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LEONARD PFLUGRAD,  
 Appellant,

v.

Administrator, DIVISION OF  
 MERIT RECRUITMENT & SELECTION  
 and Secretary, DEPARTMENT OF  
 HEALTH AND SOCIAL SERVICES,  
 Respondents.

Case No. 83-0176-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. In an Interim Decision dated June 7, 1984, the Commission ordered that the following issues were to govern the course of any proceedings in this appeal:

1. Whether or not the respondent DMRS constructively decertified the appellant from consideration for five positions within DHSS (identified as position numbers MIS 4 200-282, MIS 4 400-133, MIS 3 810-119, MIS 2 810-117, MIS 2 810-111) in violation of §230.17, Stats., and/or §ER-Pers 6.10, Wis. Adm. Code.
2. If so, whether it constitutes a violation of §230.43(1)(a)-(d) or is a deprivation of due process under Article IV, Section 2 or Amendment XIV of the United States Constitution or Wisconsin Constitution Article I, Section 1.
3. Whether the failure of DHSS to appoint the appellant to any of the five positions (MIS 4 200-282, MIS 4 400-133, MIS 3 810-119, MIS 2 810-117, MIS 2 810-111) constitutes an illegal action or an abuse of discretion.
4. If so, what is the appropriate remedy.

A hearing was conducted on October 1, 8, and 18, 1984, and the record was closed by the hearing examiner on January 25, 1985. The briefing schedule was concluded on April 1, 1985.

FINDINGS OF FACT

1. During 1983, appellant applied for and was certified for the following five then vacant Management Information Specialist (MIS) positions at the Department of Health and Social Services (DHSS):

- a. MIS 3 810-119; certification list dated June 6, 1983; the successful applicant was Michael Campbell.
- b. MIS 4 200-282; certification list dated June 10, 1983; the successful applicant was Lianne Marshall.
- c. MIS 4 400-133; certification list dated June 17, 1983; the successful applicant was Susan Ballard.
- d. MIS 2 810-117; the successful applicant was Todd Micholic.
- e. MIS 2 810-111; the successful applicant was Lynn Deschler.

2. The following is a summary of appellant's employment history in the field of data processing at the time the subject hiring decisions were made:

- a. 1977 - Higher Educational Aids Board (HEAB) - employed six weeks - probationary termination.
- b. 1977 - Limited Term Employee (LTE) with Department of Revenue (DOR) - employed eight months (the duration of the limited term).
- c. 1978 - Board of Vocational, Technical, and Adult Education (BVTAE) - employed two and one half years (until 11/14/80) - left the BVTAE to accept a position at the University of Wisconsin.
- d. 1980 - UW Internal Audit - employed two weeks - terminated.
- e. February, 1981 - Wisconsin Supreme Court - Court Information Systems - employed one and a half days - terminated.

- f. June, 1982 to September, 1982 - Sakman Software Company - employed as a Systems Analyst and Programmer.

The resume which appellant submitted as part of his application for the subject positions did not mention appellant's positions with the Wisconsin Supreme Court or the University of Wisconsin and did not list any training subsequent to 1973.

3. The interview panel for the Campbell position consisted of Dick Haugen, Judi Page, and Glen Sweeney. The hiring decision for this position was effectively made by Mr. Haugen. Ms. Page was included on the panel because the position was in her project area, the Computer Reporting Network. Mr. Sweeney was included on the panel because he had similar positions in his project area and anticipated that many of the applicants certified for this position would be certified for the positions in his project area. Appellant had recently been interviewed by Mr. Haugen for another position (on April 7, 1983) and Mr. Haugen did not conduct an additional interview of appellant for the Campbell position. Appellant was not interviewed by Ms. Page or Mr. Sweeney. Mr. Haugen concluded that Mr. Campbell was better qualified for this position than appellant because Mr. Campbell had recent experience with the 3081 System and with the programs of the 3081 System used by the Computer Reporting Network and appellant did not, because Mr. Campbell had more recent training than appellant, and because Mr. Campbell had better communication skills than appellant. Good communication skills were utilized as a selection criterion because the duties and responsibilities of this position require constant communication with users of the network. The record shows that Mr. Campbell was an LTE MIS 2 Programmer for the DHSS Computer Reporting Network at the time the

hiring decision was made and had been so employed since 1982; that from May, 1982, to July, 1982, he was an intern programmer for the DHSS; and that he had received an Associate Degree in Data Processing, Computer Programming from Madison Area Technical College in January of 1983. Mr. Haugen does not recall checking appellant's references but usually only does so prior to offering a position to an applicant. Mr. Haugen had no knowledge of appellant prior to his interview of him.

