

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 \*  
 DAVID WING, \*  
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                   Appellant, \*  
 \*  
 v. \*  
 \*  
 Secretary, DEPARTMENT OF \*  
 INDUSTRY, LABOR AND HUMAN \*  
 RELATIONS and Administrator, \*  
 DIVISION OF PERSONNEL, \*  
 \*  
                   Respondents. \*  
 \*  
 Case No. 80-65-PC \*  
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 \* \* \* \* \*

DECISION  
AND  
ORDER

NATURE OF THE CASE

This is an appeal pursuant to §§230.44(1)(a) and (d), Stats., of certain actions or omissions of the administrator and appointing authority in connection with the appellant's request for reinstatement to a position in DILHR, following the downward reallocation of the appellant's position. The parties agreed to waive a hearing and to submit this matter for decision on the basis of a "STIPULATION OF TESTIMONY," a synopsis of the testimony that would have been adduced had this matter gone to hearing. The findings which follow are based on that stipulation.

FINDINGS OF FACT

1. Effective November 8, 1976, appellant Wing's position was reallocated from the Administrative Budget and Management Analyst 5 (old Pay Range (PR)1-08) classification level to the Budget and Management Analyst 4 (old PR1-06) classification level. (The respective pay ranges were subsequently redesignated PR1-16 and PR1-14, respectively.)

2. As a result of the November 8, 1976, reallocation of his position, appellant's salary was "red-circled" in accordance with §5.03(3) Wis. Adm. Code.

3. Under the civil service statutes and rules, appellant's eligibility for reinstatement to positions at the higher salary range and classification were governed by §§16.07(2)(f), 16.11(3), 16.20(2) and 16.25(1)(a), Stats. (1975); and by §Pers 5.03(3), 16.03(4) and 16.03(7) Wis. Adm. Code. (Cf. §§230.09(2)(f), 230.15(3), 230.25(2) and 230.31(1)(a), Stats. (1979-80).

4. The Administrator, Division of Personnel, interprets the above-cited statutes and administrative rules as conferring on appellant eligibility for permissive reinstatement to positions in PR1-15 and PR1-16 for which he was qualified for the period from November 8, 1976, through the close of business on November 7, 1979.

5. In May 1979, the appellant filed with the Division of Personnel requests for transfer and reinstatement, Exhibits 8 and 9. These requests were not for specific positions but rather were general requests for transfer and reinstatement to an Administrative Budget and Management Analysis 5 (PR-15) position or a position in a closely-related classification at the same pay range.

6. On July 17, 1979, the Division of Personnel, Department of Employment Relations, announced that it was seeking applications to fill a vacancy in Madison for a Planning Analyst 4-Supervisor (PR1-15) position in DILHR's Division of Employment and Training Services, then known as the Division of Manpower Services. The certification request to fill this

position (#79-906) had been signed by the appointing authority on May 10, 1979; the Division of Personnel had approved the classification level of the position on May 16, 1979.

7. Following the deadline for acceptance of applications, James Cimino, an employe of the Division of Personnel, conducted an examination of candidates for the position. The deadline for submission of the written examination, an Achievement History Questionnaire, to the Division of Personnel was September 7, 1979.

8. Mr. Cimino's further involvement in this matter was as follows:

a. After publication of the Employment Opportunities Bulletin, he was contacted by appellant Wing regarding appellant's eligibility to be considered for the Planning Analyst 4-Supervisor position with or without competing in the examination.

b. After determining that appellant had, in his judgment, permissive eligibility to be considered by the appointing authority for positions at that level without competing in the examination, he referred appellant to David Brenna, an Assistant Personnel Manager at the Department of Industry, Labor and Human Relations.

c. He never received the letter from Appellant Wing allegedly dated September 2, 1979, attached to the stipulation of testimony as Exhibit 14. The appellant did not raise any issue with him at that time regarding the termination of appellant's claimed reinstatement rights or reinstatement eligibility either by letter, in conversation over the phone or otherwise.

9. Appellant did not seek to compete for the position by participating in the examination.

10. After scoring the competitive examination, Cimino certified a register of candidates for the position on October 22, 1979 (Exhibit 5).

