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FRED PAUL, \*

Appellant, \*

v. \*

Secretary, DEPARTMENT OF HEALTH \*

AND SOCIAL SERVICES, \*

Respondent. \*

Case No. 79-275-PC \*

\* \* \* \* \*

**OFFICIAL**

ORDER

This matter is before the Commission on consideration of a Proposed Decision and Order of the hearing examiner. The Commission has considered the respondent's objections to the Proposed Decision and Order and has consulted with the hearing examiner.

The Commission adopts by reference the Proposed Decision and Order, a copy of which is attached hereto, as its final Decision and Order, subject to the following modifications.

Findings of Fact #13, 18, 19, and 20, are each amended by the addition of the following language: ",and the Commission so finds." The reasons for these amendments are that as set forth in the Proposed Decision and Order, these findings constitute a recitation or summary of the testimony. However, the examiner intended that these be considered as findings, and they are amply supported by the record.

Finding of Fact #22 is amended to read as follows:

"McClarnon and Brekke's stated reasons for not considering appellant for the position, including that he was moody and depressed, were pretextual and not based on his merit for the position as prescribed by 230.01(2), Wis. Stats.

This amendment is made to more clearly conform to the record and to clarify that the words "he was moody and depressed" were intended to summarize the reasons

advanced by McClarnon and Brekke.

The opinion in the Proposed Decision and Order is amended by the deletion of the following two paragraphs from page 13:

"It is clearly stated on the Certification List for this position (Respondent's Exhibit 4) that "All of the above candidates must be given equal consideration (emphasis added) for this position," referring to the top five candidates including appellant. Given their preconceived prejudices against appellant, McClarnon and Brekke had a duty to disqualify themselves from the interview panel.

As a matter of fact, McClarnon testified that Biddick had always in the past picked persons from within the agency for promotion apparently without giving proper consideration to the other candidates. If he truly believed this to be a fact, he had a responsibility as deputy administrator of the agency to see that Biddick did not serve on the interview panel."

These paragraphs are deleted because in the opinion of the Commission it is not necessary that in a post-certification appointment process the appointing authority disqualify from the interview panel persons who have developed preconceived opinions about the qualifications of a candidate because of prior work-related contacts. Notwithstanding this deletion from the opinion, the Commission remains of the opinion that the record amply supports a determination of abuse of discretion, as set forth in the remainder of the decision.

The Commission modifies the last paragraph in the opinion at page 16, to conform to the issue noticed for hearing and to the remainder of the decision, to read as follows:

"No such showing has been made here. Therefore, it is the opinion of the Commission that respondent must cease and desist from failing to properly consider appellant for future promotional opportunity in the manner that was found to be improper in this case, and that appellant be given the position of Facilities Section Chief if this position should become

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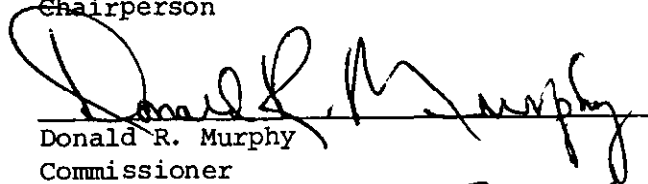
vacant in the future and he is then still otherwise qualified for the position."

Dated Feb. 17, 1981

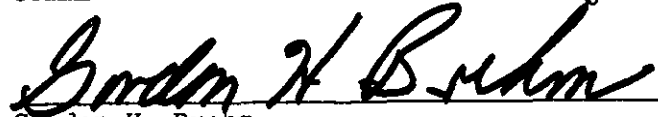
STATE PERSONNEL COMMISSION



Charlotte M. Higbee  
Chairperson



Donald R. Murphy  
Commissioner



Gordon H. Brehm  
Commissioner

AJT:mgd

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 FRED PAUL, \*  
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 Appellant, \*  
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 v. \*  
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 Secretary, DEPARTMENT OF HEALTH \*  
 & SOCIAL SERVICES, \*  
 \*  
 Respondent. \*  
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 Case No. 79-275-PC \*  
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 \* \* \* \* \*

PROPOSED  
 DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This is an appeal of the failure of respondent to appoint appellant to the position of Administrative Officer 2-Chief, Facilities Section, Division of Vocational Rehabilitation. A Hearing on this appeal was held by Commissioner Gordon H. Brehm on August 14, 15, 26, and 28, 1980.

