STATE OF WISCONSIN PERSONNEL COMMISSION

BETTY D. JACOBSON, Appellant, v. Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, Respondent. Case No. 79-28-PC	DECISION AND ORDER

OFFICIAL

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(d), Stats., with respect to the failure to appoint the appellant to an Attorney 14 position in the classified civil service. This matter was noticed for hearing on the basis of the following issues:

"Did Jim Pflasterer and/or Uclair Brandt act illegally or abuse discretion in hiring Ed Buehler and Roberta Marie Kiley as court attorneys?

Did Jim Pflasterer and/or Uclair Brandt act illegally or abuse discretion in failing to hire the appellant, Betty D. Jacobson, as a court attorney?

Did Jim Pflasterer and/or Uclair Brandt act illegally or abuse discretion for failing to fill the vacant position for Court Attorney?"

FINDINGS OF FACT

1. In October of 1978, the State Division of Personnel announced a competitive examination on a servicewide promotional basis for three vacancies in Attorney 13 positions in the classified civil service in the Bureau of Legal Affairs (BOLA), Job Service Division, Department of Industry, Labor, and Human Relations (DILHR).

2. One of the three vacancies had been created by an approved one year leave of absence without pay commenced by the incumbent, Barry Levenson, on August 19, 1978.

3. The other two vancancies had resulted from transfers of positions from the Milwaukee hearing office to BOLA Legal Services Section. These had been authorized as court attorney positions after BOLA had applied to have Levenson's position filled.

4. It was announced that the examination was open to:

> "... any classified employe in the Wisconsin State Service, not serving on a limited term or project employment basis. Seasonal employes and employes on probation may apply." Respondent's Ex. 4.

5. The tasks and knowledge required upon appointment were as follows:

> "Prepare pleadings, motions, briefs and deliver oral arguments in Circuit, Appeals and Supreme Court; read, interpret and apply complex instructions such as policies, procedures, laws and regulations. Analyze case records and transcripts for court cases. Express ideas already in written form; communicate effectively with individuals of varying socioenomic backgrounds and education; influence others in favor of a point of view; deal with parties having differing attitudes and behaviors. Knowledge of: Legal research techniques and evaluation of evidence." Respondent's Exhibit 4.

6. The following were listed as tasks and knowledge required at full performance:

> "Prepare judgments and orders pursuant to directions of the Circuit Court. Represent the agency in various administrative and court proceedings involving U.C. tax matters, enforcement of coverage, contribution and collection matters involving unemployment compensation cases; analyze circuit court decisions to make possible recommendation for appeal to the appeals or Supreme Court. Knowledge of: U.C. Laws, requirements and procedures pertaining to U.C. benefit eligibility, claim adjudication, coverages and contribution;

investigational procedures, legal research, techniques and evaluation of evidence; use of U.C. Digest; Chapter 108; sources of information on federal and state employment laws and Wisconsin Civil Service Law and Procedures." Resp. Ex. 4.

7. The same positions subsequently were reannounced in November 1978 at the Attorney 14 level following their reallocation to that classification level.

8. The appellant applied for these positions and was examined through an achievement history questionaire.

9. The appellant was ranked first on the basis of the examination scores on a certification of seven names for the vacancies provided by the Division of Personnel to the respondent on December 22, 1978.

10. In addition to the appellant, the second ranked candidate on the certification was a woman (R. Kiley). The other five certified candidates were men.

11. The positions in question were under the immediate supervision of James Pflasterer, Deputy Director of BOLA, who reported to Uclair Grandt, BOLA Director, who in turn reported to William Grenier, Job Service Administrator.

12. Mr. Grenier had been delegated appointing authority for positions under his supervision by the Secretary of DILHR. He had delegated that authority to his assistant administrator, and from there it had been delegated to Mr. Brandt with respect to BOLA positions.

13. Mr. Brandt had delegated effective appointing authority for the positions in question to Mr. Pflasterer.

14. Following the certification of candidates on December 22,

1978, Mr. Pflasterer interviewed all of the candidates.

15. Mr. Pflasterer had requested that each candidate bring a writing sample to the interview. This was done and he accepted each one.

