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JEFFREY H. ALLEN, *

Appellant, *

v. *

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

Respondents. *

Case No. 87-0148-PC *

* * * * *

DECISION
 AND
 ORDER

This matter is before the Commission on respondent's motion, which asserts appellant's appeal in the captioned case was not filed within the statutorily set time limits. The following findings, conclusions, discussion and order are based upon evidence presented at a hearing on respondent's motion.

FINDINGS OF FACT

1. In May, 1987 appellant, after passing a Division of Merit Recruitment and Selection (DMRS) servicewide promotional examination for Fiscal Supervisor 1 positions, was placed on its employment register of eligible candidates for Fiscal Supervisor (Fisc. Sup.) 1 positions.

2. Respondent DHSS used DMRS's Fisc. Sup. 1 register to fill a Fiscal Supervisor 1 vacancy in its Division of Community Services.

3. Appellant was certified and interviewed by respondent for the vacant supervisor position.

4. On July 21, 1987, Peter Gehrke, chief of respondent's Financial Management Section, wrote his bureau director and division administrator

and advised them of the completion of the interviews, the ranking of the top three candidates, and his recommendation for the position. Appellant was not listed as one of the top three candidates.

5. Gehrke's recommendation to his supervisors was received, reviewed, approved and returned to him on the same day: July 21, 1987.

6. Upon approval of his recommendation for the Fisc. Sup. 1 position, Gehrke called the successful candidate to offer the position. The successful candidate did not immediately accept the offer but asked for a brief time to consider it.

7. On July 23, 1987, the successful candidate accepted the offer. Gehrke drafted a letter of confirmation, which was finalized, typed and signed on July 24, 1987.

8. Between July 23rd and 24th and prior to signing the letter confirming the offer and acceptance of the position, Gehrke telephoned the unsuccessful candidates, including appellant, and informed them of the outcome of respondent's search to fill the vacant position.

9. Appellant filed an appeal with the Commission on August 25, 1987 in which he said he wished to appeal the examination and selection process for respondent's Fiscal Supervisor 1 position.

10. A prehearing conference was held on September 29, 1987 before Commissioner Laurie R. McCallum. In attendance were the appellant, a representative for DHSS and a representative for DMRS/DER.

11. At the prehearing conference, during discussion on jurisdiction, appellant said he received notice of the selection for the position through a telephone conversation with Peter Gehrke. At the hearing appellant testified this telephone conversation occurred during the last week of July, 1987, because he recalled a conversation about the call with fellow

candidate Jim Otterson, shortly afterwards, and he left town on August 3, 1987.

12. Commissioner McCallum testified that appellant stated, during the discussion on jurisdiction at the prehearing conference, that he wrote his appeal letter thirty days after Gehrke told him he had not been selected for the position, and the Commission so finds.

CONCLUSIONS OF LAW

1. Appellant has the burden of proof with respect to the issue of jurisdiction.
2. Appellant has failed to sustain his burden of proving his appeal was timely filed.
3. Appellant's appeal was not timely filed.
4. The Commission lacks jurisdiction over this matter.

DISCUSSION

This matter initially came before the Commission on appellant's appeal of the examination and selection process for respondent's vacant Fisc. Sup. 1 position in its Bureau of Management and Budget. At the prehearing conference held September 29, 1987, respondent objected to the Commission's jurisdiction. Subsequently, on October 23, 1987, as scheduled, respondent filed a motion to dismiss, which claimed appellant had not timely filed his appeal and he had no standing to be heard by the Commission. After completion of the motion and briefing schedule, on February 12, 1988, the Commission issued an Interim Decision and Order.

The Commission denied respondent's motion to dismiss for lack of standing; granted, in part, its motion regarding timeliness of appellant's appeal; but reserved decision, pending hearing, on the timeliness issue regarding the selection process. Accordingly, the specific question before

the Commission in this present matter is: Whether appellant filed his appeal, challenging respondent's selection process of its vacant Fisc. Sup. 1 position, within the 30-day time requirement provided in s. PC 3.01, Wis. Adm. Code.

The Commission has long held that the burden of proof as to jurisdiction is with the parties seeking relief. Van Laanen v. Wettengel, Wis. Pers. Bd. 79-17 (1/2/75); Lawry v. Div. Per., 79-26-PC (7/30/79). This view is consistent with Wisconsin case law, which holds that the burden of proof is upon the party asserting jurisdiction. Afram v. Balfour, Maclaine, Inc., 63 Wis. 2d 702 (1974), Elm Park Iowa, Inc. v. Denniston, 92 Wis. 2d 723 (1979); Doe v. Ellis, 103 Wis. 2d 581 (1981). In the present matter, appellant has the burden of establishing the Commission's jurisdiction.

It is the opinion of the Commission that the more credible evidence favors the respondent. Appellant's testimony regarding the date he received notice that he had not been chosen for the position was not clear. Also appellant failed to produce corroborating evidence supporting his claim, although he testified to a conversation about the notice with another candidate shortly after he received it.

In contrast, respondent presented more precise testimony regarding when it informed appellant he was not chosen for the position. In addition, this testimony was supported by documentation. Finally, respondent presented testimony, although contradicted by appellant, that appellant at the prehearing conference stated he wrote his appeal letter thirty days after he received notice of his non-selection.

For the reasons stated and based on the record, the Commission concludes that appellant received notice of his non-selection no later than

July 24, 1987, and that he failed to file his appeal within the 30-day time requirement.¹

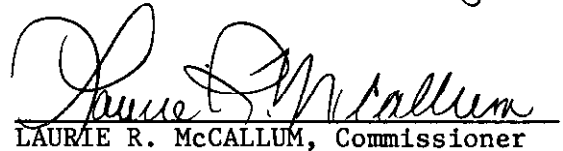
ORDER

This appeal is dismissed for lack of subject matter jurisdiction.

Dated: August 10, 1988 STATE PERSONNEL COMMISSION

DRM:rcr
DPM/3


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner

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¹ Pursuant to s. 15.06(6), Stats., a majority of the Commissioners constitutes a quorum. In this case, only one commissioner voted on the matter. The undersigned Commissioner Murphy voted to dismiss. Commissioner McCallum abstained because of her role as a witness in the proceedings. The position of the third Personnel Commissioner is currently vacant. Therefore, the appellant, who had the burden of proof, failed to obtain a majority (two) of the quorum (two), so the appellant's assertion of jurisdiction must fail and the case must be dismissed.