STATE OF WISCONSIN PERSONNEL COMMISSION

BEN MARTIN,

Appellant,

v.

SECRETARY, Department of Industry, Labor, and Human Relations,

Respondent.

Case No. 74-132

DECISION
AND
ORDER

This case was transferred to the Commission pursuant to Chapter 196, Laws of 1977, Section 127(1)(c). The Commission has considered the objections of the parties to the Proposed Decision of the hearing examiner, reviewed the transcripts of the hearings and the rest of the very extensive record in this case, heard argument by counsel, and now reaches its Final Decision.

FINDINGS OF FACT

The Commission adopts as part of its Final Decision the findings proposed by the hearing examiner in the Proposed Opinion and Order, a copy of which is attached hereto, with the following changes, amendments, and additions:

Finding #2. In the second full sentence, "In March 1977 appellant was promoted through competition to State Minority Specialist (Manpower Specialist 4)," "1977" is changed to "1971." This change is based on undisputed evidence in the record, the first date apparently being a typographical error.

Finding #3. This finding is amended by the addition of the following language:

"The appellant's record of performance with DILHR was one of outstanding achievement and he was substantially better qualified by way of his experience and record for the position in question than the person actually appointed."

In the opinion of the Commission the Proposed Finding of the examiner is quite correct as far as it goes. However, the addition to the finding is material to the issues related to the non-appointment of appellant to the position of Director of Equal Opportunity for the Employment Security Division. The addition to the finding is amply supported by the record as there was a great deal of evidence from a wide variety of sources regarding the appellant's excellent performance and accomplishments in his work, and he was substantially better qualified for the position by way of his experience and record of achievement than the individual who was in fact appointed.

The position in question involved monitoring and overseeing employment security services to attempt to ensure that they would be administered in a nondiscriminatory fashion with respect to clients, or the public, and also to monitor and oversee the personnel practices in the Employment Security Division to attempt to ensure compliance with affirmative action and equal employment opportunities guidelines. The appellant's work in DILHR and particularly as State Minority Specialist was very similar to the work that would be required of the Equal Opportunity Director. His high level of effectiveness and excellent performance in this work was attested to by a number of sources, including DILHR management. The person who actually was appointed, Mr. Miller, had only approximately two years experience as a Manpower Specialist 4 (Indian Specialist), and was

only eligible to compete for the position in question because of its trainee designation. In addition to all of these factors, the oral examining board, which ranked the appellant first of those examined, felt that he was demonstrably and clearly the best qualified candidate.

Finding #4. This finding is amended by the addition of the following language:

"The members of the panel were also aware of a number of other situations in which the appellant had taken public positions critical of DILHR management, and explicitly or implied them, in the areas of equal rights and affirmative action."

The record reflects that the appellant was a vocal, persistent, and public critic of the agency and agency management in the fields of equal rights and affirmative action. The Proposed Finding is correct as far as it goes and is adopted by the Commission but in the Commission's opinion these additional facts present a more complete picture of the situation.

In addition to the letter of complainant to the federal government referred to in the finding, the appellant in a number of instances became involved in protests or other activities related to concerns about specific instances of departmental action regarding both clients and employees. Examples of this include a protest of a decision to fill a Milwaukee Manpower Specialist position utilizing a selection process for a position in the Ashland area, and a suggestion that divisional offices in small cities with significant minority populations attempt to recruit more minority staff.

In addition to the 1972 "letter of complaint" referred to in the finding, the appellant also had filed a federal EEOC complaint on April 4,

1974, which listed DILHR as one of the respondents and which complained of conduct attributable to Mr. Kehl and other upper level DILHR management. Mr. Kehl and the appellant had had a number of disputes and the appellant had clearly expressed to Mr. Kehl his lack of confidence in his (Kehl's) ability and committment in the area of equal rights and affirmative action. Mr. Spencer and the appellant had exchanged memos concerning the extent of the appellant's duties as Employe Development Specialist, and the appellant had informed Mr. Spencer in a memo dated March 15, 1974 (Appellant's Exhibit 17), that he intended to file a federal complaint concerning what the appellant perceived to be illegal restrictions and retaliation for having made the 1972 federal complaint. With respect to Mr. Kaisler, in addition to the appellant's formal complaints against DILHR management, appellant had made him aware in a number of ways, including public questioning, of his lack of conficence in Mr. Kaisler's performance and committment in the area of equal rights and affirmative action.

