

KATHLEEN SCHMIDT,

Appellant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES

Respondent.

Case No. 89-0079-PC

RULING ON
MOTION
TO
DISMISS

On November 8, 1988, the appellant filed Case No. 88-0131-PC as an appeal of a hiring transaction which occurred in October, 1988. Later, the appellant sought to amend that appeal, in part to cover certain subsequent transactions. In an order entered June 14, 1989, the Commission allowed certain of the amendments, denied others, and directed that other allegations concerning a February 1989 nonselection be filed as a new appeal which was assigned Case No. 89-0079-PC and consolidated with the initial appeal. On October 11, 1989, the respondent filed a motion to dismiss so much of the new appeal as relates to the February, 1989, nonselection decision. The respondent's motion was premised on three distinct theories. By order dated November 15, 1989, the Commission denied respondent's motion to dismiss but noted that the denial was without prejudice as to third theory raised by the respondent, i.e. that the decision in question occurred before rather than after certification as required by §230.44(1)(d), Stats., because the theory rested on a factual assertion regarding the date of certification that the appellant disputed. On February 14, 1990, the respondent renewed its motion to dismiss and filed supporting affidavits and documents. The parties have filed briefs. The following facts appear to be undisputed.¹

¹In her brief, the appellant requested the Commission defer ruling on the motion to dismiss "until this matter be set for an evidentiary hearing to determine both the relevant facts and credibility." The reference to an evidentiary hearing appears to be to a hearing on the merits of the appellant's claim. The Commission lacks the authority to convene such a hearing if, based upon undisputed facts, the Commission lacks jurisdiction over the claim. Although elsewhere in her brief, the appellant contends that some of the facts set forth in the affidavits supplied by the respondent "are disputed by the

FINDINGS OF FACT

1. At all relevant times, the appellant has been employed in at the Winnebago Mental Health Institute (WMHI) in a shift position job in the kitchen.

2. Early in February, 1989, the incumbent in a Laundry Worker 2 position resigned from that position.

3. The appellant indicated her interest in the vacancy by sending a memo dated February 11, 1989 to Peggy Cox, a personnel assistant at WMHI. The memo stated:

I am notifying you of my letter of intent pertaining to the Laundry Worker 2 position that has been posted again. I am interested in the position and I also understand that it is a demotion in pay.

4. By letter dated February 15, 1989, Ms. Cox notified the appellant as follows:

This letter is to notify you that you will not be considered for an interview for the Laundry Worker 2 vacancy at Winnebago Mental Health Institute.

Since an interview for a counter part or a voluntary demotion is permissive, the supervisor of the vacancy has decided only to interview off of the established register.

5. The Department of Employment Relations (DER) establishes registers of qualified applicants for state civil service positions and certifies those persons who are eligible for appointment.

6. A certification list for the subject Laundry Worker 2 vacancy was sent from DER to Winnebago Mental Health Institute on March 13, 1989.

7. The appellant's name was not on the Laundry Worker 2 register on March 13, 1989. Therefore, the appellant's name was not among those certified for the WMHI vacancy.

Appellant, and some facts are missing," nothing in the appellant's brief, affidavit or attached documents draws into dispute any of the findings of fact set forth in this decision.

DISCUSSION

The only possible jurisdictional basis for this appeal is §230.44(1)(d), Stats., which provides for the appeal of 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." The appellant contends that a "hypertechical application of the statute to these facts will thwart the rule and its intent." For the purposes of ruling on the respondent's motion, the Commission accepts the appellant's contention that the decision not to consider the appellant for the vacant position was motivated by an intent on the part of WMHI management to retaliate against her for having filed an appeal about a previous selection decision.

The appellant expresses her jurisdictional arguments as follows:

The only question is whether the action was a pre-certification decision denying the Commission of jurisdiction or a post-certification decision invoking their jurisdiction.

Respondent's cite the case of Wing v. DER, 84-84-PC, 4/3/85 in support of their position. Reliance on Wing however, is inappropriate. In fact, Wing, does not support a mechanical application of the rules. Instead, it specifically analyses the facts of the situation presented and concludes, in dicta, that the Commission's analyses in an earlier case, Seep v. DHSS, 83-0032-PC, 83-0017-PC-ER (10/10/84) as to the purpose of the line of demarcation for the pre-certification versus post-certification decision was an attempt to differentiate between "(a)ctions which occur at or prior to certification, and which typically concern the examination process, are appealable pursuant to sect. 230.44 (1)(a) or (b) as actions of the administrator. Actions which occur after the point of certification (and which meet the other criteria set forth in sect. 230.44 (1)(d) are appealable pursuant to sect. 230.44(1)(d), Stats." Wing, citing Seep, at 5.