FINDINGS OF FACT

1. Appellant Fred Paul began work for the State of Wisconsin in November, 1959 with the State Employment Service. In November, 1963, he began work for respondent as a counselor in Milwaukee, was promoted to counselor supervisor in July, 1971, and then was promoted to Facilities Specialist and transferred to Madison in November, 1974.

2. Appellant served as acting supervisor of the Division of Vocational Rehabilitation (DVR) Facilities Section from about September, 1976, until at least November, 1979, when he competed for the position on a permanent basis.

3. In July, 1979, respondent announced open competition for the position of Administrative Officer 2-Chief, Facilities Section (Appellant's Exhibit 8).

4. Appellant was ranked number one on a score of 97.30 on the basis of an achievement history questionnaire in competing for the position (Appellant's Exhibit 9).

5. Seven persons, all of whom were on the certification list, were interviewed for the position on November 2, 1979. The interview panel consisted of Kenneth McClarnon, deputy administrator of DVR; Olaf Brekke, director of the DVR Bureau of Planning, Evaluation & Program Management, and John Biddick, director of the DVR Bureau of Client Services (Appellant's Exhibit 17 and Respondent's Exhibit 4).

6. Immediately following the seven interviews on November 2, 1979, the three members of the panel met and discussed the applicants. Biddick told the others that he had ranked Paul number one and that he thought appellant should be offered the position. McClarnon and Brekke both indicated they favored Joseph Weiss.

7. McClarnon and Brekke interviewed Weiss again the week following the November 2, 1979, interviews without informing Biddick. Both ranked Weiss number one and agreed to offer the position to him if his references checked out but did not inform Biddick of this decision. After checking Weiss' references, Brekke offered the position to Weiss and he accepted.

8. On November 12, 1979, Brekke notified appellant that he was not going to get the position and that he was recommending that the job be given to Weiss.

9. Appellant reported directly to McClarnon from the time he became acting supervisor of the Facilities Section until about January 1, 1979,

except for several weeks in late 1977 when he reported to Brekke. When Brekke returned to DVR in January, 1979, after having worked for another state agency for about one year, the Facilities Section was placed under his jurisdiction and appellant reported to him during 1979.

10. Appellant transferred from Milwaukee to Madison in 1974 and became a facilities specialist at McClarnon's request and worked directly under McClarnon until he became acting supervisor of the section.

11. Appellant received excellent performance evaluation reports for the entire period while he was a facilities specialist and during the first year and four months that he performed as acting section chief (no performance evaluation reports were apparently made out on appellant for 1978 and 1979). Brekke's performance evaluation dated December 19, 1977, states that appellant's "sensitivity to deadlines, ability to effectively communicate in written and oral form and concern for clients served by the agency are qualities valued and appreciated."

12. Appellant performed all of the functions of chief of the facilities section as stated on the announcement for the position drawn up by the agency in July, 1979 (Appellant's Exhibit 6) during the period from September, 1976, until November, 1979.

13. Suzanne Lee, Linda Wald and Richard Hall all testified that appellant was their supervisor while they worked in the facilities section and they considered him a good supervisor and that they liked working for him.

14. Appellant met with McClarnon several times while he was acting supervisor of the section and asked to be relieved of his supervisory duties or be compensated for doing them but agreed to stay on after McClarnon promised he would "take care of him" later.

15. The relationship between McClarnon and appellant began deteriorating some time in 1977. McClarnon told appellant several times that his attitude was poor, that he was "depressed" and that he needed "pumping up."

