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Association of Career Executives
 (ACE); an unincorporated association,
 Wynn Davies and Lloyd Riddle,

Appellants,

v.

Secretaries, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 DEPARTMENT OF TRANSPORTATION,
 and DEPARTMENT OF REVENUE;
 Administrators, DIVISION OF
 EMERGENCY GOVERNMENT and
 DIVISION OF MERIT RECRUITMENT
 AND SELECTION; and Commissioners,
 OFFICE OF THE COMMISSIONER OF
 INSURANCE and OFFICE OF THE
 COMMISSIONER OF TRANSPORTATION;

Respondents.

Case No. 92-0238-PC

* * * * *

RULING
 ON
 MOTION
 TO DISMISS

This matter is before the Commission on motions to dismiss filed February 11, 1993, by respondents DOT (Department of Transportation) and OCT (Office of Commissioner of Transportation); January 28, 1993, by DOR (Department of Revenue); February 2, 1993, by DMRS (Division of Merit Recruitment and Selection); January 29, 1993, by DOC (Department of Corrections); January 29, 1993, by DHSS (Department of Health and Social Services); and January 29, 1993, by OCI (Office of Commissioner of Insurance). The parties have filed briefs on these motions.

By way of background, appellants initiated litigation concerning most of the transactions involved in this proceeding in Dane County Circuit Court. In a February 11, 1992, memorandum decision, that Court addressed the following grounds for a motion to dismiss filed by the defendant agencies: "(1) This court lacks subject matter jurisdiction because exclusive jurisdiction resides in the Personnel Commission; (2) Even if this court has concurrent jurisdiction, it should defer to the primary jurisdiction of the Personnel Commission." Memorandum decision, p. 2. The Court decided that it could not conclude whether this commission has jurisdiction over the matters raised in the

complaint, as the defendant agencies contended, or whether the Commission did not, as the plaintiffs contended. Therefore, the Court directed the plaintiffs to pursue relief before the Commission, while the Court stayed proceedings before it, with the proviso that if the Commission assumed jurisdiction the Court would defer to the Commission on a primary jurisdiction theory, while if the Commission rejected jurisdiction, the Court would reinstate proceedings before it. The Court entered an order on March 12, 1992, directing that the plaintiffs pursue relief before this commission, and staying court proceedings pending the Commission's jurisdictional decision.

A prehearing conference was held before this commission on June 22, 1992, at which point respondents stated that they "would not contest the Commission's subject matter jurisdiction over this matter to the extent that the appeal that will be filed mirrors the matters raised in the complaint filed in Circuit Court," and appellants stated they "would not contest the Commission's subject matter jurisdiction over this matter." Conference report dated June 24, 1992. That conference report established filing deadlines of July 13, 1992, for appellant's pleading and August 3, 1992, for responsive pleadings.

In its "ruling on motion to dismiss" entered January 12, 1993, the Commission summarized appellants' pleading as follows:

In their "Request for Relief" filed on July 13, 1992, appellants "ask the Personnel Commission to find that the Defendants' actions in appointing certain individuals to 'project positions' as defined by sec. 230.27(1), Wis. Stats., without applying merit and civil service principles and safeguards as set forth in Chap. 230, Wis. Stats., are contrary to law." Appellants go on to assert a "complaint for Declaratory Judgment" consisting of 11 counts plus an allegation of "Additional Facts." These counts allege that certain project positions were filled improperly, and, more particularly, that the use of project appointments was part of an effort "to create and maintain a patronage system in state government in Wisconsin by filling civil service positions on the basis of political affiliation rather than on the basis of merit as required by law," e.g., Para. 21. The "Additional Facts" include the allegation that some of these appointments involved DOA authorized exceptions to a hiring freeze, and that by granting the exceptions, DOA "perpetuated" the violations involved in the appointments. Appellants further allege that respondents have caused the illegal expenditure of tax funds, and that respondents' actions have had a chilling effect on the free speech rights of ACE members. By the way of relief, appellants ask that the Commission make certain conclusions as to the illegality of the transactions, order that the appointments are invalid, and order that respondents be "enjoined from further violations of Chap. 230 in State employment."

In their responsive pleading, respondents raised certain affirmative defenses grounded on lack of standing, mootness, and failure to state a claim. In its January 12, 1993, ruling, the Commission rejected those defenses except to the extent that it concluded that appellants failed to state a claim against either DER or DOA, and dismissed on that basis with respect to them.

The current round of motions to dismiss are based on two grounds, neither of which has been raised before.¹ First, to the extent this matter could be considered an appeal pursuant to §230.44(1), Stats., respondents contend it was not timely filed in accordance with §230.44(3), Stats. Second, respondents contend that to the extent that it could be considered a request for a declaratory ruling pursuant to §227.41, Stats.,² the Commission has no jurisdiction over the subject matter of this proceeding, or, alternatively, that the Commission should decline to exercise any jurisdiction it might have.