Finding #6. This finding is amended by addition of the following language:

"In addition to the at least two individuals who were qualified for the position at the objective level without the trainee designation, there were at least two others who possibly would be qualified. The use of a trainee designation was either entirely unprecedented or very unusual for a position at this high level (salary range 14). The position is in a high level supervisory classification with considerable latitude for independent judgment, responsible for functioning as a technical consultant in a particular field of specialty, and has the responsibility for a state-wide program. The two people definitely qualified are black."

The Proposed Finding is correct in and of itself. The finding that at least two individuals were qualified at the objective level is based on the testimony of the DILHR personnel director. However, he recognized that there might have been as many as four people qualified. See transcript of Hearing held 3/8/77, p. 206:

> "Q Do you recall how many individuals roughly would have been eligible to compete for this job had it not been designated trainee?
>
> A I don't think it would have been any more than about four people at that time. Maybe even only two. But it wouldn't have been any more than four. Probably only two."

This, while in the witness's opinion there would have been at least two people there might have been as many as four.

The other material in this finding added by the Commission is based on undisputed testimony by representatives of the State Bureau of Personnel, which is required to authorize trainee designations, and the official class specifications for the classification of the position.

Finding #7. This finding is amended by the addition of the following language:

"These rankings, reflecting the improper award of veterans points, were before the panel at the time they determined to appoint Mr. Miller to the position in question."

This addition to this finding is based primarily on the appearance of the candidates' names and scores, in rank order, on the certification report, appellant's exhibit 2, which was provided to the interview panel.

CONCLUSIONS OF LAW

The Commission adopts as part of its conclusions of law in its Decision, the Proposed Conclusions numbered 1 and 2. The Proposed Conclusions numbered 3 and 4 are rejected by the Commission which substitutes in their place, the following conclusions:

"3. The appellant has sustained this burden of proof and demonstrated that the respondent violated the Civil Service Statutes or rules promulgated thereunder in the selection process for the Director of Equal Opportunity for the Employment Security Division, Administrative Support Bureau, DILHR, as follows:

A. The respondent added veterans points to an applicant who was not eligible for them, in violation §16.12(7), Wis. Stats. (1975);

B. The respondent caused the use of a trainee designation when the same was not appropriate, in violation of §Pers. 23.03(1), WAC"

With respect to the veterans points it is clear from the record and not disputed by the respondent that Mr. Miller was not entitled to veterans points and was awarded them erroneously. It follows that this was a violation of §16.12(7) which sets forth the criteria for the award of veterans points.

With respect to the trainee designation, §Pers. 20.03(1), WAC, provides, as relevant:

> "The director may authorize the use of the trainee classification when:
>
> (a) Qualified applicants are not available for the objective classification, or
> (b) Filling the position as a trainee will be more appropriate than appointment in the objective cassification.

Inherent in the concept of a trainee position is that the trainee will

not be able to function at the objective level while undergoing training. The job in question here was a high level, supervisory position. The personnel people who testified at the hearing indicated that it was highly unusual to use a trainee designation for this kind of high level job, and were unable to cite any case of a trainee level being used at a salary range this high. It is clear that the nature and level of the job were such to make it far more difficult for the effective functioning of the appointee and the agency than would be the case with lower level jobs.