4. The interview panel for the Marshall & Ballard positions consisted of Susan Wood and Ms. Wood effectively made the hiring decision for these positions. The positions serve as intermediaries between computer programmers in DHSS's Office of Information Systems and users who are familiar with DHSS program requirements. Ms. Wood concluded that Ms. Marshall was better qualified for the subject position than appellant because she had a stronger technical background and more recent relevant training, because she had systems analysis experience in DHSS and appellant did not, because she had more experience with users than appellant did, and because she had much better communication skills than appellant. The record shows that Ms. Marshall was employed as an MIS 3 for DHSS at the time the hiring decision was made and had been so employed since October of 1981; that her MIS 3 position required extensive contact with users in the Division of Community Services; and that she completed her data processing training in 1980. Ms. Wood felt that Ms. Ballard was better qualified for the subject position than appellant because she had much better communication skills than appellant, she had more recent relevant experience, she had more recent relevant training, and she had more extensive experience with users. The record shows that Ms. Ballard was employed as a Programmer/Analyst for the UW System Administration Information Systems from 1980 to 1983; that this position with the UW

required extensive user contact; and that she completed her data processing training in 1980. In Ms. Wood's interview of appellant, he refused to give her a reason for leaving the BVTAE and to provide a reference there. Ms. Wood did not check appellant's references because she usually does so only prior to offering a position to an applicant. Ms. Wood had no knowledge of appellant prior to her interview of him.

5. The interview panel for the Micholic and Deschler positions consisted of Dorothy Harvey, Diana Triplett, and Dennis Mahlum. The hiring decision for the Micholic position was effectively made by Ms. Harvey. The hiring decision for the Deschler position was effectively made by Ms. Triplett. Mr. Mahlum was on the panel because there was also a vacant MIS position in the unit he supervised. The panel concluded that appellant was not as well qualified for the positions as the successful applicants because his relevant training and work experience was not as recent; his communication skills were not as good; he did not have the experience with users that the successful applicants did; he was evasive in answering some of the panel's questions; and his coding sample, although more technically advanced, was not as easy to follow as theirs. The record shows that Ms. Deschler had a programming internship with DHSS in 1982; was employed as an LTE programmer at the Department of Natural Resources at the time the hiring decision was made; and had received an Associate Degree in Data Processing/Computer Programming in May of 1982. Ms. Harvey had first met appellant when she interviewed him for a position sometime in 1983 prior to interviewing him for the Micholic and Deschler positions. Prior to meeting appellant, Ms. Harvey had heard from someone, not a DHSS employe, that appellant had a quick temper. Ms. Harvey had checked appellant's

references when she had first interviewed him. When contacted by Ms. Harvey, Mr. Sakman indicated that appellant had good technical skills but didn't work independently and the DOR reference indicated that appellant had good technical skills but poor communication skills.

6. For at least five years, appellant has initiated contacts with John Preston at the Department of Employment Relations to discuss personnel matters, primarily regarding appellant's applications for various state positions in the data processing field. Sometime in 1983, prior to July 25, Mr. Preston received a phone call from an employe in the personnel unit of DHSS advising Mr. Preston that another DHSS employe was considering initiating a request to remove appellant's name from a certification list or register and inquiring as to Mr. Preston's reaction to this. Mr. Preston advised the caller that he would not recommend that appellant's name be removed from the certification list or register and that appellant did not have to be hired for the position simply because he was certified for the position, i.e., that if they wanted to hire another applicant, they should do so. Mr. Preston told the caller to "let it slide," that it would be a "hassle" to remove appellant's name from the certification list or register. None of the individuals from the DHSS personnel unit whose sworn statements became a part of the record in this proceeding could recall making such a telephone inquiry to Mr. Preston and neither Mr. Haugen, Ms. Wood, nor Ms. Harvey considered initiating such a request prior to making the subject hiring decisions. Ms. Triplett was not called as a witness in this proceeding and no attempt was made to introduce information she may have in this regard by affidavit or otherwise.