11. Judy Burke, who is employed as a personnel assistant in the DILHR personnel office, had the following involvement with this matter:

a. In October, 1979, her duties included maintaining a log of certification requests for positions within DILHR; maintaining examination registers for positions for which DILHR itself conducted examination; and the transmittal to appointing authorities of examination registers, including both those compiled by the Division of Personnel and by DILHR itself.

b. In connection with her normal duties, Burke received the register of candidates for the Planning Analyst 4-Supervisor position described above from the Division of Personnel on October 23, 1979.

c. It was her responsibility to transmit the register to the appointing authority, in this case the Administrator of the Division of Employment and Training Services, William Grenier. The register (Exhibit 5) was sent to Grenier's office between her receipt on October 23 and no later than her memorandum of October 25 regarding appellant's application (Exhibit 6) and it is uncertain whether Exhibits 5 and 6 were mailed at the same time.

d. On October 25, 1979, at the direction of David Brenna, who was then her supervisor, she sent a memo to David Pedro, the Bureau Director who had been delegated appointing authority for the position, that he could also consider appellant Wing's application for the Planning Analyst 4-Supervisor position in connection with the register of eligibles for the position (Exhibit 6). She attached Wing's application to the original of Exhibit 6 and transmitted both the note and the application to Pedro's office through inter-departmental mail.

12. David Brenna, who was then DILHR Assistant Personnel Manager in charge of staffing, had the following involvement in this matter:

- a. On a date uncertain, but prior to October 25, 1979, he was contacted by appellant Wing, probably by telephone. Appellant asked that he be considered for the above-described Planning Analyst 4-Supervisor position.
- b. Following his contact with appellant, he verified by checking the applicable personnel policies and rules and by conversations with other personnel experts that appellant was eligible to be considered for the position. Based on his research, Brenna concluded that appellant had permissive reinstatement eligibility for positions in PR1-15 and PR1-16.
- c. After verifying appellant's eligibility, he directed Judy Burke to send appellant's application to the appointing authority for his consideration along with the certified list of eligible candidates.

13. Pat Appledorn had the following involvement with this matter:

a. From October, 1979, to the present she has been employed in the classified service as secretary to the Administrator of DILHR's Division of Employment and Training Services. In October, 1979, the Division Administrator was William Grenier.

b. In connection with her normal duties she receives from the DILHR Personnel Office certain documents related to personnel actions in the Division, and generally transmits such documents on to appropriate persons within the Division for action.

c. She received the register of candidates (Exhibit 5) from the DILHR Personnel Office on October 26, 1979, and she transmitted the register on that same date to David Pedro.

d. It is uncertain whether she received for transmittal to Pedro an application for the position by David Wing and a cover memorandum dated October 25 from Judy Burke of the DILHR Personnel Office to Pedro (Exhibit 6).

e. Judy Burke received the applications from the Division and transmitted them to Pedro on October 30, 1979.

14. On December 4, 1979, after two of the originally certified candidates notified the appointing authority they were either not interested or available, one additional name was certified by the Division at the request of the appointing authority (Exhibit 5).

15. On or after December 4, 1979, and effective December 16, 1979, Andrew Cohn, whose name was certified on December 4, was selected for the position (Exhibits 4,5).

16. David Pedro, who was delegated the appointing authority for the position, had the following involvement with this matter:

a. In October, 1979, he was Director of the Bureau of Program Management in DILHR's Division of Employment and Training Services and the supervisor of the Planning Analyst 4-Supervisor position for the Madison area.

b. He received and reviewed the register of certified candidates for the position (Exhibit 6) as well as the actual applications of the certified candidates which he also requested.

c. He did not receive or review either David Wing's application for the Planning Analyst 4-Supervisor position or Judy Burke's transmittal memorandum of October 25, 1979 (Exhibit 6).

d. He selected Andrew Cohn for the position in December, 1979, on the basis of:

1. Cohn's familiarity with the Comprehensive Employment and Training Act (CETA) and his experience with CETA grants and the related contracting and planning process;

2. The level of Cohn's previous performance within the agency; and

3. Cohn's experience in working with the state Chamber of Commerce in focusing CETA services on the private sector.

17. Sometime after the appointment of Cohn, appellant inquired of Cimino and at DILHR about the filling of the vacancy for which he had applied.

18. On or about December 20, 1979, appellant Wing made telephone contact with Cimino questioning the status of his application and the position. Cimino referred Wing to David Brenna. Wing attempted to contact Brenna beginning on December 20, 1979, and on several dates thereafter, continuing into the early months of 1980.

19. On February 1, 1980, David Brenna answered appellant's inquiry as follows:

I have checked into your question regarding the Planning Analyst 4-Supervisor position with our Employment and Training Division. As far as I can determine, your name and application was forwarded to the Division along with the certification of eligibles on October 25, 1979. However, the Division has no record of your application and you were apparently not considered as a possible reinstatement for the position. A selection from the register was made effective 12/6/79.