Against the clear drawbacks of the use of a trainee designation, the expressed agency rationale for the use of the designation was an affirmative action consideration. While this is certainly a permissible criterion, the two persons known to be qualified at the objective level were both black. The agency thought there were two others who possible were qualified. If the exam had been announced at the objective level there might have been a sufficient number of qualified candidates, and at least half the pool would have been black. Another approach the agency might have taken with due regard to affirmative action considerations but without going to a trainee designation, at least in the first instance, would have been to announce the examination on a service-wide promotional or open competitive (either state or national) basis rather than departmental promotional as was done. With respect to both of those approaches, a trainee designation could still have been used if the initial announcement had not elicited a sufficient number of qualified candidates. See §Pers. 6.03, WAC. Given all the factors discussed above, including the availability of alternative options, the Commission is forced to conclude that the use of the trainee designation by the respondent was not appropriate.

The Commission adds the following additional conclusions:

4. This appeal, having been filed prior to the effective date of Chapter 196, Laws of 1977, and transferred to the Commission by the Personnel Board pursuant to §127(1)(b), Chapter 196, Laws of 1977, must be decided under prior law, §129(5).

This conclusion follows from the language of the act itself.

5. Under the circumstances here present, the violations of the Civil Service Code set forth above had a direct causal effect on the non-appointment of the appellant to this position.

The issue which provided the notice of hearing in this appeal is set forth in the prehearing conference report (Board's Exhibit 2):

> "Whether or not there was a violation of the Civil Service Statutes and the rules of the Director by the appointing authority in the selection process for the Equal Opportunity Coordinator (Manpower Specialist 6) position.

As set forth in the conclusions there were two violations established on this record. In the opinion of the Commission these violations had a substantial impact on appellant's competition for this job. The person who received the appointment would not have been allowed to compete for the job at all if it had not been designated trainee. He would not have ranked number one on the register ahead of the appellant had he not improperly been awarded veterans points.

The Commission recognizes that upon certification the appointing authority is not required to appoint the top ranked candidate and can exercise discretion as to which of the three certified condidates to appoint. However, the Commission connot conclude that the errors in the selection process amounted to "harmless error" because of these factors.

The members of the interview panel all had been involved in disputes

with the appellant and had been in adversary positions with him with respect to official and unofficial complaints made by the appellant. In the opinion of the Commission these factors created a conflict of interest in the context of the panel deciding whether to appoint the appellant to the position. In light of all these factors and the factor that the appellant was substantially better qualified for the position than the person appointed, the Commission must conclude that the violations of the Civil Service Code had a direct causal effect on the non-appointment of the appellant to this position.

OPINION

The Commission rejects the Proposed Opinion and substitutes the following as its opinion:

The Commission includes as part of its opinion the discussion under the various changes, amendments, and additions to the Findings and Conclusions set forth above.

This matter is before the Commission as an appeal of a non-contractual grievance pursuant to §16.05(7), Stats. (1975). This subsection does not address the question of available remedies on final disposition of a grievance. The Commission is of the opinion that it has relatively broad powers in this area, so long as any remedies are not inconsistent with other statutory provisions or the guidelines established by the director pursuant to §Pers. 25.01, WAC.

The matter of back pay for employees under the "prior law" that must govern this appeal is set forth under §16.38(4), Stats. (1975):

> (4) RIGHTS OF EMPLOYE. Any employe who has been removed, demoted, or reclassified, from or in any position or employment in contravention or violation of this subchapter, and who has been reinstated to such position or employment by

> order of the board or any court upon review, shall be entitled to compensation therefor from the date of such unlawful removal, demotion or reclassification at the rate to which he would have been entitled by law but for such unlawful removal, demotion or reclassification, and such employe shall be entitled to an order of mandamus to enforce the payment or other provisions of such order.

