

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 WILLIAM A. HEBERT, *
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 Appellant, *
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 v. *
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 Secretary, DEPARTMENT OF *
 HEALTH AND SOCIAL SERVICES, *
 *
 Respondent. *
 *
 Case No. 84-0233-PC *
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INTERIM
 DECISION
 AND
 ORDER

This matter is before the Commission on the respondent's jurisdictional objection. See, prehearing conference report dated January 14, 1984: "The department objected to jurisdiction on the grounds that it was a probationary termination and that any appeal with respect to the interview/hiring process was untimely." Both parties have submitted briefs.

In the brief filed by appellant's attorney, it is not argued that the Commission has jurisdiction over the termination of the appellant's probationary employment,¹ and therefore, the Commission will not address this aspect of the jurisdictional objection.

¹The Court of Appeals held that the Commission lacks such jurisdiction in Board of Regents v. Wis. Pers. Commission, 103 Wis. 2d 545, 309 N.W. 2d 366 (1981).

The appellant in his brief alleges that on or about September 12, 1984, certain agents of respondent interviewed him for an Institution Aide 5 position, but failed to inform him that he would be required, as part of his training for said position, to undergo exposure to the chemical MACE,² even though he had told them he had a severe case of asthma.

He further alleges that after accepting an appointment, he learned during the week of October 22, 1984, that there was a chemical exposure requirement, but was told it would not have an adverse effect on an asthmatic. He alleges that on or about November 6, 1984, he was told by a nurse-instructor that MACE could have an adverse effect on an asthmatic, but that he also was told by another agent that he could be excused from taking the chemical exposure test. He alleges that on November 9, 1984, yet another agent of respondent was insistent that the appellant proceed with the MACE exposure, and he did so and suffered an adverse physical reaction. He finally alleges that he was forced to resign in lieu of termination for failure to have successfully completed the chemical exposure test, effective November 16, 1984.

The appellant's letter of appeal was received by the Commission on November 24, 1984.

²He also alleges he was not told of this requirement in a conversation with another agent concerning this position that occurred prior to this interview.

Section 230.44(3), Wis. Stats., provides, as relevant, as follows:

"Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later ..."

The respondent's brief contains the following argument:

"The second [jurisdictional] objection dealt with Mr. Hebert's claim that an error occurred during the interview process. The interview occurred on September 24, 1984 per Mr. Hebert's appeal letter. He received notice of that action because he was there on September 24, 1984. Therefore, any appeal of that action would have had to occur within 30 days of that date ..."

In this case, the subject matter of the appeal concerns the respondent's alleged failure to have informed the appellant before his appointment that the training program required exposure to MACE. In analyzing the date of notice in the context of the time limit for appeals set forth in §230.44(3), Wis. Stats., due consideration must be given to the fact that an alleged omission is being appealed.

Under the circumstances alleged, it appears that any notice of the omission to the appellant at the time of the interview was only in the technical or abstract sense -- i.e., the appellant knew what he was told and therefore, by implication knew what he was not told -- everything else. It does not follow that he had actual knowledge of the specific omission - failure to inform of the MACE exposure requirement.

In Illinois Central R. Co. v. Blaka, 3 Wis. 2d 638, 646 N.W. (1958), the Court held:

"It is a general rule of law sustained by the authority of many cases that whatever fairly puts a person on inquiry with respect to an existing fact is sufficient notice of that fact if the means of knowledge are at hand. If under such circumstances one omits to inquire, he is then chargeable with all the facts which by proper inquiry, he might have ascertained ..." (citations omitted)

In the instant case, where the subject matter of the appeal involves an alleged omission, or failure to inform, and where there is nothing to suggest that the appellant would or should have had knowledge of the specific omission at the time it occurred, other than in the extremely artificial sense discussed above, he cannot be charged with "notice" of the omission at the time it occurred.

The appellant alleges that he first learned of the MACE exposure requirement the week of October 22, 1984, but that in response to his inquiry, the instructor told him that exposure would not result in an adverse effect on an asthmatic. He further alleges that when he was informed to the contrary, he sought and obtained a waiver of the required exposure, which waiver subsequently was rescinded. He argues that this would give rise to an equitable estoppel since he was lulled into the belief that he would not have to appeal because of the apparent waiver.

In the Commission's view, these allegations and arguments are sufficient to permit the appeal to survive an objection to subject matter jurisdiction. There also is a sufficient allegation of an abuse of discretion in post-certification personnel action related to the hiring process in the classified service, cognizable under §230.44(1)(d), Wis. Stats., to survive the outstanding jurisdictional objection.

At this point in the proceeding, there are a number of facts relating to jurisdiction which appear to be unresolved. Since the Commission concludes that at least facially the appellant's allegations can survive the respondent's jurisdictional objection, and the Commission is aware of a pending companion complaint of discrimination under the Fair Employment Act, Case No. 84-0193-PC-ER, it tentatively would appear appropriate to overrule the

respondent's jurisdictional objection without prejudice, in the anticipation that these matters would be consolidated and that evidence could be taken on the material jurisdictional aspects of this appeal as part of the overall hearing.³

ORDER

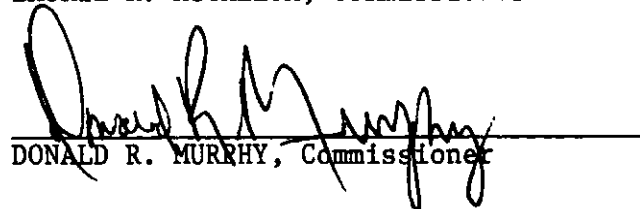
The appellant's objection to subject matter jurisdiction is sustained to the extent it relates to the appeal of a probationary termination, and otherwise is overruled without prejudice to renewal on the basis of any material facts that may be developed in further proceedings.

Dated: April 12, 1985

STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


LAURIE R. MCCALLUM, Commissioner


DONALD R. MURPHY, Commissioner

AJT:jgf
JGFO02/2

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³This approach is tentative and subject to future circumstances and the parties' input.