

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 \*  
 PETER GRANT CLEVELAND, M.D., \*  
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 Appellant, \*  
 \*  
 v. \*  
 \*  
 Secretary, DEPARTMENT OF \*  
 HEALTH AND SOCIAL SERVICES, \*  
 \*  
 Respondent. \*  
 \*  
 Case Nos. 86-0133, 0151, \*  
 & 0152-PC \*  
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DECISION  
AND  
ORDER

These matters are before the Commission on the respondent's motion to dismiss for lack of subject matter jurisdiction. The parties have been provided an opportunity to file briefs. The facts are set out below for purposes of this decision only and are not determinative for purposes of any future proceedings.

FINDINGS OF FACT

1. At all times relevant to these matters, the appellant has been employed by respondent's Division of Health, Bureau of Correctional Health Services as a physician.

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2. Prior to December 16, 1985, the appellant first sought assignment to a part-time position at Columbia Correctional Institution (CCI).

3. Another person was assigned to the part-time CCI position.

4. On or about February 14, 1986, the appellant filed a first-step non-contractual grievance relating to his non-assignment to the CCI position.

5. On June 17, 1986, the Commission received the fourth step of the appellant's non-contractual grievance relating to his non-assignment to the CCI position. The grievance stated:

I have applied for the part-time position at Columbia Correctional Institution. This position has been filled by a physician with less seniority. Copy of letter announcing appointment enclosed.

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6. Prior to October 11, 1985, the appellant applied for the position of Medical Services Director/Physician - Supervisor (hereafter referred to as the Medical Services Director position) for the Bureau of Correctional Health Services (BCHS).

7. On or about May 5, 1986, the appellant was informed he was not appointed to the Medical Services Director position.

8. On or about May 14, 1986, the appellant filed a first-step non-contractual grievance relating to his non-appointment to the Medical Services Director position.

9. On August 6, 1986, the Commission received the fourth step of the appellant's non-contractual grievance relating to his non-appointment to the Medical Services Director position. That grievance states:

I have applied for the position of medical director of the Bureau of Correctional Health Services, passed the tests and completed my interview in November of 1985. I have received no communication since. On May 5, 1986, Barbara Whitmore told the meeting of B.C.H.S. physicians that the medical directorship was offered to each of the three M.D. applicants who declined in turn and that Katy Morrison disqualified the two remaining candidates one of who is myself. This is prejudice. This is violation of personnel policy and procedure. This is harassment.

10. On December 17, 1986, an announcement was made by BCHS that the position of Medical Director had been "sacrificed" as a cost-cutting measure.

11. Early in 1987, BCHS contracted with a Dr. Ostrov, to assume the duties of Medical Director.

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12. In December of 1985 or January of 1986, the appellant was reassigned from his position at Dodge Correctional Institute (DCI) to Waupun Correctional Institute (WCI) on a half-time basis.

13. On or about May 5, 1986, appellant was informed that another person (Dr. Wilson-Atkins) was being appointed to a full-time position at DCI while the appellant was reassigned to a full-time position at WCI.

14. On or about June 12, 1986, the appellant filed first-step non-contractual grievance relating to his non-assignment to the full-time position at DCI.

15. On August 6, 1986, the Commission received the fourth step of the appellant's non-contractual grievance relating to his non-assignment to the full-time position at DCI. The grievance stated:

Apparently because of budget cuts D.C.I. and W.C.I. are approved for full-time M.D. positions. I have in writing that I can work full-time only at W.C.I. and have been reassigned to S.C.I. I have been denied the opportunity to work full-time at D.C.I. where I worked for more than four years.

It is now clear that my transfer from D.C.I. in January, 1986, was for the purpose of employment discrimination and harassment.

If Dr. Wilson-Atkins can not work at W.C.I. there is discrimination on the basis of gender.

CONCLUSION OF LAW

The Commission lacks subject matter jurisdiction over these grievances.

OPINION

These matters are before the Commission at the fourth step of the non-contractual grievance procedure and all arise from decisions not to appoint or assign the appellant to various positions.

