

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SYLVIA J. DENNIS, Appellant,

v.

**Administrator, DIVISION OF MERIT
RECRUITMENT AND SELECTION**, Respondent.

Case 565
No. 62788
PA(dmrs)-1

Decision No. 30892

Appearances:

Ms. Sylvia J. Dennis, 9 Sherman Terrace #3, Madison, WI 53704, appearing on her own behalf.

Attorney David J. Vergeront, Legal Counsel, Office of State Employment Relations, PO Box 7855, Madison, WI 53707-7855

ORDER GRANTING MOTION TO DISMISS

This matter is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss for lack of subject matter jurisdiction. The appeal arises from the decision to find the Appellant "Not Eligible" as a consequence of an examination or other review of materials submitted by the Appellant for a vacant position.

The appeal was filed with the Personnel Commission (the PC) on May 13, 2003. However, the PC was abolished pursuant to 2003 Wis. Act 33, and the authority over this matter was transferred to the Commission, effective July 26, 2003. The same legislation reorganized the executive branch so that the former Secretary of the Department of Employment Relations is now the Director of the Office of State Employment Relations. Unless otherwise noted, all references to the Wisconsin Statutes are to the version of the statutes that existed as of the time the appeal was filed in May of 2003, before the legislative changes.

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Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The position of Administrator of the Division of Merit Recruitment and Selection (DMRS) in the Department of Employment Relations (DER) was vacant early in 2003. Notice of the vacancy was published in one or more newspapers. The notice read, in part:

The Wisconsin Department of Employment Relations (DER) is looking for an energetic and talented human resource professional to serve as Administrator of the Division of Merit Recruitment and Selection

The person selected will be appointed by the Governor to serve a fixed term appointment through March 26, 2004. The successful candidate will be eligible to be re-appointed to another five-year appointment

Formal job application form and responses required. For information and instruction on how to apply, please visit the web site

2. This position is part of the unclassified service within the State civil service.
3. Appellant submitted application materials for the vacancy.
4. The Administrator examination, including scoring, was conducted pursuant to the authority of the Secretary of the Department of Employment Relations.
5. Appellant received her “Notice of Examination Results” sometime after April 3, 2003, indicating she was “Not Eligible.”
6. Appellant filed a letter of appeal with the PC on May 13, 2003, stating she “would like to appeal the determination that [she] was “Not eligible” for the Administrator of the [Division] of Merit Recruitment and Selection.”

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The Appellant has the burden to establish that the Commission has subject matter jurisdiction over this appeal.
2. As provided in Sec. 15.173(1)(b), Stats., the Secretary of the Department of Employment Relations (DER) was required to conduct the examination for the position in question.
3. Appellant has failed to sustain her burden.
4. The Commission lacks subject matter jurisdiction over this matter.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

This matter is dismissed for lack of subject matter jurisdiction.

Given under our hands and seal at the City of Madison, Wisconsin, this 30th day of April, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

DOA-Office of State Employment

**MEMORANDUM ACCOMPANYING
ORDER GRANTING MOTION TO DISMISS**

The key to resolving Respondent's motion to dismiss is the language of Sec. 15.173, Stats., which provides, in part:

(1) Division of merit recruitment and selection. (a) There is created in the department of employment relations a division of merit recruitment and selection.

(b) The administrator of the division of merit recruitment and selection in the department of employment relations shall be nominated by the governor, and with the advice and consent of the senate appointed for a 5-year term, under the unclassified service from a register of at least 5 names certified by the secretary of employment relations. The secretary of employment relations shall prepare and conduct an examination for the position of administrator according to the requirements for classified positions under subch. II of ch. 230.

This language clearly identifies the Secretary of DER as the person holding the authority and responsibility for conducting the examination in question and carves out an exception to the general rule that it is the Administrator of DMRS, rather than Secretary of DER, who has responsibility to conduct State civil service examinations. This general rule is reflected in Sec. 230.16, Stats., which notes that it is the Administrator who prescribes application materials, administers exams and appoints boards of examiners.

The Commission's authority to hear appeals of State civil service personnel actions is limited by Secs. 230.44 and .45, Stats. The provisions that are relevant to the present matter are found in Sec. 230.44, Stats.:

(1) Appealable actions and steps. Except as provided in par. (e), the following are actions appealable to the commission under s. 230.45(1)(a):

(a) Decision made or delegated by administrator. Appeal of a personnel decision under this subchapter made by the administrator [of DMRS] or by an appointing authority under authority delegated by the administrator under s. 230.05(2).

(b) Decision made or delegated by secretary. Appeal of a personnel decision under s. 230.09(2)(a) or (d) or 230.13(1) made by the secretary [of DER] or by an appointing authority under authority delegated by the secretary under s. 230.04(1m).

As noted above, most exam decisions are attributable to the Administrator of DMRS. Those decisions are reviewable as provided in Sec. 230.44(1)(a), Sec. 15.173(1)(b), Stats., the exam in the present case was conducted by the Secretary of DER, so the Commission must look to Sec. 230.44(1)(b), Stats., to see if the decision may be reviewed.

The Commission may only review those decisions of the Secretary that fall within the scope of Secs. 230.09(2)(a) or (d) or 230.13(1), Stats. The latter provision relates to decisions to keep certain personnel records closed to the public so it is clearly unrelated to the present case. Section 230.09, Stats., relates to the civil service classification structure and has no bearing on Appellant's appeal. Based upon the above analysis, the Commission concludes that it lacks the authority to hear an appeal from the examination conducted by the Secretary to fill the unclassified position of Administrator of DMRS.

Dated at Madison, Wisconsin, this 30th day of April, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

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