

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 \*  
 JEFFREY H. ALLEN, \*  
 \*  
                   Appellant, \*  
 \*  
 v. \*  
 \*  
 Secretary, DEPARTMENT OF \*  
 HEALTH AND SOCIAL SERVICES, \*  
 and Administrator, DIVISION OF \*  
 MERIT RECRUITMENT & SELECTION, \*  
 \*  
                   Respondents. \*  
 \*  
 Case No. 88-0020-PC \*  
 \*  
 \* \* \* \* \*

INTERIM  
 DECISION  
 AND  
 ORDER

This matter is before the Commission to address a member of procedural and jurisdictional issues raised by respondents. All parties have filed briefs. The following findings appear to be undisputed and are made solely for the purpose of resolving these issues.

FINDINGS OF FACT

1. In January 1987, a servicewide Promotional Announcement was issued for a Fiscal Supervisor 1 position at the Department of Transportation. The announcement stated: "The register established from this recruitment may be used to fill similar positions in other agencies during the next 6 to 12 months."

2. An examination for the announced position was administered by DMRS and a register was established on or about March 6, 1987. Appellant took said exam, received a score of 99.43 and was ranked number 1 on the register. Notice of examination results were mailed to all who took the exam on May 7, 1987. Appellant received his notice in the mail a few days later.

3. Respondent Department of Health and Social Services (DHSS) subsequently used said register to fill an Administrative Assistant 5 (AA 5) - Supervisor (Finance Manager) vacancy in its Badger State Industries. Appellant was certified for this position, was interviewed on December 4, 1987, and not selected.

4. On February 25, 1988, appellant filed this appeal which stated in substance:

I wish to appeal the non-selection decision by the Division of Corrections, Badger State Industries (DHSS) and the use of the examination (certification) for Fiscal Supervisor 1.

#### DISCUSSION

It is important to note at the outset that this case is related to another, similar, appeal (87-0148-PC) appellant filed in connection with an earlier nonselection decision that utilized the same register for a different vacancy within DHSS. In an interim decision entered in that case on February 12, 1988, the Commission held, in summary, that that appeal was "untimely to the extent it challenges exam content and administration per se pursuant to §230.44(10)(a), Stats." The Commission went on to note that although the exam was not a cognizable transaction per se, evidence concerning the exam might be relevant to appellant's §230.44(1)(d), Stats., appeal of his non-appointment with respect to his contention that "the exam was repeated as part of a deliberate attempt by respondents to facilitate the appointment of a pre-selected candidate." The Commission also held that appellant had standing with respect to the §230.44(1)(d), Stats., appeal.

In this case, the Commission's conclusions and bases therefore parallel those set forth in Case No. 87-0248-PC in the decision entered on February 12, 1988. This appeal is clearly untimely pursuant to §230.44(3),

Stats., as an appeal of the exam per se pursuant to §230.44(1)(a), Stats., because appellant had notice of the content of the exam and of his score not later than May 1987, and the appeal was not filed until February 1988, more than 30 days later. Respondent DMRS also argues that appellant lacks standing to challenge the exam, but again, the Commission sees no need to address this issue, having concluded that it has no jurisdiction over this aspect of the appeal due to untimeliness.

Respondent DHSS also argues that "Appellant cannot challenge the decision of the Respondent DHSS to request certification from the FS 1 register or a related register or the decision of the Respondent DMRS to approve such a request..." due to untimeliness and lack of standing. Since appellant knew no later than December 4, 1987, when he was interviewed, that the FS 1 register was being used to fill the AA 5 position in Badger State Industries, his appeal filed on February 25, 1988, was untimely to appeal the decisions to request or use the register for this position. However, evidence relating to these decisions that is relevant to the issue raised by the §230.44(1)(d), Stats., appeal of the nonselection, would be admissible in the hearing of that appeal.

The prehearing conference report dated March 30, 1988, reflects the parties stipulated to one issue, the examiner proposed a second issue to which respondents objected, and each respondent proposed a second issue.

At this point in this proceeding, the Commission will adopt the issue agreed to by the parties as the sole issue for hearing, to wit:

Whether the non-selection of appellant for the position of Finance Director for Badger State Industries was illegal or an abuse of discretion?

The Commission will not adopt the examiner's proposed second issue, because, in the Commission's opinion, it reflects more of an evidentiary

ruling rather than an issue per se. The examiner proposed the following statement of issue:

2. Whether or not any part of the examination procedure, including the examination and use of the register, was evidence of any illegality or a base [sic] of discretion regarding the non-selection of the appellant for the disputed position and/or evidence of an attempt to appoint a "pre-selected" candidate.

As a general proposition, the Commission is required to admit all evidence "having reasonably probative value, but still exclude immaterial, irrelevant or unduly repetitious testimony...." §227.45(1), Stats. If any part of the examination procedure is reasonably probative with respect to appellant's allegation of illegality and abuse of discretion with respect to his non-selection, it presumably should be admitted. For example, if appellant had evidence that tended to show that a question on the exam had been repeated from a previous exam as part of an effort to give an advantage to a candidate that had taken the earlier exam and that management allegedly had pre-selected for the vacancy in question, there is no reason why it should not be admitted, notwithstanding that the examination itself was not before the Commission as a separately cognizable transaction.

Since the Commission has concluded that any appeal of the exam per se is untimely and that there is no separate appeal of the use of the related register, there is no need to consider the second issues proposed by respondents.

#### ORDER

So much of the appeal as may be considered an appeal pursuant to §230.44(1)(a), stats., of the examination in question, or of the decisions to request or to use the FS 1 register to fill the AA 5 position in Badger State Industries, is dismissed as untimely filed. This matter is to

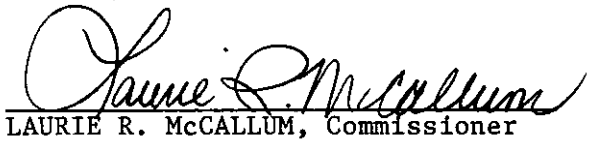
proceed to hearing as an appeal under §230.44(1)(d), Stats., on the basis  
of the following statement of issue:

Whether the non-selection of appellant for the position of  
Finance Director for Badger State Industries was illegal or an  
abuse of discretion.

Dated: June 29, 1988 STATE PERSONNEL COMMISSION

AJT:jmf  
JMF09/2

  
DONALD R. MURPHY, Commissioner

  
LAURIE R. McCALLUM, Commissioner