

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*

PHILLIP SMITH,  
Appellant,

v.

Secretary, DEPARTMENT OF  
INDUSTRY, LABOR AND HUMAN  
RELATIONS, and Administrator,  
DIVISION OF PERSONNEL,  
Respondents.

Case No. 81-412-PC

\* \* \* \* \*

PHILLIP SMITH,  
Appellant,

v.

Secretary, DEPARTMENT OF  
INDUSTRY, LABOR AND HUMAN  
RELATIONS, and Administrator,  
DIVISION OF PERSONNEL,  
Respondents.

Case No. 83-0001-PC

\* \* \* \* \*

DECISION  
AND  
ORDER

The respondent has moved to dismiss case number 83-0001-PC for lack of jurisdiction. Appellant subsequently moved the Commission to reconsider its 1982 decision dismissing Case Number 81-412-PC on jurisdictional grounds. The parties have been provided an opportunity to file briefs. However, none of the parties have requested a jurisdictional hearing and they are therefore deemed to have waived any right they may have had to such a hearing. The following Findings of Fact appear to be undisputed.

FINDINGS OF FACT

1. In Case Number 81-412-PC, the appellant sought to have the Commission review a decision, based upon the results of an examination, not to hire the appellant as a Job Service Specialist 1 - DVOP (Disabled Veterans Outreach Program) to fill permanent positions within DILHR via an accretion process.

2. In an Interim Decision and Order dated August 5, 1982, the Commission summarized the relevant facts as follows:

[The DVOP] program had originally been staffed by DILHR LTE's, but from January, 1980 until September 30, 1981, the program functions were performed under contract with first, the Disabled American Veterans and later, with Vets House. Pursuant to a federal law enacted on October 17, 1980, then existing DVOP staff were to be appointed as DVOP specialists in "the State in which such individual is so serving, unless the Secretary for good cause shown determines that such individual is not qualified for such appointment." The appellants were all serving as DVOP staff on October 17, 1980, but subsequently failed a qualifying examination and were not designated by DILHR as position incumbents for the permanent DVOP positions in DILHR.

3. Respondent DILHR decided to utilize an existing Job Service Specialist 1 (JSS 1) exam for qualification purposes. The passing score for the qualifying exam was set at 93. Finding of Fact number 16 in the interim decision provided:

The decision to set the passing score or cut off point at 93.00 was made by DILHR. Its decision was based upon the fact that DP [Division of Personnel] had used 93.00 as the passing score when it had previously administered the exam.

4. Pursuant to the Interim Decision and Order as well as a Decision and Order dated September 23, 1982, the Commission dismissed Case Number 81-412-PC for lack of jurisdiction. The Commission specifically addressed

appellant's contention that it could review the decision to require a qualifying examination:

Nothing within its statutory authority provides the Commission with the jurisdiction to review the decision by DILHR and/or the Department of Labor (or, presumably Vet's House) to require a qualifying examination in these matters. As discussed above, the decision was not made by the administrator (§230.44(1)(a), Wis. Stats.), nor did the administrator delegate to DILHR the authority to establish minimum qualifications for the position. (§230.44(1)(b), Wis. Stats.) As noted below, the administrator's role commenced at the point that DILHR, as the prospective employing agency, identified incumbents for the permanent DVOP positions based on the results of the examination. The JSS 1 examination, as used by DILHR for determining whether individuals were "at least minimally qualified", was utilized for a purpose that is outside the state civil service procedures. Given DILHR's use of the exam as a screening device prior to any accretion decisions by the administrator, the provisions of §230.16, Wis. Stats., are inapplicable.

The Commission then went on to address the question of whether it had jurisdiction to review the administrator's decision regarding the accretion of position incumbents into state classified service. The Commission concluded that it had that authority, assuming that an appeal had been timely filed by individuals with standing to review the decision:

After results from the examination were tabulated, DILHR notified DP that thirteen individuals were designated as position incumbents for purposes of accreting them into the state classified service. Once DP received the list, it applied §230.15(1), Wis. Stats., and determined "appropriate eligibility, pay, employe benefits and status identified in §230.28 and 230.35." All thirteen of the individuals were determined by DP to be eligible for accretion.

As a general matter, the administrator's decisions as to eligibility for accretion under §230.15(1), Wis. Stats., constitute a "personnel decision of the administrator" that is appealable to the Commission pursuant to §230.44(1)(a), Wis. Stats. Therefore, someone who was identified by the prospective employing agency as a position incumbent and who was subsequently determined to be ineligible for accretion by the administrator, would have a means of obtaining review of the administrator's decisions. In this case, the evidence shows that the appellants could not even be considered for accretion by the administrator, due to the

preclusive determination of "minimal qualification" made by DILHR. Therefore, the appellants were not aggrieved by the administrators accretion decision; they did not suffer any injury as a consequence of that decision. Standing to maintain an appeal requires injury to the plaintiff or petitioner from the agency action. Wisconsin's Environmental Decade, Inc. v. PSC, (supra). The appellants in these matters lack standing to contest the administrator's accretion decisions.

5. In December of 1982, respondent DILHR informed the appellant that a (downward) adjustment had been made in the passing score for the Job Service Specialist 1 exam that had been used by DILHR for identifying position incumbents for purposes of the accretion process. Respondent DILHR alleges that in late 1982 it had learned that the current passing score for the JSS 1 exam had been set at 86 rather than 93. DILHR then offered the appellant employment in a DVOP position on an accretion basis. The appellant subsequently accepted the offer.

