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IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

Filed November 10, 1977

MARILYN L. McMANUS,

v. Appellee,

IOWA MERIT EMPLOYMENT COMMISSION, and
MRS. THELMA HEITSMAN, WILLIAM C. HUBBARD,
AL MEACHAM, JAMES B. MORRIS, JR., JULIAN L.
TORGERSON, and CLIFFORD M. WHITE, Members
of the Iowa Merit Employment Commission, and
W. L. KEATING, Director, Iowa Merit Employment
Commission,

Appellants.

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2-57472

Appeal from Polk District Court - Wade Clarke, Judge.

Appeal from certiorari review modifying Iowa Merit Employment Commission decision. Sua sponte finding that the Commission was without subject matter jurisdiction. Reversed.

Richard C. Turner, Attorney General, Lorna Lawhead Williams, Special Assistant Attorney General, and Theodore R. Boecker, Assistant Attorney General, for appellants.

J. Riley McManus and A.A. Herrick, of Des Moines, for appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

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This protracted controversy involves the attempt of the Polk County Board of Social Welfare to terminate the employment of Marilyn L. McManus. The events which lead to this appeal began April 8, 1970, when McManus was notified by the Board that her services would be terminated on April 30, 1970. The district court intervened by means of a "temporary restraining order." McManus addressed a request for a hearing to the Board, and also appealed to the Iowa Merit Employment Commission. Thereafter, the restraining order was lifted and, following considerable delay, the Commission heard the appeal. McManus did not pursue her Board remedy. On June 1, 1972, the Commission ordered that McManus be reinstated and "credited with all of her seniority, sick leave accrual and vacation entitlement. . . ." Back pay was denied, however. McManus challenged the denial of back pay by petitioning the district court for a writ of certiorari. On May 31, 1974, the court affirmed McManus's reinstatement and the award of full seniority and accrued sick leave and vacation. The court further ordered that she receive back pay with interest from February 25, 1971, the date upon which her salary had stopped. From this judgment the Commission appeals.

At the outset, we must determine whether the Commission had subject matter jurisdiction of this cause. Although the issue has not been raised by either party, this court must nevertheless make an examination sufficient to ensure that the Commission acted within the power conferred upon it by statute. *Weidon v. Zoning Board*, 250 N.W.2d 396, 400 (Iowa 1977).

Subject matter jurisdiction cannot be acquired by a court through waiver or estoppel. *Steffens v. Proehl*, 171 N.W.2d 297, 300 (Iowa 1969). It must be conferred by law. *O'Kelley v. Lochner*, 259 Iowa 710, 715, 145 N.W.2d 626 (1966). These rules of subject matter jurisdiction apply to administrative agencies as well as courts. *Antrim v. Civil Service Comm'n.*, 261 Iowa 396, 401, 154 N.W.2d 711 (1967); 73 C.J.S. Public Admin. Bodies and Proc. § 116 (1951); cf. *Iowa Civil Rights Comm'n. v. Massey-Ferguson, Inc.*, 207 N.W.2d 5, 10 (Iowa 1973).

The Iowa Merit Employment Commission was created by, and derives its power from, chapter 19A, The Code. Section 19A.1 is a statement of the general purpose of the chapter: to establish a merit system of employment for the State. Section 19A.3 applies the merit system to employees of the State, with certain enumerated exceptions.

Section 19A.14 authorizes an aggrieved employee to appeal first to the "appointing authority" and then to the Commission. "Appointing authority" is defined by § 19A.2(5) as the person in charge of a division of state government. The procedures and safeguards of chapter 19A are available only to employees of the State. See generally *Peters v. Iowa Emp. Sec. Comm'n.*, 235 N.W.2d 306, 308-09 (Iowa 1975).

This analysis is supported by the existence of § 19A.16. That section permits the Commission to enter into agreements with political subdivisions of the State for use of the Commission's services. No such provision would be necessary if the merit system applied directly to employees of political subdivisions.

The critical question thus becomes whether McManus was employed by the State. We conclude that she was not. This conclusion is dictated by *State ex rel. Fenton v. Downing*, 261 Iowa 965, 155 N.W.2d 517 (1968). *Downing* dealt with the same statute which controls here, chapter 234, The Code (1971), and with the same agencies.

Downing decided the question whether the State Board of Social Welfare could discharge the Polk County Welfare Director. Resolution of that issue depended upon the court's determination of which Board employed the Director. It is the answer to that broad question which binds us in deciding this case. The court noted that both putative employers were creatures of statute. Therefore, the existence of an employment relation would depend upon statutory construction and not upon common law agency grounds. 261 Iowa at 970, 155 N.W.2d at 520.

According to *Downing*, chapter 234 establishes two employers. Persons hired under the authority of § 234.12 are employees of the county board. 261 Iowa at 971, 155 N.W.2d at 521. McManus was hired under the § 234.12 language, "[t]he county board shall employ . . . such . . . personnel as is necessary. . . ." Thus, she was not a State employee.

Our conclusion is fortified by subsequent legislative action. Code sections 234.12 and 234.13 (providing for payment of county board employees with State funds) were repealed in 1973 by Acts 65 G.A. ch. 175, § 6. Section 1 of that same chapter 175, codified as § 217.23, now provides that the (State) Commission of Social Services shall employ any necessary personnel. It must be presumed that the legislature intended some change by this enactment. *Downing*, 261 Iowa at 972, 155 N.W.2d at 521. The change intended is this: persons in the position which McManus held are no longer

county employees; they are employees of the State. Clearly then, prior to this statutory amendment, McManus was a county employee, and the Iowa Merit Employment Commission was without power to hear her appeal.¹

Upon remand, the district court shall enter an order dismissing McManus's petition for certiorari, and vacating the order of the Commission in this cause. Such order shall be without prejudice to McManus's further pursuit of relief through the appropriate county hearing procedures.

REVERSED.

¹ Downing also makes clear, contrary to contentions made at oral argument, that the involvement of federal funding is irrelevant. 261 Iowa at 968, 970, 155 N.W.2d at 519, 520. See also Peters v. Iowa Emp. Sec. Comm'n., 235 N.W.2d 306, 312 (Iowa 1975).