With respect to the timeliness issue, it is undisputed that this pleading was not filed within 30 days of either any of the contested personnel transactions, or when appellants clearly had notice of them, and are untimely under §230.44(3), Stats. In their brief, appellants do not contest untimeliness per se, but rather argue that respondents have waived the right to raise this objection "by repeatedly claiming before Circuit Court Judge Jones that the Personnel Commission was better suited than the court to consider the factual and policy-making issues raised by ACE's allegations," appellant's brief, pp. 5-6; by respondents' statement at the June 22, 1992, prehearing conference that they "would not contest the Commission's subject matter jurisdiction over this matter to the extent that the appeal that will be filed mirrors the matters raised in the complaint filed in Circuit Court," conference report dated June 24, 1992; and by respondents' failure to have raised this objection by the deadline for responsive pleadings agreed to at that prehearing conference.

It is axiomatic that issues of subject matter jurisdiction can be raised at any time and cannot be waived. See §PC 1.08, Wis. Adm. Code; In Interest of A.E.H., 152 Wis., 2d 182, 191, 448 N.W. 2d 662 (Ct. App. 1989); Morgan v. Knoll,

¹ At the time the earlier pleading was filed, all respondents except DER and DMRS were represented by different counsel.

² Although the "request for relief" was not denominated a petition for declaratory ruling under this section, its various counts were preceded by the heading "complaint for declaratory judgment," and the Commission in its January 12, 1993, ruling, referred at various points to a request for declaratory ruling.

Wis. Pers. Bd. 75-204 (5/25/76). Because §230.44(3), Stats., provides that appeals which are not filed within the prescribed 30 days "may not be heard." (emphasis added) this subsection has consistently been interpreted as mandatory and jurisdictional in nature, see Richter v. DP, 78-261-PC (1/30/79); State ex rel DOA v. Personnel Board, Dane Co. Cir. Ct. No. 149-295 (1976); 73A CJS Public Administrative Law and Procedure §168; 2 AMJUR 2d Administrative Law §544.³ Therefore, although respondents probably have waived any non-jurisdictional defenses, they have not waived the timeliness issue, and the Commission must dismiss so much of this matter as might amount to an appeal under §230.44(1), Stats., for lack of subject matter jurisdiction as untimely filed.

There are other potential jurisdictional bases for this matter. Section 227.42, Stats., provides inter alia:

- (1) In addition to any other right provided by law, any person filing a written request with an agency for hearing shall have the right to a hearing which shall be treated as a contested case if:
 - (a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;
 - (b) There is no evidence of legislative intent that the interest is not to be protected;
 - (c) The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and
 - (d) There is a dispute of material fact.

There is at least one reason why the Commission has no jurisdiction over this matter under this section.

Pursuant to §227.42(1)(a) a prerequisite to a right to a hearing is that "[a] substantial interest of the person is injured in fact or threatened with injury by agency action or inaction." Appellants have not alleged any actual or threatened injury by this agency's action or inaction. An interpretation of the language "agency action or inaction" to refer to an agency other than the agency to which the request is addressed is not tenable. See, e.g., Shearer v.

³ The WFEA does not contain this "may not be heard" language, and hence Milwaukee Co. v. LRC, 113 Wis. 2d 199, 335 N.W. 2d 412 (Ct. App. 1983), cited by appellants, which held that §111.39(1), Stats., is not jurisdictional, is distinguishable.

DNR, 151 Wis. 2d 153, 163, 442 N.W. 2d 598 (Ct. App. 1989) ("Section 227.42, Stats., is designed to provide a hearing before the agency charged with making a decision within its area of expertise so that persons whose interests may be threatened with injury by the agency's proposed action can be heard on the question before the action is taken.") Furthermore, such an interpretation could result in the absurd result of agencies having no expertise in the program area involved having review authority over other agencies' actions in those program areas.

Appellants also contend that respondents have waived any objection to a hearing under §227.42 for the same reasons as discussed above. However, if a request does not as a matter of law satisfy the statutory criteria for hearing contained in §227.42, this constitutes a defect of subject matter jurisdiction, see Board of Regents v. Wis. Pers. Comm., 103 Wis. 2d 545, 309 N.W. 2d 366 (Ct App. 1981) (subject matter jurisdiction dependent on statutory grant of authority), which is not waivable, as also is discussed above. Furthermore, appellants' assertion that while in Circuit Court, respondents conceded that this Commission has jurisdiction over this matter under §227.42 is inconsistent with respondents' court briefs, which were attached to appellants' brief filed here. Appellants cite respondents' initial brief at p. 8, but there is nothing there which asserts that appellants have a right to a hearing before this Commission pursuant to §227.42. Appellants also cite p. 4 of respondent's reply brief. Again, while respondents refer to §227.42 here, it is not in the context of an argument that the Commission can hear the case under this section. This is in a section of the reply brief that addresses the argument raised by appellants in Circuit Court that "no specific procedure authoriz[es] placement of this matter before the Administrator of DMRS." On pages 3 and 4 of their reply brief, respondents reply to this contention by enumerating three specific procedures for bringing this matter before the DMRS administrator, the third one of which is provided by §227.42.⁴