16. In the interviews, each candidate was asked substantially the same questions.

17. The following findings are made with respect to certain candidates, who were on the register in the following order:

(a) Betty Jacobson

(1) Her prior experience at the time of the interview included work with the Wisconsin legislature drafting legislation, several years with the Wisconsin Supreme Court preparing headnotes of decisions and related work; approximately two years as an unemployment compensation hearing examiner conducting administrative hearings and writing decisions; and approximately two years as a review attorney with the DILHR and later Labor and Industry Review Commission, advising the Commission with respect to the review of decisions in contested cases by hearing examiners in the various programs administered by DILHR such as Unemployment Compensation, Equal Rights, Crime Victim Compensation, etc. This work involved analyzing the decisions and accompanying records for legal sufficiency, including support in the record for findings, recommending affirmance or reversal by the Commission, and drafting decisions for the Commission. This work is similar in many respects to the type of work involved in the court attorney positions.

(2) Ms. Jacobson was somewhat reticent in her responses to the questions during the oral interview and did not do well in the interview.

(b) R. Kiley

(1) Her prior experience at the time of the interview included trial work with the National Labor Relations Board defending NLRB decisions in the U.S. Court of Appeals from 1967 to 1971; extensive trial work for approximately 2 years as Chief Staff Attorney with the Legal Services Section of the Greater Lansing Legal Aid Bureau, Michigan; limited term employment as a legislative liason attorney with the Wisconsin Department of Transportation from July 1977 through November 1977; work with the Wisconsin Department of Justice from November 1977 through (ultimately) December 31, 1978, initially doing investigative work in the anti-trust area, and from August 1978 doing a substantial amount of brief-writing in connection with litigation in the area of enforcement of equal rights decisions.

(2) Ms. Kiley did well in the interview with Mr. Pflasterer.

(c) Earl G. Buehler

(1) His prior experience at the time of the interview included approximately 3½ years representing the Department of Health and Social Services (DHSS), primarily in collection matters for state and county hospital accounts in county court, and also in contested cases before administrative agencies; and employment subsequent to that as Chief Attorney of the Division of Family Services with responsibility for the fair hearing process for Public Welfare, AFDC, etc., programs, and

for the provision of legal advice to the Division of Family Services and the DHSS Secretary's office.

(2) He did well in his interview with Mr. Pflasterer.

(3) Shortly before the interview, Mr. Buehler had prepared a memo dealing with public records and the WIN program.

(4) One of the interview questions had to do with the competing interests of the public's right to know and the right to privacy.

(5) Mr. Pflasterer was not aware prior to the interviews that Mr. Buechler had written or had been working on this memo.

(d) Howard Lustig

(1) He had had prior experience as a U.C. hearing examiner. He had been involved in litigation right after law school, and also, while in law school, had been involved as an intern in handling personnel related cases. Mr. Pflasterer was not aware of anything negative in his tenure as hearing examiner.

(e) William C. Lloyd

(1) He had worked in the Office of the Commissioner of Securities where he had been involved in trial work.

(2) He performed well in his interview with Mr. Pflasterer.

18. Following the interviews, Mr. Pflasterer ranked the two top candidates, in terms of his overall evaluation of their qualifications for the positions, as Mr. Buehler and Mr. Lloyd, in that order.

19. Mr. Pflasterer believed that, because there were protected class (female) candidates on the certification and BOLA employment of

female attorneys did not meet the Job Service Plan of Service goal, there would be problems getting the appointments approved by Mr. Grenier, under the Job Service Affirmative Action plan, unless he appointed at least one woman.

20. Mr. Pflasterer determined to leave the third position open for the following reasons:

(a) Mr. Levenson was on an approved leave of absence and he had mandatory reinstatement rights to one of the positions, or one of like nature.

(b) Mr. Levenson was particularly well-qualified and competent and he would be an asset to the bureau.

(c) With the approval of the two additional positions, where was no need to have all three positions filled at that time.

(d) He was aware that David Pearson had expressed an interest in taking a voluntary demotion from a position as Assistant Administrator for Unemployment Compensation, classified as Job Service Administrator 4, to one of the positions in question, and he wished to keep this option open for Mr. Pearson.

(1) Mr. Pearson was an acknowledged expert in the field of unemployment compensation law.

(2) Mr. Pflasterer believed that it was unlikely that Mr. Pearson really was interested in the third court attorney position; rather, Mr. Pflasterer believed it was more likely that Mr. Pearson wanted to use the threat of a move to this position as leverage

with respect to certain negotiations he was carrying on with others in DILHR.