20. Appellant filed his appeal dated February 27, 1980, with the Personnel Commission on March 3, 1980.

21. On another occasion, to wit; on or between June 29, 1979 and October 10, 1980, Mr. Wing was also the victim of his records having been lost while he was dealing with the Bureau of Personnel on personnel matters, as follows:

a. On various occasions between June, 1979 and October, 1980, appellant Wing sought permission to inspect various records of the Division of Personnel related to the filling of vacancies in



Pay Range 15 and 16 between November, 1976 and the date of the inquiry.

b. None of the records requested related to appellant Wing personally. On one occasion, the Division was unable to provide him with all of the records requested when it was discovered that some of the documents requested had been lost or misplaced after their retrieval from storage at the State Records Center.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §§230.44(1)(a) and (d), Stats.
2. The appellant has the burden of proof as to all issues.
3. The appellant had no mandatory reinstatement rights as a result of the red-circling of his salary.
4. The appellant had permissive reinstatement eligibility as the result of the red-circling of his salary.
5. The appellant was not considered by the appointing authority on either basis for appointment to the position in question, and this violated the civil service code inasmuch as the failure of DILHR to have exercised its discretion whether to have considered the appellant for appointment to the position in question constituted an abuse of discretion as to a personnel action after certification which is related to the hiring process in the classified service. See §230.44(1)(d), Stats.
6. The appellant's application was not handled by the administrator in an untimely manner in accordance with §§230.05(2) and (7), Stats., inasmuch as the latter subsection applies to the competitive examination process, and the appellant chose not to compete in the examination for this position.

7. The appellant is not entitled, as a remedy to the abuse of discretion found on this record, to have his period of permissive reinstatement under §§Pers 16.03(4) and (7), Wis. Adm. Code, extended.

OPINION

As a result of the downward reallocation of the appellant's position, effective November 8, 1976, his salary was "red-circled" pursuant to the provisions of §Pers 5.03(3), Wis. Adm. Code (1975), and he had permissive reinstatement rights pursuant to §§Pers 16.03(7) and (4):

(7) DOWNWARD REALLOCATION OF POSITION. An employe whose position has been reallocated to a classification with a lower pay rate or pay range maximum, shall have the same reinstatement eligibility to the higher class as employes who voluntarily separate from the service.

\* \* \*

(4) PERMISSIVE REINSTATEMENT, GENERAL. An employe who has separated from the classified service without misconduct or delinquency, or who has accepted voluntary demotion for personal reasons, shall be eligible for reinstatement in any agency for 3 years from date of such separation or demotion. The effective date of reinstatement shall be within the 3 year time limit.

Further, pursuant to §Pers 5.03(3)(h):

In any action resulting in the red-circling of an employe pay rate, every effort shall be made by the appointing authority and the bureau [now Division of Personnel] to restore the employe to a position commensurate to his or her former status. Any such employe with the approval of the director [now administrator] shall be placed on the appropriate employment lists. (See Wis. Adm. Code, Chapter Pers 16.)

See also, §§16.07(2)(8), 16.25(1), Stats. (1975).

Sometime after the downward reallocation, Mr. Wing contacted Mr. Cimino of the Division of Personnel regarding a vacancy in DILHR for which Mr. Cimino was handling a competitive examination. After determining that

Mr. Wing was eligible for permissive reinstatement to this position, Mr. Cimino referred him to Mr. Brenna, an Assistant Personnel Manager at DILHR. Mr. Brenna's assistant, Ms. Burke, sent Mr. Pedro, the appointing authority for the position, a memorandum advising him that he could consider Mr. Wing for appointment, as well as those certified from the competitive register. Mr. Wing's application was attached to the memorandum and placed in the state (interdepartmental) mail system. These documents were never received by Mr. Pedro, who never considered Mr. Wing for the position but appointed another candidate on December 6, 1979.

There are two respondents in this case. The administrator's role, as material, was very limited. All that the Division of Personnel did was to refer Mr. Wing to the appointing authority. Since Mr. Wing did not choose to participate in the competitive examination process, and the decision whether to appoint someone on a permissive reinstatement basis is within the sole province of the appointing authority, the division's action was routine and correct.

The only significant factual dispute on this record involved Mr. Wing's stipulated testimony that he sent Mr. Cimino of the Division of Personnel a letter, (Exhibit 14) informing him that his permissive reinstatement eligibility expired November 8, 1979. Mr. Cimino's stipulated testimony was that he was certain that he never received that letter, and that if he had received such a letter, he would have remembered it because of its unusual content and appearance.

In a proceeding such as this, the appellant has the burden of proof as to all matters in dispute, 2 Am Jur 2d Administrative Law §391, and the degree of proof is that of a preponderance of the evidence, supra, §392.

On this record, it cannot be said that there is a preponderance of the evidence in support of the appellant's position on this issue.