In Wing the Commission found that the undisputed facts established that "the appointing authority selected an applicant from among all of those who sought to transfer, reinstate or demoted in to the position. This procedure took the BMA appointment process past the point of certification and into the realm of the exercise of selection discretion by an appointing authority." (Emphasis in the original) Wing, at 7. The Commission held that it was convinced "that the legislature utilized the phrase 'after certification' to refer to a certain segment in the appointment process." Id. at 8.

In this case Appellant contends that the appointing authority decided to draw the line of demarcation in such a manner as to exclude her from consideration. Thus, a simple examination of which side of the line the decision was made would be inappropriate.

The appellant's argument would require the Commission to ignore the plain meaning of the statute to permit appeals from certain decisions which are made before certification. However, the statute refers only to personnel actions which occur "after certification." Had the legislature intended to include decisions, including those made prior to certification, which have the effect of limiting the groups of individuals who may be considered for an appointment, it could have added language to that effect. As noted by the appellant, the Commission has interpreted the statute broadly to include not only selection decisions where there has been an actual certification, but also a selection decision where a certification did not occur but the appointing authority was nevertheless in the position to make a selection from among a group of candidates. Wing v. DER, 84-0084-PC, 4/3/85. In Wing, the Commission held that it had the authority to review the appointing authority's decision not to select the appellant from among a list of persons seeking transfer, reinstatement and demotion to a vacant position. No examination had been given so no eligibles had been certified.

The Commission has consistently held that its jurisdiction does not extend to pre-certification decisions made by the appointing authority. For example in Ransom v. UW-Milwaukee, 87-0125-PC, 7/13/88, the Commission stated:

In a similar case, Miller v. DHSS, Wis. Pers. Comm., 81-137-PC (10/2/81), where the appellant objected to the type of procedural transaction used to fill a vacant position, the Commission said, "the appointing authority makes the initial decision as to which process -- promotion or transfer -- to use to fill a vacancy. The . . . role [of the administrator of the Division of Merit Recruitment and Selection] is in connection with the implementation of the particular process once it is chosen. Therefore, the determination . . . as to how and when to fill the position is not that of the administrator, either directly or on a delegated basis, and hence not appealable pursuant to §230.44(1)(a) or (b), Stats." Having excluded the other basis for jurisdiction over the appeal, the Commission concluded that it lacked subject matter jurisdiction.

While the instant case, unlike Miller, which was appealed because appellant contested filling a position by transfer instead of promotion, involves filling a position by open recruitment as opposed to servicewide recruitment, the legal underpinnings are similar. Respondent's initial decision as to whether to fill a position by transfer or promotion, and in the latter case whether to request in-service competition or open recruitment is a direct, undelegated power which is not appealable per se to the Commission.

In Ransom, the Commission went on to find jurisdiction over a decision to request further certification after the appellant's initial certification and interview.

In the present case, the decision in question was to exclude from the selection process those persons who sought to demote or transfer into the position. There is little question that an appointing authority with an improper motive for not hiring a potential candidate could effectuate that intent by deciding, prior to certification, to use open recruitment instead of a promotional register. Even though these circumstances bear many similarities to an improperly motivated decision not to select a candidate from among those certified, the undeniable fact is that, by definition, one decision would occur before certification and the other after. The fact that "[n]o other provision of the statute exists that provides Appellant with any avenue of redress" is not a sufficient basis for the Commission to assert jurisdiction under §230.44(1)(d), Stats.

In her brief, the appellant requested the Commission defer ruling on the motion to dismiss "until this matter be set for an evidentiary hearing to determine both the relevant facts and credibility." The reference to an *evidentiary hearing appears to be to a hearing on the merits of the appellant's claim*. If the Commission concludes that the undisputed facts require a finding of no jurisdiction, the only course of action available is to dismiss the matter. Although elsewhere in her brief, the appellant contends that some of the facts set forth in the affidavits supplied by the respondent "are disputed by the Appellant, and some facts are missing," nothing in the appellant's brief, affidavit or attached documents draws into dispute any of the findings of fact set forth in this decision.

ORDER

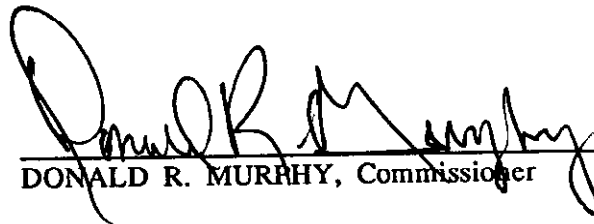
Respondent's motion to dismiss filed February 14, 1990 is granted and this matter is dismissed for lack of subject matter jurisdiction.

Dated: April 5, 1990

STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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