(3) Mr. Pflasterer determined that if Mr. Pearson did accept the transfer it would be advantageous to BOLA, despite the likely over-staffing and the problems that might be created on Mr. Levenson's return from leave of absence, because of Mr. Pearson's unusually high stature in the field of unemployment compensation law.

21. Mr. Pflasterer obtained the administrator's approval for leaving the third position open and not filling it from the register.

22. Mr. Pflasterer, in evaluating the appellant, had checked her BOLA personnel file and had consulted with two of her previous supervisors at BOLA, Mr. Jarchow and Mr. Reed, both of whom indicated that there had been problems with the quantity of her production.

23. However, the evaluations of appellant in the BOLA personnel file by her supervisors Reed and Jarchow reflected that Jarchow had evaluated the quantity of her work during her probationary period as a hearing examiner as "good" and that Reed had evaluated the quantity of her work as a DILHR Commission Review Attorney for the period July 1, 1976 through June 30, 1977, as "Does a sufficient amount of work."

24. In the fall of 1977, the appellant had testified before a legislative committee and given testimony critical of Mr. Jarchow.

25. Mr. Pflasterer had been aware of this testimony.

26. Mr. Pflasterer in evaluating appellant, did not check with her then current supervisor at LIRC, Mr. Tefft, who had supervised

appellant from the commencement of his employment with LIRC in November 1977.

27. Mr. Tefft's evaluation of appellant's work at LIRC was good as to quality and average as to quantity.

28. Mr. Pflasterer had some first-hand familiarity with Buehler's work as he had been involved in some WIN programs in which Buehler had participated.

29. Mr. Pflasterer did not check any of Buehler's references or consult with any of his supervisors.

30. While Ms. Kiley was employed at the Department of Justice (DOJ), it was determined that she would not pass probation. An arrangement was worked out whereby her probationary employment was terminated and she then was appointed in a manner that did not involve her attainment of permanent status in class.

31. Mr. Pflasterer checked with Ms. Kiley's supervisor at DOJ, Mr. Samuelson, who had determined that she would not pass probation, regarding his evaluation of her work. Samuelson indicated that her work was uneven in the area of briefing and that he had some questions about the opinion writing that she had done, but that in some respects her work was good.

32. Mr. Pflasterer had been a coworker with the appellant while

they both were UC hearing examiners out of the Madison office and had formed certain opinions about her based on some, rather limited, exposure to her work, general contacts with her in the office, and on the remarks of other coworkers about her.

33. The appellant had a general reputation among BOLA employes as being somewhat lacking in common sense and good judgment.

34. Mr Pflasterer had developed the opinion that the appellant, in general, lacked common sense, was not reasonable in all respects, and lacked self-restraint or reserve.

35. Mr. Pflasterer reached the conclusion that Mr. Buehler and Ms. Kiley were better qualified for the positions in question than the appellant, and should be hired ahead of the appellant.

36. This conclusion was based on the greater experience in litigation of Mr. Buehler and Ms. Kiley, their superior performance in the oral interview, his prior favorable impressions of Mr. Buehler, and his opinion of the appellant as set forth in the finding #34, above.

37. Mr. Pflasterer felt that Mr. Brandt might not be happy with the appointment of Mr. Lustig because of his union activity. This perception did not affect his ranking of the applicants.

38. Mr. Brandt had formed an unfavorable impression of the appellant during the period of time that she had been employed at BOLA. He felt that she lacked common sense and good judgment and had written some poor decisions. He had questions in his own mind about whether she had the ability to handle the work of the positions in question.

39. Mr. Pflasterer felt that Mr. Brandt would have questioned his judgment if he had hired the appellant, although at the time he reached his initial decision he had not been informed by Mr. Brandt of the latter's negative opinions of the appellant.

40. Having determined that Mr. Buehler and Ms. Kiley should be hired, Mr. Pflasterer proceeded to discuss his decision with Mr. Brandt.

41. Mr. Pflasterer had not discussed anything regarding specific candidates with Mr. Brandt prior to this point.

42. Prior to the final hiring decision having been made with respect to these positions, the appellant had filed a complaint with the United States Department of Labor, alleging denial of pay or underpayment because of her sex, as well as at least one other complaint of discrimination against DILHR.