This subsection does not, by its terms, apply to situations where the employe has been denied improperly an appointment. The Commission recently discussed a similar question in Noltemeyer v. DHSS, Wis. Pers. Commn. No. 78-14-PC, 78-28-I (12/20/78):

> "In the Commission's opinion, these provisions bring into play the principle of statutory construction of express mention, implied exclusion. See Teamsters Union Locan 695 Waukesha Co., 57 Wis. 2d 62, 67, n.6 (1973):
>
> 'The express mention of one matter excludes other similar matters not mentioned .... 82 CJS Statutes p. 668, §333. See also 50 Am Jur Statutes, p. 238, §244.'
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> Where the legislature has provided expressly for back pay in two specific situations, it is inappropriate to find authority to grant similar relief in the manner suggested by the appellant. This is particularly true in light of the well established principle in Wisconsin that administrative agencies are created by the legislature and their powers are limited to those which can be found within the four corners of the Statute. American Brass Co. v. State Board of Health, 245 Wis. 440, 448 (1944). See also State ex rel Farrell v. Schubert, 52 Wis, 2d 351, 358 (1971): ' any reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority,' Murphy v. Industrial Commission, 37 Wis. 37 Wis. 2d 704 (1968). The Personnel Board in interpreting §16.05(1)(f) and 16.38(4), Stats. (1975), has held that there is no authority to grant back pay where employes are improperly denied reclassification, see Van Laanen v. Knoll, No. 74-17 (3/19 and 23/76); and Nunnelee v. Knoll, No. 75-77 (8/1/77). Both of these decisions were affirmed in circuit court in Van Laanen v. State Personnel Board, No. 153-348 (5/31/77) per J. Currie); and in Nunnelee v. State Personnel Board, No. 158-464 (9/14/78) (per J. Eich).

In the opinion of the Commission these principles apply here and prevent the award of any back pay in this forum.

With respect to other possible relief, it is the opinion of the

Commission that with the exception of back pay the appellant should be "made whole" to the extent possible for the denial of this appointment. The Commission is mindful of the length of time this case has been pending and that the record may not reflect the current situation regarding the posture of the parties. Therefore, he Commission will remand the matter to the respondent with directions to report back as to what remedies it believes are available. The parties will be directed to consult in an attempt to reach agreement on an appropriate remedy.

ORDER

The Proposed Order is rejected and the Commission substitutes in its place the following Order:

The position of the respondent on this grievance is rejected and this matter is remanded for action not inconsistent with this Decision. The respondent is directed to report back to the Commission within 30 days of the date this Order is entered, a statement of position with regard to the remedy. The parties are directed to consult before the end of this 30 day period to attempt to reach agreement on an appropriate remedy. If agreement is not reached then the appellant will have 15 days from the date the aforesaid statement of position by the respondent is filed within which to file a reply.

Dated: 12/28, 1978. STATE PERSONNEL COMMISSION

Joseph W. Wiley, Chairperson

Edward D. Durkin, Commissioner

STATE OF WISCONSIN

STATE PERSONNEL BOARD

* *

BEN MARTIN,

Appellant,

v.

SECRETARY, Department of Industry, Labor and Human Relations,

Respondent.

Case No. 74-132

* *

PROPOSED
OPINION AND ORDER

Before:

NATURE OF THE CASE

This is an appeal alleging a violation of the civil service statute and rules of the Director of the Bureau of Personnel by respondent in the selection process for the Equal Opportunity Coordinator (hereinafter EOC) position.

FINDINGS OF FACT

1. Appellant was a state employe with permanent status in class as a Manpower Specialist 4 in June, 1974 when he applied for the position of Director of Equal Opportunity for the Employment Security Division, Administrative Support Bureau, Department of Industry, Labor and Human Relations (hereinafter DILHR).

2. Appellant has worked for DILHR since April, 1969 when he was hired for a District Minority Specialist position. In March, 1977 appellant was promoted through competition to State Minority Specialist (Manpower Specialist 4). In July, 1972 appellant was transferred to State Job Development Specialist in the WIN program. In March, 1974 appellant began working in the Employment Security

Division, DILHR, as an Employe Development Specialist.

3. Appellant who is black demonstrated throughout his work history with DILHR his dedication to affirmative action and equal opportunity principles regardless of a person's minority or nonminority status.

4. The interview panel for the EOC position was comprised of George Kaisler, Stanley Spencer and Edward Kehl. All the members of the interview panel were acquainted with appellant. In fact, they were aware or should have been aware that appellant had included their names in a letter of complaint to the Federal government, alleging their noncompliance with equal opportunity principles.

