

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *
 JOHN COLE,
 Appellant,
 v.
 Administrator, DIVISION
 OF MERIT RECRUITMENT
 & SELECTION,
 Respondent.
 Case No. 84-0013-PC
 * * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(a), Stats., of the handling of an examination for Administrative Assistant 5 - Compliance Monitor Team Leader.

FINDINGS OF FACT

1. The appellant made application and was scheduled to take an examination for Administrative Assistant 5 - Compliance Monitor Team Leader, in the classified civil service, on January 7, 1984.

2. The appellant was unable to take the exam on January 7, 1984, or on the scheduled makeup date of January 9, 1984, due to temporary illness as set forth in Appellant's Exhibit 3.

3. The policy established by respondent DMRS with respect to makeup exams is as set forth in Respondent's Exhibit 7, and a copy of which was provided to the appellant as part of his examination notice, Appellant's Exhibit 2, as follows:

MAKE-UP TESTS: Due to budget reductions in Wisconsin State Government, we no longer provide alternative testing times at local examination centers. The time and place indicated on this

notice is the only scheduled administration of your examination. If you cannot take your test on Saturday as scheduled because of religious persuasion or critical personal reasons, you will be allowed one additional test opportunity if you report in person at 9:00 A.M. on the Monday following the scheduled date to the Department of Employment Relations building, 149 E. Wilson Street, Madison, WI. If you report on Monday, you will be asked to sign an affidavit indicating the reason why you could not take the examination as scheduled. Others reporting on Monday for less important reasons will be allowed in to take their examinations on a first-come space-available basis until the maximum capacity of 175 persons is reached. No reservations are allowed.

4. Due to the foregoing policy, since the appellant was unable to take this examination on January 7th or 9th, he effectively was unable to take the examination for this position.

5. The respondent's policy as set forth in Finding #3, above, is motivated by the following considerations:

a. Cost. In the event that makeup exams were scheduled throughout the state on the same basis as regular exams, the additional cost to the state would be approximately \$15,000 - \$20,000 annually. In the event that additional makeup exams were permitted, but only in Madison (i.e., if the agency permitted makeup exams to be taken in Madison, but not limited to the Monday immediately after the scheduled exam), there would be an additional cost to the state of an indeterminate amount.

b. Exam security. Limiting makeup exams to the Monday immediately following the scheduled exam (i.e., the preceding Saturday) reduces the opportunity for a deferred examinee to receive information about the exam from those who took it on the regularly scheduled date.

c. Administrative convenience and expedition in grading and scoring exams. Exams given on a regularly scheduled basis are received by the respondent in Madison on the Monday following the Saturday that the exams are given. By giving the makeup exams on that Monday, the respondent

is more or less assured of getting all the exams on the same date, which makes it more convenient to process the exams and contributes to more prompt processing of the exams.

6. The exam notice sent to all examinees cautions them as follows:

" ... Please do not discuss the content of any examination with others who might at some future time be likely to take an examination for a similar position.

In taking a State of Wisconsin Civil Service examination, you should be aware that Section 230.43(1)(d) of the Wisconsin Statutes provides for a maximum fine of \$1,000 or imprisonment for up to two years or both, for anyone who willfully or corruptly furnishes any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person examined ... "

CONCLUSIONS OF LAW

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

2. The appellant has the burden of proof.

3. The subject matter of this appeal is controlled by the legal standard set forth in §230.16(2), Stats.:

"To assure that all residents of this state have a fair opportunity to compete, examinations shall be held at such times and places as, in the judgment of the administrator, most clearly meet the convenience of applicants and needs of the service."

4. The appellant has the burden of establishing that the administrator/respondent abused the discretion vested in him/her by the foregoing legal standard in establishing and implementing the policy on makeup examinations, which is set forth above in Finding #3, and which resulted in the appellant being unable to take the exam in question.

5. The appellant has not satisfied his burden of proof.

6. The actions of the administrator/respondent set forth herein in establishing and implementing the policy on makeup exams as set forth in

Finding #3, above, and which resulted in the appellant being unable to take the exam in question, did not constitute an abuse of discretion, and must be affirmed.

OPINION

The parties agreed to the following statement of issue for hearing:

"Whether the administrator abused his discretion under §230.16(a), Stats., in denying the appellant an opportunity to take the Administrative Assistant 5 - Compliance Monitor Team Leader exam on a date other than those two dates (January 7 & 9, 1984) that had been regularly scheduled."

This framing of the issue is consistent with the language of §230.16(2), Stats., which provides in part:

"To assure that all residents of this state 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 the needs of the service."

This statute vests the responsibility and authority for exam administration logistics ("times and places") in the "judgment" of the administrator. In exercising the "judgment," which has been defined as "an opinion or estimate," see Webster's New World Dictionary, Second College Edition, p. 763, the administrator must consider and balance the "convenience of applicants" and "the needs of the service."

The test of an "abuse of discretion" may be stated as follows:

"... 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 ... discretionary action is demonstrated, this court will not interfere." State v. La Goy, 136 Vt. 39, 383 A.2d, 604, 606 (1978). (emphasis added)

See also, Black's Law Dictionary, Revised Fourth Edition, p. 25:

"A discretion exercised to an end or purpose not justified by and clearly against reason and evidence." (emphasis added);

Murray v. Buell, 74 Wis. 14, 19 (1889):

"The term 'abuse of discretion' ... 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." (emphasis supplied);

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 therefore was clearly untenable." (emphasis supplied)

It is clear that the test for abuse of discretion does not call for the Commission to substitute its judgment for the judgment of the respondent. Rather, the Commission must sustain the respondent's decision if there is some rational basis for it.

As noted above, §230.16(2), Stats., provides the basic framework for the exercise of discretion. The administrator must hold examinations " ... 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 supplied) In other words, the administrator must consider, and try to strike a balance between, the convenience of applicants and the needs of the civil service system.

With respect to the subject matter of this case, the respondent has attempted to discharge this responsibility by providing to those who could not take the test on the scheduled date some opportunity for a makeup exam, albeit on a limited basis.

The respondent enunciated three reasons for not providing more alternative dates for makeup examinations: 1) cost; 2) exam security; and 3) administrative convenience and expedition in grading and scoring exams. These all are legitimate reasons for the respondent's policy. Obviously, good arguments can be made for striking the balance between the "convenience of applicants" and the "needs of the service" in some other manner

with a greater emphasis on the "convenience of applicants." However, the job of the Commission in reviewing a decision for an abuse of discretion is not to decide how it would have made the decision if it had been the respondent. Rather, it is the Commission's role to determine whether there was some reasonable basis for the decision that was made and that is being reviewed.

Clearly, the two-day time lag between Saturday and the following Monday is relatively short and in a number of cases may be unavailing to an individual, like the appellant, with a temporary illness. On the other hand, permitting the makeup exam to be given on yet the following Monday would undoubtedly, although incrementally add to cost, undermine exam security, and detract from administrative convenience. While the appellant's arguments have some force, it must be concluded that he has not sustained his burden of establishing an abuse of discretion.

ORDER

The action of the respondent is affirmed and this appeal is dismissed.

Dated: April 25, 1984 STATE PERSONNEL COMMISSION

AJT:jat


LAURIE R. McCALLUM, Commissioner


DENNIS P. MCGILLIGAN, Commissioner

Parties:

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