43. Both Mr. Brandt and Ms. Pflasterer were aware of one or more of these matters at the time of their discussion regarding the appointments.

44. Mr. Brandt agreed with Mr. Pflasterer's decision as to whom to hire and also as to keeping the third position open.

45. Mr. Brandt and Mr. Pflasterer proceeded on the same day to discuss the decision with Mr. Grenier.

46. At the time they approached Mr. Grenier, Mr. Brandt and Mr. Pflasterer were under the impression that the divisional affirmative action policy then in effect would have required them to specifically justify hiring Mr. Buehler ahead of the appellant because there was an imbalance of male court attorneys in BOLA.

47. In point of fact, at the time of the conference with Mr. Grenier, this policy was not yet formally effective, and, as interpreted by Mr. Grenier, it would not have required such justification of Mr. Buehler's hire since one of the projected appointees (Ms. Kiley) was a woman.

48. In the course of their discussion with Mr. Grenier, it was suggested to him that if the appellant were not appointed that there probably would be a grievance; that the appellant had filed another grievance.

49. Mr. Grenier approved the recommended decisions as to the appointments of Mr. Buchler and Ms. Kiley and as to leaving the third position open, but told them that if Ms. Kiley refused to accept the offer they would have to come back to him for further review before the job could be offered to a male.

50. Mr. Pflasterer proceeded to offer the positions to Ms. Kiley and Mr. Buehler.

51. The offer to Ms. Kiley was made shortly after the first day of 1979.

52. Ms. Kiley had concluded her employment with DOJ as of December 31, 1978, and immediately thereafter had commenced employment with the Department of Revenue (DOR) in the status of a project employe in a project employment position pursuant to §230.27, Wis. Stats., which was her employment status at the time of the aforesaid offer and continued until she began employment with BOLA on January 28, 1979.

53. Both Ms. Kiley and Mr. Buehler accepted the offers and began employment with BOLA on January 28, 1979.

54. Mr. Levenson returned from his leave of absence and was reinstated to the third position prior to the expiration of the leave of absence.

55. Since 1965 BOLA has hired 89 UC hearing examiners. The breakdown by sex is as follows: (See Joint Exhibit 1)

a. Overall

71 male	18 female

b. LTE's

Of the 89, there were 15 hired as limited term employes (all in 1975). Of these 15, 6 were female. Of these 15, 6 ultimately were hired in permanent positions. Of these 6, 3 were female.

c. Appointments to permanent positions made from 1976 to present

26 male	12 female (2 of these previously had served as LTE's)

56. At no time prior to the decision on whom to hire as court attorneys did any LIRC commissioner or staff have any input with BOLA or Job Service people involved in the decision with respect to the decision as to whom to hire or not hire for the court attorney positions.

57. The reasons advanced by the respondent, through his agents, for failing or refusing to appoint appellant to a court attorney position, were not pretexts to shield an alleged motivation for the decision

related to the appellant's sex or prior complaints or claims of discrimination against respondent or his agents; nor was her reputation among BOLA employes, as set forth above, pretextual.

58. The respondent, through his agents, was not motivated in his failure or refusal to appoint the appellant to a court attorney position either because of her sex or because she had filed claims or complaints of discrimination against the respondent or his agents.

59. The respondent, through his agents including Mr. Pflasterer and Mr. Brandt, abused his discretion in hiring Mr. Buehler and Ms. Kiley as court attorneys to the extent that he did so without first having obtained an evaluation of the appellant's work from her then current supervisor, Mr. Tefft.

60. The respondent, through his agents, including Mr. Pflasterer and Mr. Brandt, abused his discretion in failing to hire the appellant, Betty D. Jacobson, as a court attorney, to the extent that he did so without first having obtained an evaluation of the appellant's work from her then current supervisor, Mr. Tefft.

61. The respondent, through his agents, including Mr. Pflasterer and Mr. Brandt, did not abuse his discretion in failing to fill the vacant (third) court attorney position.

62. The respondent was not aware, at or prior to the time of Ms. Kiley's appointment, that it was in violation of §230.19(2), Stats.

63. There has not been a showing of obstruction or falsification as enumerated in §230.43(1), Stats., and no obstruction or falsification

is found.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(d), Stats.

2. The appellant has the burden of proof as to all matters.

3. Pursuant to §230.44(1)(d), Stats., a personnel action after certification which is related to the hiring process in the classified service and which amounts to an abuse of discretion is a violation of Subsection II of Chapter 230, Stats.