6. On January 4, 1983, the Commission received a letter of appeal from the appellant which stated as follows:

On behalf of Phillip Smith and pursuant to Wisconsin Statute 230.44, this is to notify you of Mr. Smith's appeal from previous decisions of the Department of Industry, Labor and Human Relations and the State Division of Personnel for refusing to hire Phillip Smith as a Job Service Specialist-1 October 1st, 1981 and further appealing decisions of both of those departments not to hire Phil Smith as a Job Service Specialist at the same seniority level he would have been at had he been hired on October 1st, 1981 together with all back pay and fringe benefits including seniority due him.

#### CONCLUSIONS OF LAW

1. The Commission lacks jurisdiction to reopen or reconsider its Interim Decision and Order dated August 5, 1982 and its (final) Decision and Order dated September 23, 1982 that were issued in Case Number 81-412-PC.

2. The Commission lacks the authority to review respondent DILHR's 1981 decision identifying position incumbents for accretion.

3. Assuming a timely appeal, the Commission has jurisdiction to review accretion decisions made by the administrator, Division of Personnel.

4. The Commission lacks the authority to review any decision of respondent DILHR that may have set appellant's seniority date or denied him back pay or fringe benefits as long as no certification of eligibles for the position occurred.

#### OPINION

##### Motion for Reconsideration

In a letter dated March 10, 1983, the appellant moved the Commission to reconsider its interim and final orders in Case Number 81-412-PC on the grounds that "an error of fact existed:"

The grounds for said motion to reconsider its decision are the facts that the State of Wisconsin has now determined that Phillip Smith, Appellant, is qualified for such employment and pursuant to the Federal mandate, the State of Wisconsin is required by law to have hired Phillip Smith the in Fall of 1981.

The sole reason that the appellant was not hired was the fact that DILHR had indicated that he failed to pass an examination. DILHR has now taken the position that the score be modified so that, in fact, Phillip Smith did pass the original examination and that based upon these new facts, the Personnel Commission ought to reconsider its decision dismissing the appeal on grounds of lack of jurisdiction and other grounds.

The appellant suggests that due to events which occurred some months after the issuance of the Commission's decision, the Commission should reopen Case Number 81-412-PC. However, the Commission has previously ruled that there is "at least a reasonable doubt as to the existence of the [Commission's] power to reopen [a] case." Elder v. DHSS, Case No. 79-PC-ER-89 (3/19/82). This conclusion was based on the absence of

Wisconsin case law and a split among other jurisdiction as to whether an agency has an inherent or implicit power to reopen a case. In Elder, the Commission denied a motion to reopen in light of State ex rel Farrell v. Schubert, 52 Wis. 7d 351, 358 (1971) which stated:

[A]ny reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority. (Citation omitted)

For the same reason as expressed in Elder, appellant's motion to reopen must be denied. If the appellant's motion is more properly referred to as a petition for rehearing (§227.12, Stats.) the Commission would lack jurisdiction to consider it in light of the 20 day filing period established in §227.12(1), Stats.

#### Motion to Dismiss

Respondent moved to dismiss Case Number 83-0001-PC for lack of jurisdiction, arguing that a new appeal of decisions made in 1981 is barred by the doctrine of res judicata as well as being untimely and that appellant's hiring in December of 1982 was not a personnel action after certification.

Based upon the briefs filed by the parties, it appears to be undisputed that sometime in December of 1982, respondent DILHR decided to change the passing score for the JSS 1 exam that it had used in qualifying Vet's House personnel as position incumbents for possible accretion into state classified service. The administrator's role in the accretion process is set out in §230.15(1), Stats.

When the state becomes responsible for a function previously administered by another governmental agency, a quasi-public, or a private enterprise, or when positions in the unclassified service, excluding employees of the legislature, are

determined to be more appropriately included in the classified service, the administrator shall determine appropriate eligibility, pay, employe benefits and status identified in §§230.28 and 230.35.

DILHR's use of the JSS 1 exam and setting (or changing) any passing scores for that exam were clearly decisions made prior to accretion. Any such decisions are, pursuant to the Commission's rulings in Case Number 81-412-PC outside of the Commission's jurisdiction. However, in order for the appellant to have been accreted into state service in late 1982 or early 1983, the administrator had to have made the determinations required by §230.15(1), Stats. Those determinations are appealable to the Commission as personnel decisions of the administrator. (§230.44(1)(a), Stats. Because the subject of the appeal is the administrator's 1982 (or 1983) decision rather than the 1981 decision, the doctrine of res judicata is inapplicable.

To the extent the seniority, back pay, and fringe benefit decisions relating to the accretion of the appellant into state service fall within the scope of §230.15(1), Stats., they are reviewable by the Commission. However, to the extent that those determinations may have been made by respondent DILHR and do not qualify as personnel decisions after certification for the position, they are not reviewable under §230.44, Stats.

For the reasons outlined above, the administrator is the only appropriate party respondent in Case Number 83-0001-PC and that case may be dismissed as to DILHR.

ORDER

Appellant's motion to reconsider Case Number 81-412-PC is denied.  
Respondent's motion to dismiss Case Number 83-0001-PC is granted as to  
respondent DILHR but denied as to respondent Administrator, Division of  
Personnel.

Dated: June 9, 1983 STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Chairperson

KMS:jmf

  
LAURIE R. McCALLUM, Commissioner

Parties:

Phillip Smith  
c/o Attorney Michael S. Siddall  
301 N. Lynndale Drive  
Appleton, WI 54911

Howard Bellman, Secretary  
DILHR  
P. O. Box 7946  
Madison, WI 53707

Glen Blahnik, Acting Administrator  
DP  
P. O. Box 7855  
Madison, WI 53707