

**MARCIA MARTA,**  
*Appellant,*

v.

**Secretary, DEPARTMENT OF  
VETERANS AFFAIRS,**  
*Respondent.*

RULING  
ON  
MOTION TO  
DISMISS

Case No. 02-0020-PC

This matter is before the Commission on the respondent's motion to dismiss the appeal for failure to state a claim for which relief can be granted. The parties have filed written arguments and the facts set forth below are undisputed. In its submission dated September 3, 2002, the respondent also objected to "continued representation" of the appellant by David Jaeck because "he is neither an attorney nor is he presently a union functionary." Respondent asked for clarification of Mr. Jaeck's "status before the court."

#### FINDINGS OF FACT

1. Appellant was employed by respondent at the Wisconsin Veterans Home at King on a limited term basis as a registered nurse commencing on November 19, 2001.
2. Limited term employees are entitled to fewer benefits than persons employed on a permanent basis.
3. Appellant was hired on a permanent basis effective January 13, 2002.
4. During a conversation on March 20, 2002, with a union representative, appellant learned that respondent had hired Darlene Snell into a permanent position of Nurse Clinician 2, effective November 18, 2001.
5. Appellant filed an appeal with the Commission on April 22, 2002, in which she sought to obtain review of the effective date of the decision to hire her on a permanent basis. Appellant alleges: a) that during her employment interview prior to her November hire as a limited term employee, respondent stated that its policy was not to hire permanent employees at that time of year; and b) that during this interview respon-

dent stated that it would not hire appellant into a permanent position until after the first of the year.

6. During a prehearing conference held on July 11, 2002, the parties agreed to the following statement of issue for hearing:

Whether respondent acted illegally or abused its discretion when it hired appellant [into a permanent position] effective on January 13, 2002, rather than November 19, 2001.

## OPINION

### I. Motion to dismiss

Respondent moves to dismiss this appeal "due to a failure by Complainant to state a claim for which relief can be granted." Respondent bases its motion on the contention that the sole authority to award retroactive compensation to an employee as a remedy to a successful appeal filed under §230.44(1), Stats., is found in §230.43(4), Stats., which provides, in part:

If an employee has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been restored to such position or employment by order of the commission or any court upon review, the employee shall be entitled to compensation therefore from the date of such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled by law but for such unlawful removal, demotion or reclassification. The employee shall be entitled to an order of mandamus to enforce the payment or other provisions of such order.

Respondent also recites various circuit court decisions interpreting §230.43(4), Stats., as support for its contention.

The appellant has explained the relief she is seeking in this matter as follows:

I request at the very least my permanent hire date be moved back to November 19, 2001, thus taking me off probation on May 19, 2002. This would make me eligible for health insurance two months earlier.

It is not at all clear from this statement that the sole relief identified by the appellant in this matter is retroactive compensation. Appellant states that she seeks an earlier effective date for the decision to hire her on a permanent basis.

This appeal relates to the Commission's authority under §230.44(1)(d), Stats., which provides:

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.

The Commission lacks the authority to award back pay to an appellant who has successfully appealed a non-selection decision under §230.44(1)(d). *Pearson v. UW*, 84-0219-PC, 2/12/97 A, citing *Seep v. Pers. Comm.*, 140 Wis. 2d 32, 409 N.W.3d 142 (Ct. App., 1987) However, that conclusion does not mean that no relief can be awarded in such cases. In *Pearson v. UW*, 84-0219-PC, 8/5/96, the Commission ordered the appellant appointed to the position in question when it next became vacant. In *Johnson v. DHSS*, 94-0009-PC, 3/3/95, the Commission ordered respondent to interview the appellant for the next vacancy after finding that respondent had abused its discretion by failing to interview appellant for a vacant position. In *Rosenbauer, v. UW-Milwaukee*,, 91-0086-PC, 91/0071-PC-ER, 9/24/93, after the Commission concluded that respondent had abused its discretion by not giving all certified candidates the same opportunity to augment their resumes, the appropriate remedy was a cease and desist order where the appellant had failed to establish that she would have been hired if all the candidates had the same opportunity.

Respondent has incorrectly framed its motion as if the appellant had stated that back pay was the sole relief she was seeking in this matter.

The Commission also notes that it has the statutory authority found in §230.44(4)(c), which provides:

After conducting a hearing on an appeal under this section, the commission shall either affirm, modify or reject the action which is the subject of the appeal. If the commission rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision.

If the appellant prevails on the issue for hearing set forth above, the Commission would either reject or modify the respondent's action and remand the matter to the respondent with direction to take "action in accordance with the decision."

The appellant could obtain relief from the Commission so the respondent's motion to dismiss must be denied.

II. Participation of Mr. Jaeck as appellant's representative

The second topic raised by respondent relates the role of Dave Jaeck, who participated, along with the appellant, during the prehearing conference, and submitted appellant's response to respondent's motion to dismiss. Respondent's stated its objection as follows:

[T]he department objects to Mr. Jaeck's continued representation of Ms. Marta. He is neither an attorney nor is he presently a union functionary. We would ask for clarification of his status before the court (sic).

Mr. Jaeck is clearly serving as the appellant's representative as permitted by §PC 1.04(1), Wis. Adm. Code:

A party is entitled to appear in person or by or with the party's representative in any case before the commission except as otherwise prohibited by law. The representative shall be presumed to have full authority to act on behalf of the party, including the authority to file or withdraw a case.

The respondent has not suggested that Mr. Jaeck's participation in this matter is "prohibited by law" and the Commission is unaware of any basis on which to restrict the appellant's choice to have Mr. Jaeck represent her interests.<sup>1</sup>

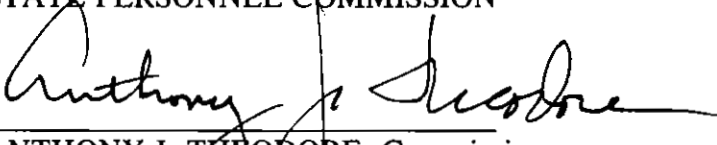
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<sup>1</sup> There is no suggestion that Mr. Jaeck is being compensated by the appellant, which would be contrary to the Commission's decision in *Sathasivam v. DOC*, 01-0119-PC-ER, 7/1/02, or that Mr. Jaeck is an attorney whose license to practice law has been suspended or revoked, as was the situation in *Walters v. DOC*, 02-0014-PC, 9/25/02.

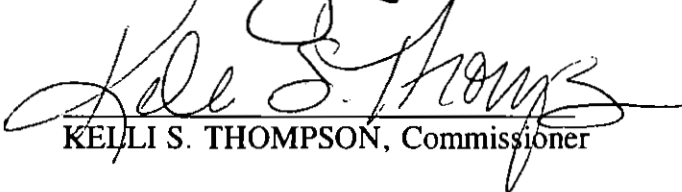
ORDER

Respondent's motion to dismiss is denied. Respondent's objection to participation by Mr. Jaeck is overruled.

Dated: OCT. 18, 2002 STATE PERSONNEL COMMISSION

  
ANTHONY J. THEODORE, Commissioner

KMS:020020Arul1

  
KELLI S. THOMPSON, Commissioner