4. The respondent through his agents did not act illegally in hiring Mr. Buehler as a court attorney, except to the extent that there was an abuse of discretion as set forth in finding #59.

5. The respondent through his agents did act illegally in hiring Ms. Kiley as a court attorney, inasmuch as she was hired at the time she was employed pursuant to §230.27, Stats., in contravention of §230.19(2), Stats., in addition to the abuse of discretion as set forth in finding #59.

6. The respondent through his agents did not act illegally in failing to hire the appellant as a court attorney, except to the extent that there was an abuse of discretion as set forth in finding #60.

7. The respondent through his agents did not act illegally in failing to fill the vacant (third) court attorney position.

8. LIRC is an independent agency from DILHR for personnel purposes.

OPINION

Although this matter was not filed under Subchapter II of Chapter 111 as a complaint of discrimination, it partakes of many of the legal attributes of such a proceeding due to the nature of the appellant's allegations. She alleges, among other things, that she was not hired because of her sex and because of her prior complaints of discrimination. With respect to these charges, §230.18, Stats., provides in part as follows:

> "No discriminations may be exercised in the recruitment, application, examination or hiring process against or in favor of any person because of the person's political or religious opinions or affiliations or because of age, sex, handicap, race, color, national origin or ancestry except as otherwise provided." (emphasis supplied)

This section prohibits, independently of Subchapter II of Chapter 111, discrimination in the hiring process in the classified service on the basis of sex. This prohibition is probably broad enough to include discrimination on the basis of retaliation, or opposition to alleged sex discrimination, as, for example, by having filed prior claims or complaints of sex discrimination. In any event, discrimination on the basis of such retaliation also would constitute an abuse of discretion under §230.44(1)(d), Stats.

These kinds of allegations of sex and retaliation discrimination in hiring, illegal under Subchapter II of Chapter 230, are also cognizable under and proscribed by Subchapter II of Chapter 111, see §§ 111.33(2), 111.32(5)(g), 1., 2., Stats. Therefore, it seems appropriate

to advert to the body of law developed in the discrimination area to analyze this facet of this case. In her closing argument the appellant urged the use of the type of analysis set forth in McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973), and the respondent did not object to this approach.

With respect to the claim of sex discrimination, the appellant is required to prove the following:

(1) that she is a member of a protected class;

(2) that she applied and was qualified for a job for which the employer was seeking applicants;

(3) that despite her qualifications, she was rejected;

(4) that, after her objection, the position(s) remained open and the employer continued to consider applicants from persons of her qualifications. See 411 U.S. at 802.

While the ultimate burden of proof or persuasion always remains with the appellant, the establishment of the foregoing prima facie case shifts the burden of proceeding or going forward to the respondent, who then must "articulate some legitimate, nondiscriminatory reason" for its action. See Board of Trustees v. Sweeney, 439 U.S. 24 (1978).

If the respondent satisfies this burden, the appellant then has an opportunity to show that the articulated nondiscriminatory reason for the action is actually a pretext for the true discriminatory reason. A very similar process is followed with respect to a retaliation claim.

See Young v. Columbia University College of Physicians and Surgeons, 23 Employment Practices Decisions ¶31, 058 (U.S.D.C., S.D.N.Y., June 25, 1980):

> "'... the plaintiff must show: first, protected participation or opposition under Title VII known by the alleged retaliator; second, an employment action or actions disadvantaging persons engaged in protected activities; and third, a causal connection between the first two elements, that is a retaliatory motive playing a part in the adverse employment actions ... It is well established that the order of proof in a retaliation case follows the rule in McDonnell Douglas Corp. v. Green ... the plaintiff must first establish a prima facie case; the burden then shifts to the employer to articulate some legitimate nondiscriminatory reason for the alleged act of reprisal; and lastly, the burden returns to the plaintiff, who is given an opportunity to demonstrate that the employer's reasons are a mere pretext for discrimination taken in retaliation for participation in protected activities.'
>
> In the case at bar, Young has made out a prima facie case, under the McDonnell Douglas formula. She is a woman; she protested that she was being discriminated against because of her sex, a form of 'protected participation or opposition' under Title VII which unquestionably became known to the defendants; she was subsequently discharged; and replaced by a man. In these circumstances, defendants hear the burden of articulating a legitimate non-discriminatory reason 'for the alleged acts of reprisal' which reason plaintiff must then prove to have been a pretext for termination 'taken in retaliation for participation in protected activities.'" 23 EPD at para. 16, 483-16,484.

