

MARGARET O'BRIEN,

Appellant,

v.

Secretary, DEPARTMENT OF
TRANSPORTATION,

Respondent.

Case No. 88-0059-PC

DECISION
AND
ORDER

This matter is before the Commission on the respondent's motion to dismiss for lack of jurisdiction. The parties filed briefs. The following facts appear to be undisputed and are made solely for the purpose of deciding the instant motion to dismiss.

FINDINGS OF FACT

1. In early 1988, the appellant was certified for a vacant Administrative Officer 1 position in the Office for Highway Safety of the respondent, Department of Transportation.

2. The appellant was interviewed, along with seven other candidates, on February 23, 1988. Another candidate was selected to fill the position.

3. On February 26, 1988, the appellant was notified that she had not been selected.

4. On March 18, 1988, the appellant filed a grievance alleging that her failure to be selected for the position constituted discrimination on the basis of age in violation of §111.321 and .322(1), Stats. A cover letter to the grievance indicated that it was being initiated according to Department of Transportation Administrative Manual (TAM) 412-1, which relates to the grievance procedure for non-represented employees and states, in part:

For complaints alleging violations of the Wisconsin Fair Employment Act, Title VII of the Civil Rights Act, Age Discrimination in Employment Act of 1967, or Section 504 of the Rehabilitation Act of 1973, the grievant may initiate the ... complaint at Step 3, item 12b of this procedure.

5. In February of 1987, the respondent had issued a second directive, TAM 40, which also referenced the Fair Employment Act:

Grievances may be filed under this procedure when challenging the Department of Transportation's application and interpretation of the:

* * *

d. Wisconsin Fair Employment Act (111.31 - 111.37, Wis. Stats.)
Title VII of the Civil Rights Act of 1964, Section 504 of the
Rehabilitation Act of 1973d, or the Age Discrimination in
Employment Act of 1967.

6. In response to the grievance, the respondent scheduled a third-step hearing, which took place in Eau Claire on April 7, 1988. The parties agreed to allow the respondent an extension to respond to the grievance until April 22, 1988.

7. On April 22, 1988, the respondent denied the grievance, stated that the "decision not to offer the Administrative Officer 1 position to the grievant was not based on age."

8. On May 20, 1988, the appellant filed an appeal of the third step decision with the Commission. The appeal documents stated in part:

FACTS FORMING BASIS OF APPEAL:

Ms. O'Brien filed an Employee Grievance Report alleging age discrimination on 3/18/88. The Grievance was denied approximately 4/22/88....

On February 23, 1988, during an interview for the position of Admin. Officer I, Sup./Conf., the interviewers expressed concern about how soon Ms. O'Brien might retire. They were concerned she would take the job and shortly thereafter "fly the coop." Ms. O'Brien was qualified for the position she applied for; she is a member of the protected class; the person selected for the job is significantly younger. In its response to the grievance, the department did not provide any explanation for its action, nor rebut any part of Ms. O'Brien's case.

REASON APPELLANT BELIEVES ACTION TO BE IMPROPER:

In the Grievance ... Ms. O'Brien alleged direct evidence of age discrimination. The Department of Transportation has not provided any explanation for its action.

The Department of Transportation has additionally demonstrated it does not take this matter seriously. In response to concerns expressed by Ms. O'Brien, the department's representative, Omer R. Jones, assured Ms. O'Brien's counsel only the District Director knew Ms. O'Brien had filed a grievance and that no one else would be aware of any action. Thereafter, without notifying Ms. O'Brien or her counsel, the Department also advised the Administrative Section Head Ms. O'Brien had filed a grievance.

Equally as disturbing, Mr. Jones joked about age discrimination at the Third Step Hearing on 4/7/88. While this was part of an informal exchange, it nonetheless is indicative of the Department's attitude in regard to age discrimination.

The Department's action is arbitrary, capricious, and disregards the law forbidding discrimination based on age.

