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DAVID WING

Appellant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES
and Administrator, DIVISION
OF MERIT RECRUITMENT AND
SELECTION,

Respondents.

Case No. 85-0232-PC

* * * * *

DECISION
AND
ORDER

This matter is before the Commission on respondent DMRS's motion to dismiss for lack of subject matter jurisdiction on the grounds of untimely filing and the ground that "... no personnel decision was made by the Administrator of DMRS within the meaning of s. 230.44(1)(c), Stats., or under the Wisconsin Administrative Code." Letter from DMRS counsel to commission dated November 25, 1986. The parties have briefed this motion. The parties are in agreement that DHSS may be dismissed as a party-respondent. The factual background of this case as it relates to this motion is as follows.

By a letter dated November 20, 1985, received by the Commission on November 29, 1985, Mr. Wing requested that the Commission "...consider my memo 9/19/85 to be an appeal." That memo, which had been received on September 25, 1985, contained in part, the following:

"...today I received the attached letter from Mr. Dale Bruhn, part of my investigation as to other failures by DER to forward my application for reinstatement to appointing authorities...."

The attached letter was a copy of a letter to Mr. Wing from Dale Bruhn, Director, Bureau of Recruitment and Examination Services, DMRS, dated

September 17, 1985, as follows:

In response to your phone call of September 16, 1985, I checked with the Staffing Specialist who handles the Administrative Assistant classes. She does not recall receiving anything from you. She also checked our files and could not find any application material from you. She also pointed out that our procedure in processing applications for examination and certification is very precise and if an application is received by us it can be traced.

Not finding it in our files indicates one of two things, either we never received any application from you or if we did it was sent to the agency at the time of certification of eligibles. Since the Department of Health and Social Services did not receive anything, we can only conclude that we never received anything from you.

By a letter dated December 3, 1985, Commission staff responded to Mr.

Wing's letter of November 20, 1985, in part as follows:

"I have reviewed the documents you submitted. It appears that the only decision that you want reviewed is the same decision that is the subject of the Wing v. DPI & DER, Case No. 85-0013-PC [this case involved a vacancy at DPI].

If my understanding is incorrect, please indicate in writing both the decision(s) you seek to have reviewed and how they differ from the subject matter in 85-0013-PC...."

Mr. Wing responded by a letter dated December 5, 1985, received December 11, 1985. This letter included the following statement:

"I have not fully completed by investigation as of this date due [sic] continuing health problems thus I can not fully respond to your 12/3/85 request.

The only facts I do know is that DER (DMRS) did not forward my application again to H&SS and that H&SS did not require testing for reinstatements, all according to Mr. Rich Berg H&SS personnel...."

Following a prehearing conference where Mr. Wing agreed to provide additional information about the transaction and to identify more specifically the position in question within DMRS, Mr. Wing submitted copies of certain documents under cover of a letter dated July 11, 1986. These included:

- 1) A current opportunities bulletin which identified the position as an Administrative Assistant 5 (AA5) in the Division of Community Services, with an application deadline of March 21, 1985, and a tenta-

tive examination date of April 13, 1985;

2) A completed application form which Mr. Wing dated March 8, 1985;

3) A memo from Mr. Wing to "whom it may concern" dated March 8, 1985, forwarding the application and calling attention to his reinstatement eligibility. There is a note on the bottom written by Mr. Wing which states: "5/30/85 Call Bev Lawton today questioning status. She said wait and see. Raters still very busy scoring test results..." and the name and phone number of Mr. Rick Berg;

4) A June 10, 1985, memo from Mr. Wing to Rick Berg, which includes the following:

"Thanks for your help in my quest for reinstatement. I believe DER's failure to forward my applicant materials to be another effort to impede my rights.

I have enclosed per your request both my resume and settlement agreement."

5) Mr. Wing's notes of a telephone conversation with Mr. Berg, no date indicated.

Pursuant to §230.44(3), stats., appeals may not be heard unless they are filed within 30 days of the effective date of the action or within 30 days after receipt of notice, whichever is later. Because of this "may not be heard" language this time limit has been held to be mandatory and jurisdictional in nature. Richter v. DP, Wis. Pers. Comm. No. 78-261-PC (1/30/79); State of Wisconsin ex rel DOA v. Personnel Board, #149-295 (Dane Co. Cir. Ct. 1976).

The documents submitted by the complainant establish that he was aware in June 1985 of DER's failure to have forwarded his application to DHSS. His memo of June 10, 1985, to Mr. Berg states unequivocally:

"I believe DER's failure to forward my applicant materials to be another effort to impede my rights...." (emphasis in original).

Mr. Wing states in his brief dated December 16, 1986:

"I was to the best of my ability trying to determine again if DMRS had impeded my efforts to be reinstated and obtain an opportunity for a satisfying career and fair treatment as per state policy and statutes, 230.01(2).

I did determine the employing agency did not receive my application from DMRS.

The issue(s) for said case.

1) What I needed to determine was did DMRS again claim not to receive my application and why again did they fail or refuse to forward my application (note this is the 3rd time DMRS impeded my efforts to secure other state employment, am I blacklisted?) On 9/16/85 I wrote to Mr. Bruhn again asking questions as to my rights.

* * *

I did timely file a [sic] appeal, within 30 days after notice from DMRS, not the receiving agency that they failed or refused to again forward my application for employment. See Dale Bruhn 9/17/85 letter.... (emphasis is in original).

Mr. Wing had formed the belief as of June 10, 1985, that DMRS had not forwarded his materials to DHSS. At least as of then his time for appeal began to run. That he wrote to DMRS some three months later, on September 16, 1985, to inquire about his rights and apparently to ascertain whether DMRS claimed not to have received his materials in the first instance does not alter this conclusion.

Since the Commission determines this appeal was not timely filed, it does not reach the second ground for respondent's motion.

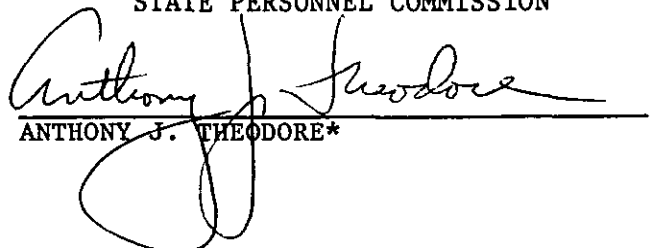
ORDER

This appeal is dismissed as untimely filed. Respondent DHSS is dismissed as a party respondent pursuant to the parties' stipulation.

Dated: March 9, 1987

STATE PERSONNEL COMMISSION

JGF002/1
AJT:baj


ANTHONY J. THEODORE*

Parties

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*Appointed as hearing examiner with authority to make a final decision pursuant to §227.46(3)(a), stats.