Appellants quote language from Milwaukee Met. Sewerage Dist., 126 Wis. 2d 63, 73, 375 N.W. 2d 158 (1985), for the proposition that §227.42 "serves as a safety net, affording a hearing right to those who are not granted a specific right to a hearing by other statutory provisions or administrative rules." Appellants' quotation leaves out the opinion's next sentence: "To receive a

⁴ A decision of the DMRS administrator presumably would be appealable to this Commission pursuant to §230.44(1)(a), Stats.

hearing under sec. 227.064(1) [now §227.42], however, a person must satisfy the requirements delineated in subsections (a) through (d). The District shall be entitled to a contested hearing, therefore, only if it fulfills the requirements outlined in subsections (a) through (d)." id. (emphasis added) Similarly, appellants argue that "it is a fundamental principle of our jurisprudence that an organization has a right to be heard in some meaningful way at a time when relief can be granted," brief, p. 8, citing Metro. Greyhound Mgt. Corp. v. Racing Bd., 157 Wis. 2d 678, 689-90, 460 N.W. 2d 802 (Ct. App. 1990). Again, however the Court goes on to tie a right to a hearing under §227.42 to satisfaction of the statutory criteria:

By enacting sec. 227.42(1), Stats., the legislature has recognized the importance of ensuring certain minimum procedural safeguards for those whose substantial interest ... is injured in fact or threatened with injury by agency action or inaction, sec. 227.42(1)(a), where the injury or threatened injury "is different in kind or degree from the injury to the general public," sec. 227.42(1)(c).

157 Wis. 2d at 690. Thus this decision also can not fairly be cited as precedent for some generalized right to hearing independent of satisfying the specific criteria of §227.42(1)(a)-(d).

The "request for relief" filed here by appellants does not specify the jurisdictional basis on which it relies. However, its various counts are preceded by the heading "Complaint for Declaratory Judgment." In its January 12, 1993, ruling the Commission referred to this proceeding as in part a request for declaratory ruling pursuant to §227.41, Stats., on the assumption that the appellants' reference to "declaratory judgment" in their request for relief probably was meant to refer to a declaratory ruling, the administrative counterpart of §806.04, Stats.⁵ In their briefs in support of their current motions to dismiss, respondents have advanced a number of contentions as to why the Commission should not hear this matter as a petition for declaratory ruling pursuant to §227.41. In their brief in opposition to dismissal, appellants neither respond to these arguments nor assert that the Commission should take jurisdiction of this matter as a §227.41 declaratory ruling proceeding, but rely solely on the contentions discussed and rejected above, that respondents have waived their objections to the Commission hearing this matter under

⁵ The judicial proceeding was referred to by the court as a declaratory judgment proceeding pursuant to §806.04, Stats.

§§230.44(1) or 227.42, Stats. Perhaps, as suggested in one of respondent's briefs, the reference in appellants' pleading to "Complaint for Declaratory Judgment" was merely an inadvertent result of appellants' replication of part of their judicial pleadings in the instant proceeding. In any event, the Commission is constrained to conclude that appellants have no interest in pursuing this matter here as a declaratory ruling proceeding pursuant to §227.41, in light of their failure to plead such a proceeding, their failure to respond to respondents' arguments in opposition to the Commission proceeding with this matter as a declaratory ruling proceeding under §227.41, and their reliance solely on §§230.44(1) and 227.42 as jurisdictional bases. Accordingly, the Commission will decline to proceed with this matter under §227.41.⁶ Therefore, since the Commission does not have subject matter jurisdiction of this matter under either §230.44(1) or §227.42, Stats., it must be dismissed.⁷

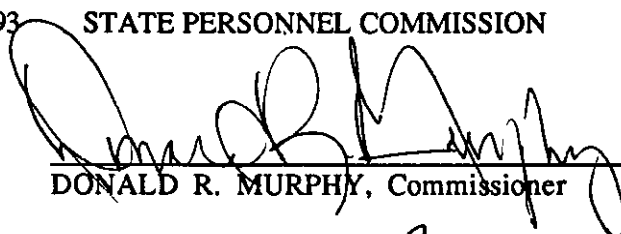
⁶ Section 227.41(1), Stats., provides that an agency "may, on petition by any interested person, issue a declaratory ruling" (emphasis added).

⁷ The Circuit Court's February 11, 1992, memorandum decision states that the Court will resume jurisdiction over the companion court case in the event that this Commission denies jurisdiction. Therefore, apparently the issues raised in this proceeding will be heard before that Court.

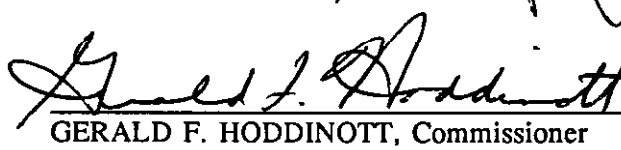
ORDER

This case is dismissed for lack of subject matter jurisdiction under §§230.44(1) and 227.42, Stats. The Commission will retain jurisdiction for the sole purpose of resolving the pending discovery motions, which are not yet ready for decision.

Dated: March 29, 1993 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Commissioner

AJT:tmt


GERALD F. HODDINOTT, Commissioner

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**NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION**

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached

affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.