In this case, the appellant made out a prima facie case of sex discrimination. She is a woman. She applied for the vacancies and established her qualifications by scoring first on the civil service examination. She was rejected and the employer considered and hired other applicants.

She also established a prima facie case with respect to the charge of retaliation inasmuch as she established that she had complained of

sex discrimination by the employer and this was known by the respondent's agents at the time they took the adverse action (here, the decision not to hire the appellant).

The respondent for his part satisfied his burden of coming forward with evidence to articulate a legitimate non-discriminatory basis for his actions. Both Mr. Buehler and Ms. Kiley had more experience in the conduct of litigation than did the appellant. Both did better in the interview. Mr. Pflasterer believed, based on both his own observations and his perception of the appellant's reputation in BOLA that she lacked to some extent common sense and good judgment. As to leaving the third position open, Mr. Levenson did have reinstatement rights which ultimately might have lead to the bumping of another employe if there were no vacancy on his return, the caseload was not that great, and Mr. Pearson had indicated an interest in a voluntary demotion into the position.

The question then is whether the appellant sustained her burden of proving that these stated reasons for the decision were pretextual. The parties presented, through Joint Exhibit 1, data as to hearing examiners hired by BOLA. This information is difficult to evaluate in light of the absence of evidence as to the number and availability of qualified women over the period of time in question. Also, the bureau has increased markedly its hiring of women hearing examiners in recent years.

With regard to keeping the third position open, it is true that Mr. Pflasterer perceived Mr. Pearson's interest in the job as more of a

means of obtaining leverage with respect to another situation than as a genuine interest in the job itself. However, there were additional reasons for keeping the job open - Levenson's reinstatement rights and the lack of caseload at the time in question. Keeping this position open was not pretextual.

There are a number of other facts supporting appellant's position that in the opinion of the Commission are of more significance.

First, Ms. Kiley had not passed probation at Justice. Second, while the appellant lacked the actual experience in litigation of the two appointees, her experience as a review attorney with DILHR and LIRC was similar in many respects to the type of litigation involved in the court attorney jobs, as Chapter 227 reviews are on the record except in unusual cases. Third, Mr. Pflasterer did not check on the appellant's performance on her then current job with LIRC, where her supervisor rated the quality of her work as good and spoke of her in rather complimentary terms in his testimony at the hearing. Rather, he checked on her work in her previous positions at BOLA with two former supervisors. Ms. Jacobson had testified negatively with respect to one of these supervisors in legislative hearings. Fourth, Mr. Pflasterer admitted to concern that Mr. Brandt would not be pleased with the appointment of Mr. Lustig on account of his union activity. This is inferential of a possible dislike of persons who tend to "rock the boat" or assert their rights.

However, it is true that both Mr. Buehler and Kiley had extensive

experience in litigation while the appellant did not. Both made good impressions in their interviews with Mr. Pflasterer while the appellant did not. Mr. Pflasterer had received information from Justice which mitigated Ms. Kiley's failure to pass probation. Another thing that came through very clearly on this record was that the appellant's reputation in BOLA for common sense and judgment was negative. This was supported by the testimony of Brandt, Pflasterer, Reed and Pearson.

The appellant has argued that this reputation was in itself a pretext, that it had been deliberately developed by various BOLA employes as a means of thwarting her opportunities. It could not be found, on the basis of the entire record including the testimony and demeanor of all the witnesses, that this was so.

In determining whether the appellant has sustained her burden of proving that the reasons for its decision articulated by respondent are pretextual, it is necessary to examine the totality of the circumstances. These include the factor of the respondent's agents' opinions of the appellant's common sense and judgment. This opinion was of substantial significance to the appointing authority's agents in the hiring decision. In the context of these points, other factors which in isolation might seem of more significance - e.g., the failure of one of the appointees to have passed probation at another agency - loom less large. It would not be unanticipated that an appointing authority's felt concern about the common sense and judgment of a candidate would override to some extent other concerns. In the opinion of the Commission there is not a

preponderance of evidence that the respondent's articulated reasons for the hiring decision were a pretext for a motivation prohibited by §230.18, Stats.

