

STATE OF WISCONSIN

PERSONNEL COMMISSION

MARY A. JENSEN,
Appellant,

v.

**Superintendent, DEPARTMENT OF
PUBLIC INSTRUCTION,**
Respondent.

**RULING
ON
MOTION
TO DISMISS**

Case No. 99-0070-PC

This matter is before the Commission on respondent's motion to dismiss the appeal as untimely filed. The motion was raised on the second day of hearing on the merits of the appeal. The hearing was concluded later that day and the examiner established a briefing schedule on respondent's motion.

The case arises from an appointment decision. The issue for hearing reads as follows:

Whether respondent's decision not to select the appellant for the position of Teacher Assistant was illegal or an abuse of discretion.

The appellant filed her appeal with the Commission on July 16, 1999. The letter of appeal read as follows:

In January of this year, I applied for a Teacher Assistant position, job code 44398. I was interviewed in March and later congratulated by a member of the team who assured me I was definitely a contender for the job. I have since been informed a person who lives out of state was offered the position. I have not received a response from the Wisconsin School for the Deaf or DPI as to what the results of my interview were and I am concerned about why I was not chosen and why I did not receive even a letter of denial.

The Commission convened a prehearing conference on August 25, 1999, at which time a hearing was scheduled for October 19th. During the conference, the parties agreed to identify the hearing witnesses no later than September 17th, and to indicate whether the witnesses would require an interpreter. Both parties complied with the agreement.

Appellant listed 12 possible witnesses and indicated she was looking into the possibility of obtaining representation from an attorney. The hearing examiner convened a telephone conference with the parties on September 17th and, with their agreement, postponed the October 19th hearing until November 1 and 2.

The hearing was held as scheduled. On both November 1st and 2nd, the appellant presented witnesses in support of her allegations. Appellant rested her case after calling two witnesses on November 2nd. Up to that point, appellant had not testified. Respondent called the appellant as respondent's first witness and began by asking questions as to when appellant learned that the teaching assistant (TA) position in question had been filled by someone else. Respondent then moved to dismiss the appeal as untimely filed. Appellant testified that during a potluck at the end of the 1998-99 school year, Tosha Drew was introduced as the new TA.¹ The parties later stipulated the potluck occurred on June 7, 1999.

The time limit for filing an appeal of a selection decision under §230.44(1)(d), Stats., is established in §230.44(3), Stats.:

Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later

An untimely filing usually deprives the Commission of "competency" to hear an appeal. *Association of Career Executives v. Klauser*, 195 Wis. 2d 602, 608-09, n. 7, 536 N.W. 2d 478 (Ct. App. 1995). In her written response to the motion, appellant made the following argument:

After hours of preparation and nearly two days of hearings this 30 day rule is introduced. Why wasn't this brought up at the very beginning of this process? After [respondent] found themselves with a poor case all

¹ In her brief, appellant states she "first realized" she had been rejected for the position in question when she saw an advertisement in a local paper on July 7, 1999, for a new Teacher Assistant position. This statement is inconsistent with appellant's testimony that she found out about the hiring decision when Ms. Drew was introduced at the potluck at the close of the school year. While appellant's testimony is such that one could argue she knew sometime before the June 7th potluck that she had not been hired, it is clear she learned of the decision no later than June 7th.

of a sudden they try to introduce a technicality. I thought the objective of this process was to do the right thing.

Issues relating to competency to proceed are in the nature of affirmative defenses and are subject to waiver. *See e.g., Mueller v. Brunn*, 105 Wis. 2d 171, 178, 313 N.W.2d 790 (1982); *Heidemann v. American Family Ins. Group*, 163 Wis. 2d 847, 859-61, 473 N.W.2d 14 (Ct. App. 1991). Therefore, if respondent waits too long to raise an issue of timeliness, the issue would be considered waived. The appellant has raised the issue of waiver by asking why respondent didn't raise their concern "at the very beginning of this process."

While there is nothing on the face of the appeal to indicate it had been more than 30 days since appellant was notified of the personnel action, there is also nothing in appellant's letter tending to show the appeal was timely filed with the Commission. The letter states that appellant had never received a rejection letter for the position, but appellant also says she was "informed a person . . . was offered the position" and it is clear appellant knew she (the appellant) had been rejected for the vacancy. The Commission concludes there was enough information in the letter of appeal to raise a question as to the timeliness of the appeal, a question that respondent should have pursued.²

Respondent chose not to explore the issue of timeliness until appellant had rested her case after calling 8 witnesses during two days of hearing. The hearing had previously been postponed once and respondent had the opportunity to raise the timeliness question during the prehearing conference, during the conference at which the hearing was rescheduled or by filing a motion at any time during the months after the appeal was filed on July 16th. The respondent did not make use of any of these opportunities and waited until November 2nd, the second day of hearing. Given these circumstances, the Commission concludes that the respondent has waived its objection to the competency of the Commission to hear the matter.

² The Commission has added this sentence to the proposed ruling to better explain its rationale.

ORDER

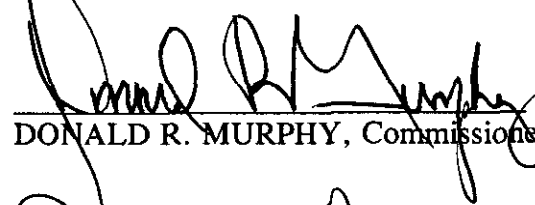
Respondent's motion to dismiss the appeal as untimely filed is denied. The examiner is directed to set a schedule for the parties to submit post-hearing briefs on the merits of the appeal.

Dated: February 11, 2000

STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson



DONALD R. MURPHY, Commissioner



JUDY M. ROGERS, Commissioner

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