16. Neither McClarnon or Brekke ever reprimanded or disciplined appellant for his work as a facilities specialist or as acting section chief.

17. Upon Brekke's return to DVR in January, 1979, McClarnon and Brekke began bypassing Paul by leaving him out of meetings and not copying him on letters and memos.

18. Every other witness except McClarnon and Brekke agreed that they were unaware that appellant was depressed or had an attitude problem.

19. Every other witness except McClarnon and Brekke agreed that appellant was a good supervisor and was well liked by his fellow workers.

20. Kenneth Kassner, a regional administrator for DVR who has worked for the agency for almost 30 years, testified that "Paul must have rubbed someone the wrong way" and that "Each time someone in the agency who was in an acting position and then didn't get the job, it was because of personality conflicts."

21. McClarnon told appellant in a conversation on May 21, 1980, that he would not consider him for a lateral transfer to another position outside of Madison because Paul had "a bad attitude," violated confidences, and because of his inability to communicate. He also ignored appellant's request for a demotion to another office outside of Madison in DVR.

22. McClarnon and Brekke's reasons for not considering appellant for the position, that he was moody and depressed, were pretextual and not based on his merit for the position as prescribed by §230.01(2), Wis. Stats.

23. McClarnon and Brekke had made up their minds not to consider appellant for the position of facilities section chief prior to the time all the candidates were interviewed on November 2, 1979.

24. Respondent committed an abuse of discretion in not properly considering appellant for the position.

25. Appellant was eminently more qualified for the position in question than the person selected. Paul has a B.S. Degree in psychology and an M.S. in rehabilitation counselling. He had worked for the agency for 16 years, the last three of which he had been in an acting role in the position in question. Weiss has a B.A. Degree in philosophy and an M.A. in sociology and was working on his Ph.D. in sociology. He had been director of a small community action agency for about nine months and had been director of a Criminal Justice Planning agency for about three years. He had little or no experience working for a rehabilitation agency.



CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this appeal pursuant to §230.44(1)(d) and §230.45(1)(a), Wis. Stats.

2. The burden of proof is on appellant to show by greater weight of credible evidence that respondent committed an illegal act or abuse of discretion in not appointing appellant to the position of Administrative Officer 2-Chief, Facilities Section.

3. Appellant has met his burden with respect to showing that respondent committed an abuse of discretion in not appointing him to the position.

OPINION

The issue agreed to by the parties in this appeal is "Whether the failure to appoint appellant to the position of Administrative Officer 2-Chief, Facilities Section, constituted an illegal act or an abuse of discretion."

Appellant had been an employe of the Division of Vocational Rehabilitation for 13 years, the previous two years as a Facilities Specialist, when he was asked by Terry Willkom, then DVR administrator, about September, 1976, to take over as acting chief of the Facilities Section. Paul accepted and assumed the responsibilities previously performed by Kenneth McClarnon, who moved up as an assistant to Willkom.

For approximately the next three years, appellant continued to function as supervisor of the Facilities Section. (See Appellant's Exhibits 1, 3, 4 and 5.) All of the witnesses from DVR who testified during the hearing except McClarnon and Brekke agreed that it was generally accepted

in the agency that appellant was the acting Facilities Section Chief during this period. Suzanne Lee, Linda Wald, and Richard Hall all testified that they worked under Paul and there was no doubt in their minds that he was their supervisor and the acting chief of the section.

Brekke and McClarnon testified that Paul had never been officially named as acting Facilities Section Chief and that he only functioned as a "lead worker" during this three-year period. This testimony was not supported by testimony from all of the other agency employes who testified, none of whom could recall appellant ever being referred to as a "lead worker." Brekke's own evaluation report on appellant, dated December 19, 1977, referred to Paul as acting chief of the Facilities Section (Appellant's Exhibit 5).