In addition to the allegation of discrimination, there have been a number of arguments advanced concerning other questions of legality under the civil service code. The appellant argues that Ms. Kiley's appointment was illegal because it violated §230.19(2), Stats.:

> "If, in the judgment of the administrator, the group of applicants best able to meet the requirements for vacancies in positions in the classified service are available within the classified service, the vacancies shall be filled by competition limited to persons in the classified service who are not employed under §230.26 or 230.27 unless it is necessary to go outside the classified service to create a balanced work force as defined in §230.03(4m) in a classified civil service classification within an agency." (emphasis supplied.)

This position was announced on a servicewide promotional basis. A person employed under §230.27, Stats., would not have been eligible for appointment. Therefore, it is necessary to examine Ms. Kiley's employment status. The evidence relating to her employment status at Justice is somewhat confusing, but the preponderance of the evidence on this record supports a finding that she never attained permanent status in class there. See her testimony at T., V. 5, pp. 20-21:

> "Q Now, in fact were you released and then rehired at the Justice Department?
>
> A That May have been the case. I'm not -- I don't recall the exact nature.

* * *

> I do remember there was some concern that if I worked there after 365 days or something, I could then force them into some kind of position. So I had to agree that my continued work would be on a status different then - I never went into it too much, but I do remember there was some discussion of that. What that boils down to in forms and legal might be a release and then a rehire.
>
> * * *
>
> It was made clear to me that I was not being made a permanent employe, and they did not want to run the risk which they had had a problem with in the past, of having someone later claim to have permanent status, and it was not their intention.
>
> Q So that you, in fact, never gained permanent status at Justice?
>
> A That's correct. I think, but then again I'm not sure. I really wasn't too concerned with it.

Ms. Kiley moved from Justice to Revenue. Inasmuch as she had not attained permanent status in class at Justice, the movement to Revenue could not have been a _per se_ demotion. See §Pers. 17.01, Wis. Adm. Code: "A demotion is the movement of an employe with permanent status in one class to a position in another class that has a lower single rate or pay range maximum." The testimony as to her employment status at Revenue again was somewhat confusing, but the preponderance of the record evidence supports a finding that it was a project employment under §230.27, Stats. See Kiley's testimony at T., Vol, V, p. 45:

> "Q I understand that you had a project.
>
> A That is the project. It was called the Pitts project.
>
> Q A project term of employment is a limited term, it isn't LTE[2]

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[2] Limited Term Employment.

but it is limited?

A Yes, that's a distinction they made.

Q What is it that your response to transfer depended on? Whether you stayed, it would depend on what the new Secretary of Revenue would do in the area of law?

A If it was determined that we were really going to pursue the matter, I intended on staying with the Department of Revenue. If it became obvious that the matter was going to be not a significant effort, I was not going to be staying.

Q Whether or not he pursued the matter as a project attorney, did you expect permanent employment or what?

A The project had been running since '72.

Since Ms. Kiley has been found to have been employed under §230.27, Stats., at the time of her appointment to the BOLA court attorney position, the appointment was in violation of §230.19(2), Stats.

The failure of the respondent to fill the third vacant court attorney position was not illegal. Section 230.25(2), Stats., provides in part:

> "If an appointing authority does not make an appointment within 60 days after certification he or she shall immediately report in writing to the administrator the reasons therefor.. If the administrator determines that the failure to make an appointment is not justified under the merit system, the administrator shall issue an order directing that an appointment be made."

The respondent did so notify the administrator and he did approve the respondent's action. There was an adequate rational and legitimate basis for the decision to hold the position open.

In addition to questions of specific illegality, appeals under §230.44(1)(d), Stats., involve the question of whether there has been an "abuse of discretion" in a personnel action after certification

related to the hiring process. With respect to the definition of "abuse of discretion," see 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 Caras v. Delaware Liquor Commission, 90 A 2d 492, 494 (Del. 1952):

> "In order to constitute an abuse of discretion by public officials it must appear that its exercise was unreasonable and that the ground upon which it was based or reason shown therefor was clearly untenable."