9. Appellant also filed a complaint of age discrimination with the Commission on the same date. That complaint was assigned Case No. 88-0095-PC-ER, and has been scheduled for hearing on the following issue:

Did the respondent discriminate against the petitioner on the basis of age, as set forth in her charge of discrimination, in respect to the decision not to select the petitioner for the vacant Administrative Officer 1-Confidential/Supervisor position.

10. The respondent has not requested nor received approval from the Secretary of the Department of Employment Relations to adopt a grievance procedure which differs in any way from the procedure established in ch. ER 46, Wis. Adm. Code.

OPINION

The appellant's case can be divided into two main allegations: the first relates to the decision not to select her for a vacant Administrative Officer 1 position and the second relates to certain conduct during the third step hearing of the non-contractual grievance process.

The selection decision is clearly the subject of the appellant's companion complaint of age discrimination, which has been assigned Case No. 88-0095-PC-ER. It is also the subject of the grievance as it was initially filed on March 18, 1988. That grievance specifically contended that the selection decision violated the Fair Employment Act. In the briefs filed regarding respondent's motion, the appellant also argues that the selection decision was an

abuse of discretion and is therefore appealable under §230.44(1)(d), Stats., which 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.

To the extent the appellant seeks to pursue this matter as a direct appeal of a non-selection decision under §230.44(1)(d), Stats., such an appeal, filed with the Commission on May 20, 1988, would be untimely. Pursuant to §230.44(3), Stats., appeals must be filed within 30 days of the effective date or the date of notification of the action being appealed. May 20th was more than 30 days after the appellant learned on February 26th that she had not been selected for the position. The Commission has previously held that the time limit for filing an appeal is not tolled by the employee's pursuit of a non-contractual grievance of the same transaction. Cleveland v. DHSS, 86-0133-PC, etc., 7/8/87.

To the extent the appellant seeks to pursue a grievance arising from the non-selection decision, such a grievance is specifically precluded by administrative rule. The Commission's jurisdiction over non-contractual grievances is based on §230.45(1)(c), Stats., which provides that the Commission shall: "Serve as final step arbiter in the state employe grievance procedure established under s. 230.14(14) [230.04(14)]." According to §230.04(14), Stats., the Secretary of the Department of Employment Relations "shall establish, by rule, the scope and minimum requirements of a state employe grievance procedure relating to conditions of employment." The Secretary of DER has limited the scope of the grievance procedure in §ER 46.03(2)(d) as follows:

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

* * *

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

The appellant points to the specific language in TAM 40 and 412-1 which refer to using the grievance procedure to challenge the respondent's application and interpretation of the Fair Employment Act. The appellant argues:

]The Department should not be allowed to promulgate directives and procedures and then argue its own procedures do not meet with state law. It cannot reasonably be an employee's responsibility to check whether or not the directives provided to him or her have actually been approved under §ER 46.065, allowing agencies to adopt grievance procedures which differ from §ER 46. The Appellant here has followed the Department's grievance procedure as provided to her.

If the Department has not had its grievance procedure approved under §ER 46.065, a question as to the Commission's jurisdiction could be raised. But, what then becomes of the right to an appeal promised by the Department in TAM 412-1?

Section ER 46.065 provides:

Each agency shall adopt this [grievance] procedure or, subject to approval of the secretary, submit an amended procedure if that amendment would more efficiently promote the goals and policies of this chapter.

In its reply brief, the respondent notes that because it did not follow the procedure established in the rules for modifying ch. ER 46 (see finding of fact 10), TAM 40 and 412-1 cannot be relied upon for filing non-contractual grievances arising from non-selection decisions where the agency is alleged to have violated the Fair Employment Act. To the extent the appellant is raising an issue of equitable estoppel and is contending that the respondent should be prevented from raising a jurisdictional objection because of appellant's reasonable reliance on the provisions of TAM 40 and 412-1 in filing her March 18th grievance, there is no showing that there was reliance *to the appellant's detriment* with respect to these provisions. The appellant went ahead and filed a separate complaint of age discrimination under the Fair Employment Act. That claim, which has been assigned Case No. 88-0095-PC-ER, is scheduled for hearing and there is no allegation that it was untimely filed.