The Commission's jurisdiction to hear fourth-step grievances is premised on §230.45(1)(c), Stats., which provides:

(1) The Commission shall:

\* \* \*

(c) Serve as final step arbiter in a state employe grievance procedure relating to conditions of employment, subject to rules of the secretary providing the minimum requirements and scope of such grievance procedure.

Among the various rules adopted by the Secretary of the Department of Employment Relations are the following:

ER 46.03(2) An employe may not use this chapter to grieve:

\* \* \*

(d) A personnel action after certification which is related to the hiring process;

\* \* \*

(j) A condition of employment which is a right of the employer as defined in §ER 46.04.

ER 46.04(2) For the purpose of this chapter, the management rights of the employer include, but are not limited to, the following:

(a) Utilizing personnel, methods and means to carry out the statutory mandate and goals of the agency.

\* \* \*

(c) Managing and directing the employes of the agency.

(d) Hiring, promoting, transferring, assigning or retaining employes.

To the extent these grievances relate to non-selection decisions, the Commission's authority is preempted by §ER 46.03(2), Wis. Adm. Code. That rule compares with §230.44(1)(d), Stats., which grants the Commission the authority to hear appeals taken from 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." Non-selection decisions occurring after the point in the selection process of obtaining a

group of eligible applicants (Wing v. DER, 84-0084-PC, 4/3/85) may be appealed directly to the Commission pursuant to §230.44(1)(d), Stats., as long as 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." §230.44(3), Stats. The time limit for filing such an appeal is jurisdictional and is not tolled by the employee's pursuit of a non-contractual grievance. Hagen v. Weaver, 76-49, 12/21/76 (Personnel Board).

The present cases are all untimely as appeals because they were filed more than 30 days after the day of notice or the effective date.

In addition, to the extent the appellant may be seeking to grieve a transfer decision or an assignment of duties, his grievances are preempted by §ER 46.04(2)(d), Wis. Adm. Code.

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In his brief, filed on June 16, 1987, appellant first made reference to events occurring after he filed his grievance and relating to the Medical Director post. His brief refers to the December 12, 1986 announcement that the position was not going to be filled via a civil service appointment, and to the "early 1987" contract with Dr. Ostrov to assume the medical director duties. Appellant argues:

III The position of Physician-Supervisor remained open and recruiting continued (see 7/23/86 entry) until the position was "sacrificed" as a cost cutting measure about 12/12/86. DHSS circumvented the hiring freeze to enlarge the bureaucracy and to discriminate against Dr. Cleveland by contracting the position of Physician-Supervisor to someone with no experience in the corrections field. The premeditated circumvention of established hiring processes and of higher authority mandates (budget reductions) to discriminate against a more qualified employee is not an appropriate personnel action after certification, outside the review of the Personnel Commission. The Personnel Commission has jurisdiction to consider these facts in context with others and hear Dr. Cleveland's appeals.

To the extent that the Commission would have any authority to review these actions, any appeal now would be untimely under §230.44(3), Stats., which requires that appeals be filed within 30 days.

Case 86-0152-PC

In his fourth-step grievance, that has been assigned Case No. 86-0152-PC, the appellant contends that his January 1986 transfer was "for the purpose of employment discrimination." In his brief, the appellant also refers to both age and sex discrimination. Therefore, the Commission will assign a separate case number to the grievance form as to those allegations of discrimination under the Fair Employment Act. The claim under the Fair Employment Act will be unaffected by the dismissal of the pending appeals.

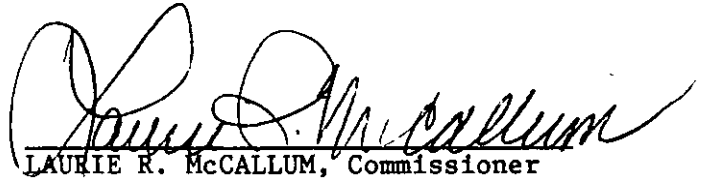
ORDER

These matters are dismissed for lack of subject matter jurisdiction.

Dated: July 8, 1987 STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

KMS:jmf  
JGF004/2

  
LAURIE R. MCCALLUM, Commissioner

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