As discussed above, the appellant had a negative reputation for common sense and judgment in BOLA. The Commission found that the respondent relied in large measure on this perception of the appellant, and not on discriminatory reasons, in the hiring decision. In such a post-certification hiring decision, it is deeply-rooted principle of the Wisconsin civil service that the appointing authority does have considerable discretion as to whom to appoint. See, e.g., State ex rel Buell v. Frear, 146 Wis. 291, 131 N.W. 832 (1911). In the exercise of this discretion, it certainly was not impermissible for the respondent's agents to have considered to some extent the appellant's reputation in BOLA for, and their perception of, her common sense and judgment.

However, in this case the appellant had ranked first following competitive examination for the vacant positions in question. At the time the hiring decision was under consideration by the respondent she

had been under Mr. Tefft's supervision at LIRC for over a year. There was, at least on the surface, some variance between the written evaluations of appellant found in her BOLA personnel file and the comments made by her former BOLA supervisors, one of whom had been the subject of adverse testimony by the appellant before a legislative committee. Yet when questioned as to why he consulted with the former BOLA supervisors and not her current LIRC supervisor, Mr. Pflasterer testified, in substantial part, that "it was a really convenient thing to do because they just worked two and four offices away from me ...." T., Vol. II, pp. 218-219. Obviously a phone call could have been made to the LIRC office, which is located in Madison, to have consulted with appellant's supervisor there.

It is one thing for the appointing authority to consider a preconceived opinion as to a former employe. It is another thing to be so influenced by the opinion so as to ignore current relevant evidence of her abilities.

Under all of the facts and circumstances, it is the opinion of the Commission that there was an abuse of discretion in this hiring process in failing to have consulted with the appellant's current supervisor. As noted in Murray v. Buell, supra, this is not based on a determination that there was a "bad motive or wrong purpose ..." Rather, the Commission considers such failure to have been clearly unreasonable.

The appellant has argued that LIRC is not an independent agency

for personnel purposes. In an Interim Decision and Order entered on December 4, 1979, in Case No. 78-192-PC, involving these parties, the Commission concluded that "Commencing July, 1977, LIRC was a unit of DILHR with separate and independent authority to carry out personnel functions, including hiring of employes and fixing their compensation." The appellant has not presented evidence or argument that would lead to a contrary conclusion. It was pointed out that DILHR and LIRC had the same agency numbers on certain personnel documents submitted as exhibits. This is an administrative matter that is of limited significance in light of the statutory analysis set forth in the foregoing decision.

With respect to the matter of remedy, §230.44(4)(d), Stats., 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 s. 230.43(1)."

There has been no such showing in this case. The Commission therefore, while it "rejects" the actions of the respondent which it has determined to have violated the civil service code, see §230.44(4)(c), Stats., it may not require the removal of any of the incumbents in these positions to permit the appellant to be considered further for appointment. The respondent should be required to cease and desist, in any future selection processes in the classified civil service involving the appellant, from: (1) Any violation of §230.19(2), Stats., with respect to the appointment of persons employed under §230.27, and (2) any abuse

of discretion pursuant to §230.44(1)(d), Stats., regarding the evaluation of appellant's references. This matter will be remanded to the respondent for action in accordance with this decision.

ORDER

The actions of the respondent appointing Ms. Kiley in contravention of §230.19(2), Stats., and in making the appointments in question without having checked the appellant's then current references, are rejected. The respondent's other actions in connection with these appointments are affirmed. This matter is remanded to the respondent for action in accordance with this decision.

Dated: April 10, 1981. STATE PERSONNEL COMMISSION

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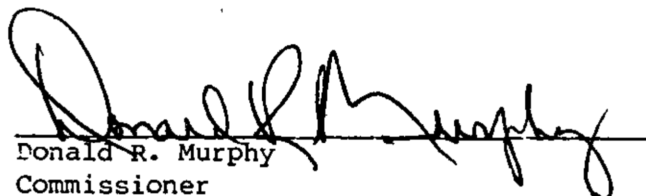

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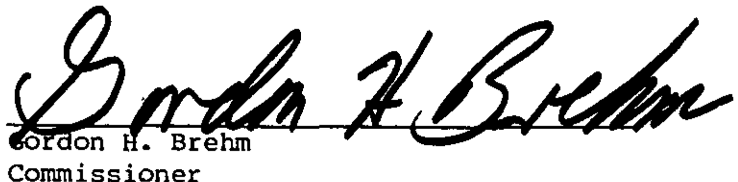
Commissioner



Gordon H. Brehm
Commissioner

AJT:jmg