

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*  
GEORGE LUNDEEN,  
Appellant,  
v.  
Secretary, DEPARTMENT OF  
ADMINISTRATION,  
Respondent.  
Case No. 79-208-PC  
\* \* \* \* \*

DECISION  
AND  
ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(d), Wis. Stats., of the denial of permissive reinstatement.

FINDINGS OF FACT

1. The appellant was employed in the classified civil service by the respondent from September 23, 1963, until he retired on December 3, 1977.
2. At the time of his retirement, the appellant's position was classified as Superintendent of Buildings and Grounds 3.
3. At all relevant times prior to his retirement, the appellant had worked under the immediate supervision of Robert Shaw, who reported to Gordon May, who in turn reported to Paul L. Brown.
4. The appellant's retirement had been prompted by his having reached the then mandatory retirement age of 65 on November 23, 1977.
5. Following a change in state policy in 1978 that changed the mandatory retirement age to 70, the appellant on November 10, 1978, requested reinstatement to his former position. See letter of November 10, 1978, Respondent's Exhibit #1.

6. On December 21, 1978, Ms. Kramer discussed appellant's reinstatement request with Mr. May, who had the authority to effectively recommend appointment, subject to the approval of his supervisor, Paul Brown.

7. Mr. May stated that he did not wish to reinstate the appellant because of his poor human relations skills.

8. By letter dated January 30, 1979, from the DOA Personnel Director, Patricia Kramer, to the appellant, Respondent's Exhibit #3, the respondent stated as follows:

"In the last couple of months, we have reviewed your request for reinstatement to a position of Superintendent of Buildings and Grounds 3. We have not had nor do we in the near future expect a suitable vacancy for your reinstatement.

If any change occurs in our recruitment needs, we will advise you."

9. The aforesaid letter was intended by Ms. Kramer as a discreet and polite way of informing the appellant that he would not be reinstated by the respondent to a permanent position.

10. On April 4, 1979, the respondent publicly announced an examination for a Superintendent of Buildings and Grounds 3 vacancy. The appellant was not specifically informed of this vacancy.

11. The appellant did not apply for consideration for appointment to this position, and another person was appointed to it following examination and certification.

12. There was a reasonable basis for the decision not to reinstate the appellant.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(d), Wis. Stats.
2. The appellant has the burden of proving to a reasonable certainty, by the greater weight of the credible evidence, that the respondent's failure to reinstate him following his retirement was illegal or an abuse of discretion.
3. The appellant has failed to sustain his burden.
4. The failure of the respondent to reinstate the appellant following his retirement was neither illegal nor an abuse of discretion.

OPINION

The respondent raised for the first time at the commencement of the hearing an objection to the Commission's subject matter jurisdiction on the ground that this transaction was not covered by §230.44(1)(d), Stats., because the appellant was never certified for the position in question.

Section 230.44(1)(d), Stats., provides in part as follows:

"...the following are actions appealable to the Commission...

\* \* \*

(d) Illegal action or abuse of discretion. 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." (emphasis added)

The Commission cannot agree that this language requires that the appellant have been certified as a precondition to jurisdiction. It is noteworthy that this subsection refers by its terms to "certification"

without qualification. In the opinion of the Commission, the restriction urged by the respondent would have the effect of reading into this statute an implied limitation on appeals to situations after certification "of the appellant."

The respondent also argues in his post-hearing brief that there "has been no personnel action after certification relating to the hiring process in the classified service...." See brief of respondent filed 3/18/81, p. 5.

The appellant requested and was eligible for reinstatement. The respondent elected not to reinstate him to a vacant position. This failure to reinstate was equivalent to a denial of reinstatement or appointment occurring after certification when the actual appointment was made.

With respect to the substantive issue, the question is whether the denial of reinstatement was illegal or an abuse of discretion.

There does not appear to be any question that the appellant's reinstatement eligibility with DOA was permissive, see §Pers 16.03(4), Wis. Adm. Code. Therefore, the only question is whether the respondent's denial of reinstatement amounted to an abuse of discretion.

An abuse of discretion has been defined in Murray v. Buell, 74 Wis. 14,19 (1889):

"The term 'abuse of discretion' exercised in any case by the trial court, as used in the decisions of courts and in the books, implying in common parlance a bad motive or wrong purpose, is not the most appropriate. It is really a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence."

See also Black's Law Dictionary (4th Edition), p. 25:

"A discretion exercised to an end or purpose not justified by and clearly against reason and evidence."

The Commission cannot conclude on this record that there was an abuse of discretion. Following the request for reinstatement, Ms. Kramer consulted with Mr. May, who had supervised the appellant and who had effective authority regarding the appellant's reinstatement. He stated that he did not wish to reinstate the appellant because of his poor human relations skills. This clearly provided at least a rational basis for the agency's decision not to reinstate the appellant.

Furthermore, in addition to Mr. May's opinion that the appellant had poor human relations skills, although Mr. Shaw testified favorably about some aspects of the appellant's performance, he admitted to having made negative comments about the appellant's disposition and interpersonal relations skills.

ORDER

The action of the respondent of failing or refusing to reinstate the appellant is affirmed and this appeal is dismissed.

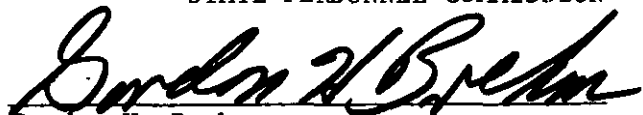
Dated June 3, 1981


STATE PERSONNEL COMMISSION

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