The second of the appellant's allegations relates to certain conduct during the third step hearing of the non-contractual grievance process which she described in her May 20th letter as follows:

The Department of Transportation has additionally demonstrated it does not take this matter seriously. In response to concerns expressed by Ms. O'Brien, the department's representative, Omer R. Jones, assured Ms. O'Brien's counsel only the District Director knew Ms. O'Brien had filed a grievance and that no one else would be aware of any action. Thereafter, without notifying

Ms. O'Brien or her counsel, the Department also advised the Administrative Section Head Ms. O'Brien had filed a grievance.

Equally as disturbing, Mr. Jones joked about age discrimination at the Third Step Hearing on 4/7/88. While this was part of an informal exchange, it nonetheless is indicative of the Department's attitude in regard to age discrimination.

In addition to the various limitations listed previously in this decision, §ER 46.07 limits the scope of matters which may be appealed to the Commission at the fourth step of the non-contractual grievance process:

(1) If the grievant is dissatisfied with the decision received from the appointing authority or designee at the third step under s. ER 46.06(2)(c)2., the decision may be grieved to the commission only if it alleges that the employer abused its discretion in applying subch. II, ch. 230, Stats., or the rules of the administrator promulgated under that subchapter, subchs. I and II, ch. 230, Stats., or the rules of the secretary promulgated under those subchapters, or written agency rules, policies, or procedures

The appellant relies on the Commission's decision in Wing v. UW, 85-0007-PC, 5/22/85, explained further, 9/20/85. In Wing, the Commission dismissed the original subject of the grievance, a contention that the employer had refused the employe access to certain information which the employe felt he needed to adequately perform his work, as a management right and outside the scope of the grievance procedure as provided by §ER 46.03(2)(j), Wis. Adm. Code. However, the Commission allowed the grievant to pursue two additional claims arising from the agency's conduct during the grievance process. The first of the additional claims related to the respondent's refusal to allow the employe to tape record the first step grievance meeting. The second claim related to an allegation that during the second step proceeding, the respondent "made a proposal to buy me off, purchase of my contract and must leave state service." The employe contended that the respondent's conduct constituted retaliation for prior disclosures or grievances. Retaliation for using the non-contractual grievance procedure is expressly prohibited by §ER 46.10, and the retaliatory conduct complained of by the employe in Wing did not fit within the definition of management rights or within any of the other restrictions as to the scope of the grievance process. Because the employe in that case had, *inter alia*, alleged the employer had "abused its discretion in applying ... the rules of the

secretary promulgated under ch. 230, Stats.," the Commission concluded it had jurisdiction at the fourth step to review the respondent's conduct.

In the present case, the appellant has alleged that the respondent's conduct at the third step constituted an abuse of discretion, but the appellant has not indicated how she feels the identified conduct involved the application of civil service statutes or rules or written agency rules, policies or procedures, as is required by §ER 46.07(1), Wis. Adm. Code. The clear intent of the language of this provision is to require an allegation of an abuse of discretion with respect to the application of some *written* standard or policy. In Wing, that allegation was made. Here, the appellant has not pointed to any written standard or policy abrogated by the respondent's conduct. Therefore, the appellant's claim arising from the respondent's conduct at the third step of the non-contractual grievance procedure is outside of the Commission's jurisdiction.

ORDER

This matter is dismissed for lack of jurisdiction.

Dated: June 14, 1991 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Commissioner

KMS:kms


GERALD F. HODDINOTT, Commissioner

Parties:

Margaret O'Brien
231 W Tyler Ave
Eau Claire WI 54701

Ronald R. Fielder
Secretary DOT Rm 120B
4802 Sheboygan Ave
P O Box 7910
Madison WI 53707