

STATE OF WISCONSIN

PERSONNEL COMMISSION

LEE JAMES STARCK,
Appellant,

v.

**Secretary, DEPARTMENT OF HEALTH
AND FAMILY SERVICES,**
Respondent.

**RULING
ON
MOTION
TO DISMISS**

Case No. 98-0053-PC

A hearing was held in this matter on November 17, 1998, on the following issue:

Whether respondent's failure to have hired appellant for the position of LTE Stock Clerk in April 1998 was illegal or an abuse of discretion.

After the hearing, the parties filed post-hearing briefs. After the conclusion of the briefing schedule but before a proposed decision had been issued to the parties, the respondent filed a motion to dismiss the appeal for lack of subject matter jurisdiction. The parties filed written arguments on the respondent's motion which is now before the Commission. The following facts appear to be undisputed.

FINDING OF FACT

The appellant was one of six candidates interviewed on April 15 and 20, 1998, for a vacant 50% limited term employment (LTE) position of Stock Clerk at Winnebago Mental Health Institute (WMHI) in April of 1997.

CONCLUSIONS OF LAW

1. The appellant has the burden of establishing that the Commission has the authority to review the selection decision for the 50% LTE Stock Clerk position at WMHI in April of 1998.

2. Appellant has not sustained his burden.

3. The Commission lacks subject matter jurisdiction over this appeal.

OPINION

The conference report for the prehearing conference held on August 20, 1998, included a notice of hearing and referred to §230.44(1)(d), Stats, as the jurisdictional basis for the hearing. That paragraph provides that “[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.”

Respondent argues:

Limited term appointments are governed by §230.26, Stats., and by Chapter ER-MRS 10 of the Wisconsin Administrative Code. Section ER-MRS 10.05 of the Code provides that "limited term employees do not earn permanent status and are denied benefits and rights specified under s. 230.26(4), Stats." Section ER-MRS 10.04(1) provides that the civil recruitment and selection procedures applicable to permanent positions of employment "may be modified" for LTE appointments. One of the procedures which are not applied for LTE appointments is the use of the certification process for employment registers. There are not mandatory requirements for appointment procedures related to LTE positions. Therefore, there are no procedures that can be appealed to the Commission.

The Commission has previously ruled that it lacks subject matter jurisdiction over limited term employee hiring decisions. In *Barker v. UW*, 88-0031-PC, 4/20/88, the Commission held:

As noted in §ER-Pers 10.04, Wis. Adm. Code, [1988] the procedures used for recruitment and selection of limited term employees may be a modification of the recruitment and selection process used for permanent positions. In *Kawczynski v. DOT*, 80-181-PC, 11/4/80, the Commission held that s. 230.44(1)(d), Stats., does not apply to a selection of a limited term employee because there is no certification for a limited term vacancy. Even though subsequent decisions have concluded that the phrase "after certification" in s. 230.44(1)(d), Stats., refers to a certain segment of the appointment process and does not require an actual certification, the limited term appointment process does not include a segment that is comparable to a certification of eligibles.

This analysis is still viable and it applies to the factual premise of the present case: appellant unsuccessfully sought appointment to a LTE position at WMHI. Certification was not part of the process used to fill the position in question, nor was any process similar or comparable to certification used to fill this position. Therefore, the Commission lacks the authority to hear this matter under §230.44(1)(d), Stats.

Appellant has raised several arguments in response to the jurisdictional objection. He suggested that the "motion to dismiss due to the LTE status of this position has already been ruled on and must not once again be considered." However, the materials submitted by complainant merely indicate there had been some question earlier in the appeal process as to whether appellant had filed his appeal in a timely manner. The timeliness issue was the subject of an interim ruling issued by the Commission on July 29, 1998. Respondent's motion to dismiss the appeal as untimely filed was denied at that time. That ruling simply did not address the issue of subject matter jurisdiction. It is axiomatic that the issue of subject matter jurisdiction may be raised at any time and is not subject to waiver by the parties.

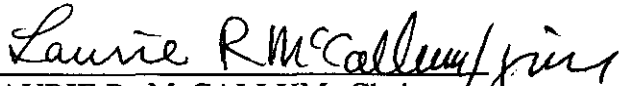
Appellant correctly points out in his arguments that the LTE employees have a completely different status than employees hired into permanent positions in the state civil service system. This argument, as well as the other arguments raised by appellant, does not establish that the Commission has the authority to hear this matter. The appellant, as the party asserting jurisdiction, has the burden of establishing the Commission's jurisdiction over the matter. *Allen v. DHSS & DMRS*, 87-0148-PC, 8/10/88.

While the Commission certainly would have preferred that the jurisdictional question had been raised earlier in the appeal process, it issues the following


ORDER

This matter is dismissed for lack of subject matter jurisdiction.

Dated: June 2, 1999 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

KMS:980053Adec2


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.

2/3/95