



STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *
 DAVID WING,
 Appellant,
 v.
 Secretary, DEPARTMENT OF
 PUBLIC INSTRUCTION and
 Secretary, DEPARTMENT OF
 EMPLOYMENT RELATIONS,
 Respondents.
 Case No. 85-0013-PC
 * * * * *

INTERIM
 DECISION
 AND
 ORDER

This matter is before the Commission on the respondents' motions to dismiss for lack of subject matter jurisdiction. The Commission has considered the parties' written arguments.

In order to resolve these motions, the Commission first must scrutinize the appellant's factual allegations. Pursuant to an agreement reached at the prehearing conference, Mr. Wing filed on April 18, 1985, an "amended appeal setting forth with specificity the facts of the transaction appealed."

In summary, Mr. Wing alleges in this document that the July 18, 1984, Current Opportunities Bulletin (COB) announced a vacant position at the Department of Public Instruction (DPI), with instructions to submit an application form to Cheryl Anderson, an employe of the Division of Merit Recruitment and Selection (DMRS), Department of Employment Relations (DER) by August 2, 1984. He alleges that he did so.

Mr. Wing further alleges that on August 7, 1984, he met with Sanford Cogas of DER to discuss "settlement of all outstanding differences." He

further alleges that at Mr. Cogas's request, he identified several vacant positions, including the aforesaid DPI position, as part of a possible settlement.

Mr. Wing further alleges that in mid-August 1984, he telephoned Ms. Anderson, and among other things, identified his application as a transfer and/or settlement possibility, referring to his discussions with Mr. Cogas. Mr. Wing also alleges he also sent her certain confirming correspondence thereafter. He further states that in mid-January 1985, he again contacted Ms. Anderson regarding the status of his application, and was referred directly to DPI personnel. He then states he contacted DPI personnel and was told to submit a resume, which he did. Thereafter, he says he was told on or about January 17, 1985, by Mr. Jeff Geisler of DPI that he would not be considered for the vacancy, citing DER's failure to have certified him.

Mr. Wing then states he contacted Ms. Anderson, who told him that Mr. Cogas had told her, following the communications between her and Mr. Wing the previous August, that he (Mr. Cogas) would take care of Mr. Wing's application, and thus she had not taken any additional action.

The respondents in their briefs and in certain attached affidavits, make a number of factual allegations, and are disputed. However, at this stage of the proceeding, the extent of the Commission's inquiry is to determine whether the appellant's allegations, assuming they can be proven, give rise to an appeal over which the Commission has jurisdiction.

Section 230.44(1)(c), Stats., provides for an appeal to the Commission of "a personnel decision under this subchapter made by the administrator [of DMRS]...." In the administrator's brief it is argued that no such decision was made in this case. However, §ER-Pers 12.02(3), Wis. Adm. Code, provides:

The administrator may submit the names of persons interested in transfer, reinstatement or voluntary demotion along with a certification or, at the request of the appointing authority, in lieu of a certification.

Essentially what the appellant appears to be arguing with respect to DMRS is that the administrator failed or refused to submit his name to DPI in accordance with this rule in connection with the vacancy in question. Such a failure or refusal is appealable under §230.44(1)(a), Stats. An opposite conclusion would mean that the appeal rights of an employe whose interests were damaged would depend on whether the administrator made an enunciated decision to withhold or deny something, or merely permitted the same thing to occur through a period of inaction.

With respect to DPI, §230.44(1)(d), Stats. provides:

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 to the Commission.

DPI received notice of Mr. Wing's interest in this position after the agency had received a certification for it but before an appointment had been made. However, DPI cites Anderson v. DOATCP, Wis. Pers. Commn. No. 80-175-PC (4/9/81) for the proposition that "... in an appeal under §230.44(1)(d), Stats., a conclusion of illegality or abuse of discretion ought at least to be arguable." The respondent then argues, based on its statement of the facts, there is not even an arguable abuse of discretion. In summary, DPI asserts that it did not interview Mr. Wing because at the time it became aware of his interest in the job, it had reached a decision internally as to whom to offer the position.

The Anderson case involved a situation where the action appealed, the failure to release certain individuals from probation at certain times, was compelled by a mandatory provision of the civil service code. There simply

was no possible argument that could have been made that management had acted illegally or abused its discretion. This is not the case here. DPI's argument comes down to an assertion that, based on the facts it presents, it is clear that its exercise of discretion was not abusive. Such a contention is not appropriate on a motion to dismiss for lack of subject matter jurisdiction, particularly where not all the relevant facts are undisputed. Mr. Wing's appeal does meet the jurisdictional requirements of §230.44(1)(d), Stats., as to DPI, and that agency's arguments concerning the exercise of its discretion can and should be considered in connection with a hearing on the merits.

ORDER

Respondents' motions to dismiss for lack of subject matter jurisdiction are denied.

Dated: September 20, 1985 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner

AJT:jmf
ID5/1

Note: Laurie R. McCallum, Commissioner, did not participate in this decision.

Parties:

David Wing
RPS 307A
UW-Stout
Menomonie, WI 54751

Herbert Grover
Superintendent, DPI
P. O. Box 7841
Madison, WI 53707

Howard Fuller
Secretary, DER
P. O. Box 7855
Madison, WI 53707