5. The interview panel was also acquainted with the other two certified candidates. Miller and McClain were also employes of DILHR at the time of the selection process.

6. The EOC position was designated trainee by respondent with the approval of the Director of the Bureau of Personnel. There were at least two individuals, appellant and one of the other certified candidates, who were qualified for the position without the trainee designation.

7. One of the top three candidates, Miller, who was ultimately selected, was improperly awarded veterans points by respondent. As a result he was initially ranked number one when he should have been ranked number two.

8. The top three candidates and their actual grades were: Appellant (Black male) 95.3; Miller (Native American male) - 94.1; and McClain (Black male) - 93.5.

9. There was a change in the duties and responsibilities of the position from the time of the examination to after certification. Initially the EOC position was to supervise the Indian Affairs Specialist position. After certification the change was to the effect that the position would actually act as the Indian Affairs Specialist. The percentage of time devoted to this aspect of the job was ten percent.

CONCLUSIONS OF LAW

1. The Personnel Board has jurisdiction over this appeal under s. 16.05(1)(f), Wis. Stats. (1975).

2. The burden of proof in this matter is on appellant. Reinke v. Personnel Board, 53 Wis. 2d 125 (1971); Greene v. Wettengel, Case No. 73-4 (6/2/75); Haerle v. Wettengel, Case No. 73-139 (6/3/75); Heiser v. Schmidt and Wettengel, Case No. 566 (6/9/73); Miller v. Wettengel, Case No. 452 (6/11/73).

3. Appellant has failed to sustain his burden of proof.

4. Respondent did not violate the civil service statutes or rules promulgated thereunder in the selection process for the Director of Equal Opportunity, DILHR.

OPINION

The record in this case is lengthly. Appellant presented a great deal of evidence which established his proven ability to further equal opportunity and affirmative action goals. The evidence also clearly established that his employment supervisors did not always agree with the techniques he used to attempt to implement those goals. Therein lies what we conclude is the reason for his nonselection for the EOC position. What must then be determined is whether the nature of the disagreement was such that respondent violated the civil service laws or rules promulgated thereunder in making his decision.

There is not question that some aspects of the examination process minimally reflected poor personnel practice. We do not conclude that the use of the trainee designation was illegal. However, we conclude that DILHR did not investigate as thoroughly as possible the number of people who were eligible and interested in the position. We do find it unusual that the trainee designation

was used for a position at this level. But the use of the designation was not illegal. See s. 16.33, Wis. Stats. (1975); Chapter Pers. 20, W.A.C.

The error in assigning Miller veterans points had minimal impact on appellant's chances of being selected after certification. We find that it was an administrative error. Miller did not claim veterans points, he merely submitted a partially completed form. There was no evidence showing an intent to defraud or otherwise claim unearned points. However, we do feel that respondent was wrong in not advising the top three of the change in ranking after the error was discovered. We recognize that it made no difference in the certification list. However, we do feel appellant and the others should have been advised.

There were three candidates certified. The three candidates with or without the wrongful assignment of veterans points all scored well about 90. At least on paper they were all very well qualified for the position. The ranking of candidates becomes essentially immaterial after certification unless an error is discovered which would change the certification list.

The appointing authority has the discretion to select any person from among the top three. However, that discretion cannot be abused. Appellant here alleges that respondent abused his discretion and violated the civil service law in selecting Miller over him. We conclude he did not. While it appears clear that appellant was very qualified for the position and might well have done an excellent job, we do not find that respondent illegally selected Miller. The evidence showed that within the interview panel's judgment Miller, a Native American, more accurately fit the criteria they had set forth. Whether in fact he proved to be as competent as respondent expected or hoped or whether appellant might have

performed more effectively is not the question to be resolved. We conclude that appellant was not racially discriminated against by respondent in not being selected for the position question.

ORDER

IT IS HEREBY ORDERED that respondent's action is affirmed and this appeal is dismissed.

Dated: _____, 1978 STATE PERSONNEL BOARD

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