Appellant met with McClarnon and Willkom several times during this period and asked to be relieved of his duties as acting section chief but was talked into staying in the position by McClarnon with the promise that "I will take care of you."

The Rules of the Director of Bureau of Personnel state:

"Pers. 32.01 Acting Assignments. When a position is vacant and requires the temporary assignment of a permanent employe, the appointing authority with the approval of the director may proceed based on the following principles:

- (1) The appointing authority will initiate action to fill the position on a permanent basis.
- (2) There are no other viable alternatives.
- (3) The appointment will normally be for 6 months or less.
- (4) The assignee shall meet the minimum qualifications established for the position by the director.
- (5) It is not the intent of the appointing authority to generate a series of acting assignments." (emphasis added)

Respondent clearly violated Pers. 32.01, Wis. Adm. Code, in permitting appellant to function as acting chief of the Facilities Section for nearly three years without moving to fill the position on a permanent basis. Appellant was and is classified in Pay Grade 15 while he was performing the duties of a position that is classified at Pay Grade 17.

Appellant's performance evaluation reports for the period from 1975 through 1977 (Appellant's Exhibits 5, 10, 11, 12, 13, 14) all rated his work as a Facilities Specialist and as acting supervisor of the Facilities Section as excellent.

In July, 1979, respondent finally acted to fill the position of chief of the Facilities Section through an open competitive examination (Appellant's Exhibit 6). Seven persons were originally certified, the five highest scores on an achievement history questionnaire, and two lateral transfer candidates. The next two highest scorers were added to the certification list when two persons in the top five dropped out.

The seven candidates were interviewed by McClarnon, Brekke and Biddick on November 2, 1979. Each interview lasted about 45 minutes. Three of the candidates, Paul, Suzanne Lee and William Sather, were well known to the interview panel since they were employed by DVR.

Immediately following the interviews, the panel met and discussed the candidates. Biddick said he ranked appellant number one while Brekke and McClarnon indicated they favored Weiss.

Biddick testified that he felt that McClarnon and Brekke had made up their minds prior to the interviews that they were not going to consider appellant for the position. He said that neither McClarnon or Brekke would discuss appellant's qualifications for the position during the meeting of the panel following the interviews.

Biddick testified that he heard prior to the interviews that McClarnon was "irked" with appellant. He further testified that McClarnon and Brekke worked closely together and never disagreed on agency policy.

Biddick, who had previously been Facilities Section Chief for eight to ten years, testified that appellant had done a good job as acting chief of the section for three years. He said he ranked Weiss last among the candidates interviewed because he had no facility experience, no DVR experience, and no contracting and program supervision experience. He said he considered this experience "critical" in filling the section chief position.

Martin Eft, a Regional Administrator who has worked by DVR for 20 years, testified that he had once been reassigned to Green Bay after having "policy differences" with McClarnon. He said he was surprised that Paul did not get the section chief position because "he seemed to be the logical choice." He said he never considered appellant more "depressed" than the average person and he thought he was not lacking in managerial skills.

Suzanne Lee, now a Budget and Management Analyst for DVR who worked as a facilities specialist while appellant was acting section chief,

testified that she "assumed that Paul would get the position" because "he seemed like the logical person." She said appellant was a good supervisor and she enjoyed working for him. She took a voluntary demotion and transferred from the facilities section five months after Weiss was named section chief because she "did not like working for him" and because "he was not a good supervisor." She said Weiss "was in over his head" in the position.

Richard Hall, another facilities section specialist who worked for appellant, testified that "Paul was a good supervisor, better than the guy (Weiss) I have now."

Linda Wald, an Auditor II in the Facilities Section who was hired by Paul, also testified that she considered appellant a good supervisor.

Brekke testified that appellant never was acting chief of the Facilities Section but was merely a "lead worker." This contradicted the testimony of every other witness from DVR, except McClarnon, who all agreed that there was no doubt that appellant was acting chief of the section for about three years.