7. In a July 25, 1983, conversation initiated by appellant, Mr. Preston told appellant of such inquiry from DHSS and suggested that appellant apply for handicapped certification. Mr. Preston's rationale for such a suggestion was that, since a hiring agency would be required to explain

the non-selection of an applicant certified as handicapped, appellant may be able to ascertain why he could not gain or keep a position in a field where trained persons were in such great demand and that, if an agency felt appellant was someone who needed special assistance, appellant may get special consideration. Mr. Preston concluded that appellant may be psychologically or emotionally handicapped. Mr. Preston based this conclusion on his observation of appellant exhibiting what Mr. Preston felt was bizarre behavior, e.g., appellant shaking his fist at Mr. Preston, and on comments from others who had observed appellant and who regarded appellant as a "wild and crazy guy."

8. When appellant was terminated from his position at the Wisconsin Supreme Court, Court Information Systems, appellant broke two windows in the Supreme Court offices with his briefcase when his supervisor insisted that appellant remove his personal belongings from his desk and blocked the exit when appellant refused to do so.

9. On October 7, 1982, Dan Wallock, director of DER's Bureau of Register Establishment approved the removal of appellant's name from a certification list at the BVTAE's request.

10. In a meeting held on April 10, 1984, in response to a request for information from appellant, Mr. Wallock told appellant that he would not grant any future requests to remove appellant's name from a certification list or register if the basis for such requests was the same as the basis for the 1982 BVTAE request due to the fact that he felt significant time had passed.

11. Appellant filed a timely appeal of the actions of respondents which form the basis of this appeal on August 9, 1983.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this appeal pursuant to §§230.44(1)(a) and (d), Stats.
2. The appellant has the burden of proving by a preponderance of the credible evidence that respondent DMRS constructively decertified appellant from consideration for the five subject positions or that it was an illegal action or an abuse of discretion for respondent DHSS not to appoint appellant to any of the five subject positions.
3. Appellant has not sustained his burden of proof.
4. Respondent DMRS did not constructively decertify appellant from consideration for the five subject positions nor was it an illegal action or an abuse of discretion for respondent DHSS not to appoint appellant to any of the five subject positions.

OPINION

The first issue under consideration in this appeal is: whether or not the respondent DMRS constructively decertified the appellant from consideration for the five subject positions within DHSS in violation of §230.17, Stats. and/or §ER-Pers 6.10, Wis. Adm. Code.

Appellant alleges that respondent DMRS, through Mr. Preston, advised respondent DHSS to ignore appellant's certification for the subject positions and that this advice constituted a constructive decertification of appellant. It is uncontroverted that respondent DMRS did not actually remove appellant's name from the certification list or register for any of the subject positions. However, any attempt to accomplish such removal through some procedure other than that which is required would violate the spirit and the letter of the applicable law. A crucial question in this regard is then: whether Mr. Preston advised respondent DHSS to ignore appellant's certification for the subject positions. The essence of



Mr. Preston's advice was the following: If DHSS wanted to hire a certified applicant other than appellant, they should do so without requesting the removal of appellant's name from a certification list or register because to effect such a removal would be administratively cumbersome and time-consuming. Was this advice equivalent to advising respondent DHSS to "ignore" appellant's certification for the subject positions? In a situation where the essence of a communication is in question, it is often instructive to review the action taken in response to such communication. What action did respondent DHSS take in regard to the subject hiring decisions after receiving Mr. Preston's advice? The testimony of those who had effective authority for making the subject hiring decisions reveals that appellant was interviewed for the subject positions and his qualifications were compared to those of the successful applicants. A necessary conclusion is that Mr. Preston never advised respondent DHSS to ignore appellant's certification for the subject positions or that, if such advice was given, respondent DHSS chose not to follow it. In neither instance could a constructive decertification be said to have occurred. In support of his argument in this regard, appellant cites the failure of respondent DHSS to interview him for the Campbell position. However, Mr. Haugen, who had the effective authority for making the subject hiring decision, had interviewed appellant approximately two months earlier for a different MIS position. The other two interview panel members did not interview appellant nor were the results of the earlier interview discussed with them. However, the record does not show that they had any significant influence on Mr. Haugen's hiring decision. Finally, the nexus between Mr. Preston's advice and the subject hiring decisions is tenuous at best. None of the individuals from the DHSS personnel unit whose sworn statements

