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ASSOCIATION OF CAREER EMPLOYEES,  
an unincorporated association,  
and WYNN DAVIES,

Appellants,

v.

Administrator, DIVISION OF MERIT  
RECRUITMENT AND SELECTION,

Respondent.

Case No. 94-0060-PC

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ASSOCIATION OF CAREER EMPLOYEES,  
an unincorporated association,  
and WYNN DAVIES,

Appellants,

v.

Secretary, DEPARTMENT OF  
ADMINISTRATION, and  
Administrator, DIVISION OF MERIT  
RECRUITMENT AND SELECTION,

Respondents.

Case No. 94-0069-PC

\* \* \* \* \*

RULING ON  
MOTION  
TO DISMISS

On May 4, 1994, appellants, Association of Career Employees (ACE) and Wynn Davies, its Executive Director, filed an appeal with the Commission alleging that the Administrator, Division of Merit Recruitment and Selection (DMRS), respondent, failed to act as requested by them to investigate the creation, use, recruitment and appointment to the position of Director of the National and Community Service Board and that this failure to act was appealable under §§230.44(1)(a) and 230.45(1)(a), Stats. This appeal was docketed as Case No. 94-0060-PC.

On May 9, 1994, the same appellants, ACE and Davies, filed an appeal under §230.44(1) and 230.45(1)(a), Stats., alleging the Administrator, DMRS, and

the Secretary, Department of Administration, had violated civil service laws and policies in their appointment to the Director of the National and Community Service Board project position.

At the prehearing conference held June 20, 1994, respondents raised the question of jurisdiction regarding appellants' allegations about creating the position and the parties agreed to the following issues:

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Whether DMRS failed to investigate the creation, use, recruitment and appointment to National and Community Service Board Director position held by Mr. Larry Swoboda.

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(1) Whether the Personnel Commission has jurisdiction over the creation of positions in state classified civil service.

(2) Whether the National and Community Service Board, Director, project position was appropriately filled in accordance with state classified civil service laws and rules.

Afterwards, respondents filed a motion to dismiss and a briefing schedule was completed August 17, 1994.

Respondent DMRS moves to dismiss Case No. 94-0060-PC on the basis that appellants' claim is moot. DMRS argues that since it was the authority for approving the appointment at issue, it serves no purpose to investigate itself and the same was advised appellant Davies by letter dated May 4, 1994, in reply to his earlier April 15, 1994, request.

In response, appellant argues that respondent's administrator failed to act, that respondent failed to reply until May 10, 1994, and that respondent failed to adequately investigate and take corrective action.

Documents provided by respondent in support of its motion included a letter dated May 4, 1994, to Davies under the signature of the Administrator, DMRS. In it he writes:

DMRS does not have the statutory responsibility to authorize or create a civil service position. Position authorization is the specific responsibility of the State Legislature, the Joint Committee on Finance, or the Governor according to §16.505. Stats. Therefore, DMRS does not have any role in the creation of a project position.

In this letter the administrator states that DMRS approved the request to fill the project Executive Director, National and Community Service Board position and the recruitment and selection procedures for this position.

It is undisputed respondent did receive and respond to appellants' request to investigate the entire process involving the appointment to the National and Community Service Board position. It is also undisputed respondent investigated the matter to the extent it deemed necessary and to the extent of respondent's authority. Whether or not the DMRS administrator personally conducted the investigation is beside the point. He administered it.

The Commission believes the stated issue in this matter is a non-issue. Whether viewed as moot or failing to state a claim upon which relief can be granted, this appeal must be dismissed.

In Case No. 94-0069-PC, respondents' motion for dismissal impacts the question of the validity of the creation of the Executive Director project position at the National and Community Service Board. Respondents argue that the Commission lacks jurisdiction over the creation of this position and it cannot grant relief. In support, respondents direct attention to §16.505, Stats., which governs in pertinent part:

- (1) Except as provided in Subs. (2) and (2m), no position, as defined in §230.03(11), regardless of funding source or type, may be created or abolished unless authorized by one of the following:
  - (a) the legislature....
  - (b) the joint committee on finance....
  - (c) the governor....

Section 16.505(2)(b) exempts this requirement from certain fees collected by air pollution permits, and 16.505 authorizes the Board of Regents, University of Wisconsin System to create or abolish positions from certain revenues.

Continuing, respondent argues that creating a civil service position or increasing the position authorization of an agency is budgetary, not within the Commission's authority to provide relief in Chapter 230, Wisconsin Statutes.

In reply, appellant Davies states:

ACE has never denied that the Governor has authority to create positions in this manner. That is besides the point.

The issue on appeal are Respondents' personnel decisions regarding the project position and recruitment process that was "created" especially to select Larry Swoboda.

Davies states that ACE's appeal "creation" as used in the issue in question, means all personnel decisions by respondents, inclusive of respondents' input in creating a project position, rather than a permanent position and all intermediary determinations culminating in the appointment of Swoboda.

It is clear from the statutes that respondent has no authority with respect to the creation of positions, but that he has, and in this case he exercised the authority pursuant to §ER-Pers 34.03(1), Wis. Adm. Code, to approve the filling of this project position on a project appointment basis. It is also clear that respondent has, and in this case he exercised the authority pursuant to §ER-Pers 34.09 to approve the recruitment and selection procedures utilized to appoint Mr. Swoboda to this position. These matters are subsumed under issue #2 ("Whether the ... project position was appropriately filled in accordance with state classified civil service laws and rules.") However, the Commission will dismiss, as requested by respondent, so much of this appeal as relates to the creation of the classified civil service position, as a matter outside the parameters of the respondent's statutory authority, and hence outside the Commission's appellate authority under §230.44(1), Stats.

ORDER

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Respondent's motion to dismiss is granted and this appeal is dismissed

Case No. 94-0069-PC

Respondents' motion to dismiss is granted, and so much of this appeal as relates to the creation of the classified civil service position in question is dismissed for failure of subject matter jurisdiction.

Dated: October 24, 1994 STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Commissioner

DRM:rcr

  
JUDY M. ROGERS, Commissioner

Parties (as to Case No. 94-0060-PC):

Assoc. Career Employees  
and Wynn Davies  
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P.O. Box 29  
Madison, WI 53701

Robert Lavigna  
Administrator, DMRS  
137 E. Wilson Street  
P.O. Box 7855  
Madison, WI 53707

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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)