Brekke also testified that each of the three members of the interview panel revealed their top three choices from among the seven persons interviewed at the meeting of the interview panel immediately following the November 2, 1979 interviews. He said the meeting lasted at least 45 minutes to an hour -- Biddick said the meeting lasted no longer than 20 minutes -- and that all of the candidates' qualifications were discussed.

Brekke denied that he had made up his mind not to consider appellant for the position prior to the interviews. He admitted, however, that an observation that Paul's "judgement could be adversely influenced by lack of confidence in other members of management team" in his notes made during the interview of appellant November 2, 1979 was based on an opinion he held of Paul prior to the interviews (Respondent's Exhibit 5).

Brekke admitted that his knowledge about appellant's temperament and personality and his opinion that Paul "could get himself down" affected his decision not to select appellant for the position.

Brekke admitted that Biddick had not been invited to or informed about the second interview with Weiss at which Brekke and McClarnon interviewed Weiss. He said the interview process had been completed on November 2, 1979 when Weiss had been selected subject to a reference check.

Brekke testified that the names of the top three candidates selected by the three members of the interview panel were written on a blackboard at the meeting of the panel following the interviews by himself. Biddick testified that this never happened, that he announced his choices but that Brekke and McClarnon only indicated that they favored Weiss. Brekke also testified that appellant "had difficulty in his relationships with McClarnon" prior to his applying for the position.

McClarnon also denied that he had made up his mind not to consider appellant for the position prior to the interviews. He also denied that Paul had ever been named as acting chief of the Facilities Section, that he had only been a "lead worker" or "point man" in the section for three years.

McClarnon said there was at least one or maybe two meetings of the interview panel on November 2, 1979, following the interviews of the seven candidates. He said one meeting lasted "at least an hour or more." He testified that Biddick stated that appellant should be given the position because he was from within the agency, not because of his qualifications. McClarnon stated that Biddick always maintained that promotions should be given to candidates from within the agency, that "if you are there you deserve the job." McClarnon testified that the names of the top three candidates selected by the interview panel were written on a blackboard by Brekke at the meeting following the interviews. He said that Brekke and he independently came up with Weiss as their number one candidate and that Biddick appeared "amazed" by this.

McClarnon said that he "had problems" with appellant prior to the November 2, 1979, interviews. He testified that "Fred's worst enemy was himself," that he "suffered from a crisis of confidence." He said that appellant was often "depressed" and that he "couldn't stay up for his job." McClarnon admitted that "things I knew about him (Paul) before the interview were a negative factor." He said that appellant's "attitude was his problem, not his ability to do the work."

Both McClarnon and Brekke directly contradicted Biddick's testimony that in his opinion, they had made up their minds prior to the interviews not to consider appellant for the position. They also contradicted Biddick's testimony that appellant's qualifications were not even discussed by the three at the meeting following the interviews and Biddick's test-

imony that no formal decision was reached at that meeting on selecting one candidate for the position.

The hearing examiner has determined that Biddick is the more credible witness.

It is clearly stated on the Certification List for this position (Respondent's Exhibit 4) that "All of the above candidates must be given equal consideration (emphasis added) for this position," referring to the top five candidates including appellant. Given their preconceived prejudices against appellant, McClarnon and Brekke had a duty to disqualify themselves from the interview panel.

As a matter of fact, McClarnon testified that Biddick had always in the past picked persons from within the agency for promotion apparently without giving proper consideration to the other candidates. If he truly believed this to be a fact, he had a responsibility as deputy administrator of the agency to see that Biddick did not serve on the interview panel.

Section 230.44, Wis. Stats. (1977), provides:

"Appeal procedures. (1) Appealable actions....

(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."

Section 230.01, Stats. (1977), provides:

"Statement of policy. (1) It is the purpose of this chapter to provide state agencies and institutions of higher education with competent personnel who will furnish state services to citizens as fairly, efficiently and effectively as possible.