With respect to the action of the appointing authority, it is clear that Mr. Pedro never considered Mr. Wing's request for consideration of his appointment to the position in question. The stipulation of testimony supports a conclusion that Mr. Wing's papers were sent to Mr. Pedro but never reached him. This record does not answer the question of whether they were lost in the state mail system, misdirected, or mislaid within DILHR, or the subject of some other act or omission, and there is not a basis for a finding that they were the subject of any deliberate attempt to subvert Mr. Wing's interests.

At this point, it is necessary to examine exactly what is included in the right to permissive reinstatement granted pursuant to §§Pers 16.03(4) and (7), Wis. Adm. Code. All that is provided is that the employe "shall be eligible for reinstatement in any agency for 3 years from date of such separation or demotion...." The term "reinstatement" is defined as an act of:

...re-appointment without competition of an employe or former employe (a) to a position in the same class in which the person was previously employed or (b) to a position in another classification to which the person would have been eligible to transfer had there been no break in employment or (c) to a position in a class having a lower pay rate or pay range maximum for which the person is qualified to perform the work after the customary orientation provided to new workers in the position.

(2) Such re-appointment may be either at the discretion of the appointing authority (permissive) or may be required by the law or these rules (mandatory). ..."Pers 16.01, Wis. Adm. Code.

Standing alone, eligibility for permissive reinstatement only gives the person the opportunity to be re-appointed without having to pass an exam with a score in the certifiable range. As the respondent points out, there is nothing in the rules which requires the appointing authority either to appoint the person or to consider the person for appointment.

Section Pers 5.03(3)(h), Wis. Adm. Code, provides that "...every effort shall be made by the appointing authority and the bureau to restore the employe to a position commensurate to his or her former status." Since the Division of Personnel [formerly bureau] had no authority to have made the appointment here in question, it would appear that, with respect to this transaction, it did what it could pursuant to this rule when it referred Mr. Wing to DILHR. As to the "appointing authority" referred to in the rule, assume for the moment that this term refers to the appointing authority for the vacancy in question, in this case DILHR, as opposed to the appointing authority for the agency within which the employe was red-circled, in this case the UW-System. In any event, there is nothing on this record from which to conclude that DILHR's failure to have considered the appellant for the position in question was due to a lack of effort as opposed to circumstances unrelated to the agency's intent, state of mind, or "efforts."

The respondent goes on to argue as follows:

Appellant's eligibility to be considered was permissive, and at the discretion of the appointing authority. There clearly was no violation of the statutes and rules in Pedro's failure to consider the application between the date it was sent to him on October 25, 1979 (Ex. 6) and November 7, 1979, when appellant's eligibility to be considered at all terminated, since Pedro was never obligated to consider appellant in the first place. DILHR's brief, p. 6.

However, the respondent's handling of this transaction is reviewable pursuant to §230.44(1)(d), Stats., not only for illegality, but also for abuse of discretion. It may be discretionary with an appointing authority whether to consider a person for permissive reinstatement, but it must properly exercise that discretion and not abuse it.

In this case, the failure to have considered the appellant for this position was not based on the exercise of an informed discretion, but, at best, on happenstance or inadvertance. In the opinion of the Commission, the failure to exercise discretion, even if inadvertent, amounts to an abuse of discretion. See, Spalding v. Spalding, 355 Mich. 382, 94 N.W. 2d 810, 811-812 (1959):"

The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations;

State v. La Goy, 136 Vt. 39, 383 A. 2d 604, 606 (1978):

The test of an abuse of discretion... is the failure to exercise discretion or its exercise on reasons clearly untenable or to an extent clearly unreasonable, and so long as a reasonable basis for the court's discretionary action is demonstrated, this Court will not interfere. (emphasis supplied);

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.

The determination of a remedy in a situation such as here presented presents some difficulty because the loss or injury to the employe is not readily quantifiable--e.g., this is not a situation where an employe was underpaid a certain amount on an hourly basis. Rather, as a result of the respondent's abuse of discretion, the appellant lost the opportunity to have been considered for permissive reinstatement to the position in question.

However, as discussed above, the respondent did not violate §Pers 16.03, and an order by the Commission rejecting the respondent's action could not have the effect of restoring a period of reinstatement eligibility to the appellant.

Although it appears to be of marginal utility, given the circumstances of this matter, the Commission, pursuant to §230.44(4)(c), Stats., will "reject" the action of the appointing authority which is the subject of this appeal, and "remand the matter to the person taking the action for action in accordance with this decision," which will include ceasing and desisting from any further such abuse of discretion with respect to the appellant.

ORDER

The action of respondent DILHR here found to be an abuse of discretion is rejected, and this matter is remanded for action in accordance with this decision.

Dated: April 5, 1983 STATE PERSONNEL COMMISSION

  
KURT M. STEGE, Hearing Examiner

KMS:jmf

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