. See §230.44(3), Stats. (1977).

2. This appeal can not be concluded, on this record, to have been untimely filed with respect to the reclassification of the position in question and the regrading of Mr. Wilson to the Job Service Supervisor 2 level.

OPINION

In an affidavit filed with its brief in support of its motion to dismiss, the respondent characterized appellant's statement of her appeal as follows:

" ... she was appealing the appointment of Talmadge Wilson to a position for which she had competed and passed the examination, but for which Wilson had failed the examination."

This characterization was not disputed by the appellant. Also, the appellant commenced her appeal letter as follows: "Talmadge Wilson has recently or will soon be reclassified to the position Job Service Supervisor for which he didn't pass the examination."

Respondent makes the following argument in its brief:

"In March, 1979, Pullen filed her appeal of an appointment made by DILHR in May, 1978. It is, uncontrovertible, based on Pullen's own written statement contained in her letter to Verne Knoll that she was well aware of the fact of Wilson's appointment and of the essential details surrounding it no later than the date of the letter itself, May 23, 1978. Her appeal attempting to challenge the appointment was not filed with the Commission until March 12, 1979, more than nine and one-half months later. Therefore, her appeal is untimely ..."

Based on a review of the documents submitted by the parties, it appears that there were two personnel transactions that are of concern with respect to Mr. Wilson. The first is the transfer of Mr. Wilson to the position in question following the downgrading of its classification from Job Service Supervisor 2 to Job Service Supervisor 1 "for training purposes." The second was or is the reclassification of the position and the regrading of Mr. Wilson to the Job Service Supervisor 2 level.

It is clear that the appellant had knowledge of the first transaction at an early date, and as to that transaction the appeal is untimely.

However, as to the second transaction, there is no indication that the appellant had knowledge of the date of the reclassification at the time she filed her appeal, as may be seen from the section of her appeal letter cited above. It cannot be concluded that the appeal was untimely with respect to the second transaction.

Nor can it be concluded that the appeal was solely with respect to the first transaction. The appellant did state that "she was appealing the appointment of Talmadge Wilson to a position for which she had competed and passed the examination," but there appears to have been some ambiguity as to the meaning of these terms, evidenced by the first line of the appeal letter and as indicated in appellant's brief:

"As I stated in the prehearing on July 17, 1979, I'd no prior knowledge when Talmadge Wilson was appointed permanently to any position as McGlynn implied.

I expected Grenier to respond to Knoll's letter which he never did, as far as I know." (emphasis supplied).

Based on the record to date, it can not be concluded that the appellant

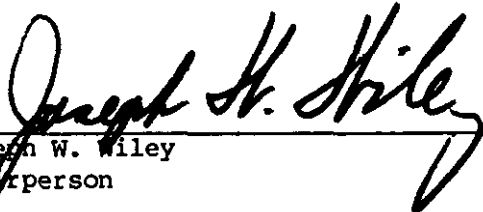
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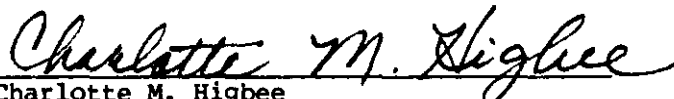
is not appealing the second transaction, and the respondent's motion at this point must be denied as to that facet of this appeal. Hopefully it may be possible to clarify the appellant's intentions at some point prior to further proceedings.

ORDER

The respondent's motion to dismiss is granted in part and denied in part and so much of this appeal as relates to the transfer of Mr. Wilson to the position in question at the Job Service Supervisor 1 level is dismissed. The Commission retains jurisdiction over so much of the appeal as relates to the reclassification of the position and the regrade of the incumbent to the Job Service Supervisor 2 level.

Dated: Sept. 14, 1979. STATE PERSONNEL COMMISSION


Joseph W. Wiley
Chairperson


Charlotte M. Higbee
Commissioner

AJT:jmg

9/8/79