(2) It is the policy of the state and the responsibility of the secretary and the administrator to maintain a system of personnel management which fills positions in the classified service through methods which apply the merit principle, with adequate civil service safeguards...." (emphasis added)

<sup>s</sup> Section 230.02, Stats. (1977), provides:

"Liberal construction of statutes. Statutes applicable to the department shall be construed liberally in aid of the purposes declared in §230.01."

Sections 230.15 and 230.16, Stats. (1977), provides:

"230.15 Appointments, Promotions, Changes In Classified Service.

(1) Appointments to, and promotions in the classified service, shall be made only according to merit and fitness, which shall be ascertained so far as practicable by competitive examination....(Emphasis Added)

230.15(3) No person shall be appointed, transferred, removed, reinstated, restored, promoted or reduced in the classified service in any manner or by any means, except as provided in this subchapter.

230.16 Applications And Examinations

(2) Competitive examinations shall be free and open to all applicants who are residents of this state and who have fulfilled the preliminary requirements stated in the examination announcement. To assure that all state residents have a fair opportunity to compete, examinations shall be held at such times and places as, in the judgment of the administrator, most nearly meet the convenience of applicants and needs of the service....(Emphasis Added)

230.16(3) The administrator may appoint boards of examiners of at least 2 persons for the purpose of conducting oral examinations as a part of the examination procedure for certain positions. All board members shall be well-qualified and impartial....(Emphasis Added)

230.16(5) In the interest of sound personnel management, consideration of applicants and service to agencies, the administrator may set a standard for proceeding to subsequent steps in an examination, provided that all applicants are fairly treated and due notice has been given....(Emphasis Added)"

It is clear from a reading of these statutes that it is the policy of the State of Wisconsin to use the merit principle in appointing persons to the civil service system and in making promotions available to civil service employees. In order to see that this policy is implemented, competitive examination procedures have been established that state agencies must observe in filling vacancies.

As part of these procedures, a certification list is established by the Division of Personnel based on an examining process of the candidates who apply for each vacancy. The top 10% of the candidates up to a maximum of 10 names -- when less than 50 candidates apply, the top five are selected -- are then placed on the certification list according to their scores in the examination by the Division of Personnel as eligible for each vacancy. Each agency is permitted to select any person from the certification list, no matter what their ranking, to fill the position. This process permits agencies to select the candidate that they believe will best fit the position. This procedure also recognizes the fact that no examination process can be perfect in rating potential job candidates.

It is important to note, however, that in order to see that the merit principle which is the foundation of the civil service system is strictly observed, the certification list provides that each candidate certified must be given equal (emphasis supplied) consideration.

In the instant case, two of the three panelists who interviewed the seven persons on the certification list did not give equal consideration to all of the candidates because they had made up their minds before the

interviews not to consider appellant for the position. This was a clear abuse of discretion.

In Caras v. Delaware Liquor Commission, 90A 2nd 492, 494 (1952), the court said,

"There is abuse of discretion by public officials where power or right to act in an official capacity is unreasonably exercised."

Having found an abuse of discretion, the Commission must fashion a proper remedy. Section 230.44(3)(d), Wis. Stats. (1977), provides:

"The Commission may not remove an incumbent or delay the appointment process as a remedy to a successful appeal under this section unless there is a showing of obstruction or falsification as enumerated in §230.43(1)."

No such showing has been made here. Therefore, it is the opinion of the Commission that respondent must cease and desist from failing to properly consider appellant for future promotional and lateral transfer opportunity and that appellant be given the position of Facilities Section Chief if this position should become vacant in the future and he is then still otherwise qualified for the position.

ORDER

That the action of respondent in this case is rejected and this matter is remanded to respondent for action in accordance with this decision.

Dated \_\_\_\_\_, 1981

STATE PERSONNEL COMMISSION

\_\_\_\_\_  
Charlotte M. Higbee, Chairperson

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Donald R. Murphy, Commissioner

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Gordon H. Brehm, Commissioner