became a part of the record in this proceeding recall requesting advice from Mr. Preston regarding the removal of appellant's name from a certification list or register at or before the date the subject hiring decisions were made. None of those who had effective authority for making the subject hiring decisions who testified in this proceeding ever discussed removing appellant's name from a certification list or register at or prior to the date the subject hiring decisions were made. The Commission concludes that the appellant was neither actually nor constructively decertified for the subject positions.

The next issue is: whether the failure of respondent DHSS to appoint the appellant to any of the five positions constitutes an illegal action or abuse of discretion.

The only illegality which can be inferred from appellant's arguments is that relating to the constructive decertification theory discussed above.

The term "abuse of discretion" has been defined as "... a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." Lundeen v. DOA, No. 79-208-PC, (6/3/81). The question before the Commission is not whether it agrees or disagrees with the appointing authority's hiring decision, in the sense of whether the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather, it is a question of whether, on the basis of the facts and evidence presented, the decisions of the appointing authority may be said to have been "clearly against reason and evidence." Harbort v. DILHR, No. 81-74-PC (1982); Ebert v. DILHR, No. 81-64-PC (1983). The record clearly shows that, in regard to each of the subject hiring decisions, the selection criteria (recent relevant training, recent relevant work experience and communication skills) were reasonably

related to the duties of the positions and that, when these criteria were applied to appellant's qualifications and to those of the successful applicants, it was reasonable to conclude that appellant was not as well qualified for the subject positions as the successful applicants. The subject hiring decisions were not therefore clearly against reason and evidence and the appellant has failed to show an abuse of discretion in this regard.

Appellant implies that, as a result of the consideration by those who had effective authority for making the subject hiring decisions of rumors they had heard about appellant prior to the dates such hiring decisions were made, he did not receive fair and equal consideration for the subject positions. The record shows that only Ms. Harvey had any previous knowledge of appellant and this knowledge was to the effect that appellant had a quick temper. It is not possible for these hiring decisions to be made in a vacuum, to insulate those making these decisions from the exchange of information endemic to any work place. To require a manager to excuse himself/herself from a hiring decision in the event he/she knows anything about one of the applicants is absurd and administratively impossible. Furthermore, the record does not support appellant's allegation that Ms. Harvey's decision not to effectively recommend the appointment of appellant to the subject position was based on the rumors that she had heard. Appellant further alleges that Ms. Harvey's testimony that she "had decided that the appellant would not be hired for any future openings based upon previous interviews" shows that she did not give the appellant fair and equal consideration for the subject position. However, Ms. Harvey actually testified that, if she were to interview appellant now and his performance was the same as it was during the previous interview, she would not hire him.

This clearly shows only that Ms. Harvey bases hiring decisions at least in part on an applicant's performance during an oral interview, which is what she is required to do. Ms. Harvey did check appellant's references, she did compare appellant's qualifications with those of the successful applicants, and her hiring decision was reasonably based on such references and comparisons.

ORDER

The action of respondents is affirmed and this appeal is dismissed.

Dated: June 6, 1985 STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

  
DONALD R. MURPHY, Commissioner

  
LAURIE R. MCCALLUM, Commissioner

LRM:jmf  
ID9/2

Parties:

Leonard Pflugrad  
c/o Atty. Donald Weeden  
217 S. Hamilton  
Suite 203  
Madison, WI 53703

Sue Christopher  
DMRS, Administrator  
P. O. Box 7855  
Madison, WI 53707

Linda Reivitz  
DHSS, Secretary  
P. O. Box 7850  
Madison, WI 53707