STATE OF WISCONSIN PERSONNEL COMMISSION

MICHAEL PEARSON,

Appellant,

v.

President, UNIVERSITY OF WISCONSIN - MADISON

Respondent.

Case No. 84-0219-PC

FINAL DECISION AND ORDER

This matter is before the Commission following the issuance of a proposed decision and order, the Commission having considered the objections and arguments of the parties and consulted with the hearing examiner. The Commission adopts as its final decision and order in this matter the proposed decision, and order, a copy of which is attached hereto and incorporated by reference, with the following amendments:

1. The Commission amends Finding #13e in order to better reflect the record by addition of the following language beginning at page 6, line 5:

> ... and ranked him last among the candidates in this area. Neither Skroch's ratings nor rankings of the candidates' technical skills were considered by Meier in deciding Critchley was the number one ranked candidate. In contrast, appellant has 15 years of experience, nine of which involve working with master keying systems nearly full-time and served a full formal apprenticeship. Pearson's experience is clearly superior to Critchley's, as attested by Skroch's rating, but Meier gave him the same number of points as Critchley for the second item and only seven points, a rating of only "adequate" on

the fourth item. In addition, it is clear that Meier's rating of Critchley and appellant on these two factors ignored Skroch's opinion on the subject.

2. The Commission adds the following language to the opinion:

Although respondent was very emphatic that Skroch was brought in from retirement to give his views of the candidates' technical (locksmith) skills, Meier effectively ignored Skroch's input in his evaluation of the candidates. In this regard the record indicates that Meier did not throw Skroch's ratings of the candidates into the hopper in order to determine the candidates' scores on the interview; that Meier did not consider Skroch's ranking of the candidates on their knowledge of master keying systems in arriving at his decision to select Critchley instead of appellant to fill the disputed position and that Meier's own rating (interview scores) of Critchley versus appellant's locksmith and master keying system skills did not reflect Skroch's input regarding same. Finally, Meier's rating of Critchley over appellant in this area flies in the face of the great weight of evidence in the record which supports a finding that Pearson's locksmith experience was clearly superior to Critchley's.

Subsequent to the promulgation of the proposed decision and order, the appellant filed a motion on August 5, 1985, for an award of attorney's fees. There is no specific statutory provision permitting an award of attorney's fees in an appeal under §230.44(1)(d), Stats. The appellant's motion relies primarily on the Supreme Court's opinion in Watkins v. LIRC, 117, Wis. 3d 753, 345 N.W. 2d 482 (1984), where the Court held there was implied statutory authority under the Fair Employment Act to award

attorney's fees. However, there are a number of factors which distinguish Watkins.

First, the Court in Watkins relied substantially on the liberal construction provision in the Fair Employment Act, at §111.31(3), Stats. The appellant suggests that a similar provision applies in interpreting this Commission's remedial authority under §230.44(4)(c), Stats., by virtue of §230.02, Stats.:

> Statutes applicable to the department shall be construed liberally in aid of the purposes declared in §230.01.

The word "'[d]epartment' means the department of employment relations." §230.03(9), Stats. It is one thing to argue that this rule of liberal construction should be applied to statutes which provide substantive protections to employes and are "applicable to the department" as the employer. It is at least questionable whether this liberal construction provision should apply to a statute like §230.44(4)(c), Stats., which sets forth the remedial authority of another agency, this Commission, and which is only "applicable" to DER in the sense that it defines the latter's potential liability as an employer. However, even if §230.02 were deemed applicable to §230.44(4)(c), there are other differences in the applicable laws.

The court in Watkins also relied substantially on the broad statement of remedial power contained in the Fair Employment Act at §111.39(4)(c):

> ... order such action by the respondent as will effectuate the purpose of this subchapter, with or without back pay.... (emphasis supplied)

The Commission's remedial authority is set forth at §230.44(4)(c), Stats., as follows:

> After conducting a hearing on an appeal under this section, the Commission shall either affirm, modify, or reject the action which is the subject of the appeal. If the Commission rejects or modifies the action, the Commission may issue an enforceable

> order to remand the matter the person taking the action for action in accordance with the decision.... (emphasis supplied)

While this remedial authority is fairly broad, the remedy must be connected to the action which is the subject of the appeal. Furthermore, while §111.39(4)(c), Stats., permits a back pay award whenever necessary to make the employe whole, §230.43(4), Stats., is narrower and explicitly limits back pay to certain specific transactions where there is an actual out-of-pocket wage loss -- removal, demotion, or reclassification.

Finally, the legislature enacted the "Whistleblower" law, subchapter III, Chapter 230, Stats., effective in 1984, and therein provided an explicit grant of authority for the Commission to award attorney's fees, see §230.85(3)(a) 4. Stats. This explicit enactment is inconsistent with the notion that such authority is implied in §230.44(4)(c), Stats.

3. The Commission adds the following conclusion of law:

5. The Commission lacks the power to award attorney's fees.

4. The Commission amends the proposed order by addition of the following:

The appellant's motion for award of attorney's fees filed August 5, 1985, is denied.

Dated: September 16, 1985 STATE PERSONNEL COMMISSION

Dennis P McGilligan.
DENNIS P. McGILLIGAN, Chairperson

Laurie R. McCallum
LAURIE R. McCALLUM, Commissioner

AJT:jmf
ID5/1 (enclosure)

Parties:

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STATE OF WISCONSIN PERSONNEL COMMISSION

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MICHAEL PEARSON,

Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Madison),

Respondent.

Case No. 84-0219-PC

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PROPOSED DECISION AND ORDER

NATURE OF THE CASE

This is an appeal of a hiring decision pursuant to §230.44(1)(d), Stats. The parties stipulated to the following issue at a prehearing conference held before Kurt M. Stege, hearing examiner, on November 27, 1984:

> Whether the respondent committed an illegal act or an abuse of discretion in not appointing the appellant to the position of Maintenance Supervisor 1 - Locksmith.

Hearing in the matter was held on February 12, 1985.[1] The parties completed their posthearing briefing schedule on April 26, 1985.

FINDINGS OF FACT

1. At all times material herein, Michael Pearson, hereinafter referred to as the appellant, has been employed as a Locksmith 2 in the UW-Madison Physical Plant.

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[1] The parties stipulated on June 10, 1985, to use appellant's tapes (copied from the Commission's tapes according to the regular process by a third party) in lieu of Commission's copy of same as the record to decide the instant case.

2. In the late summer of 1984, the respondent sought applicants for the position of Maintenance Supervisor 1-Locksmith in the UW-Madison Physical Plant Locksmith Shop. This position is responsible for the overall supervision of the Locksmith Shop, and requires both a knowledge of locksmithing and supervisory ability. The vacancy in the position was created by the retirement of Ed Skroch.

3. A test was administered by the Department of Employment Relations and six people were certified as eligible for the position on the basis of their scores. Among this group was the appellant who had worked under Skroch and was known by James Meier, Craftsworker Supervisor and first-line supervisor of the position in question, and other Physical Plant employes. The remaining certified eligibles for the position were not employed by respondent and were not known to anyone in the Physical Plant.

4. Interviews for the position were conducted on September 10, 1984, by a panel consisting of Meier, Donald Sprang, Personnel Manager at the Physical Plant, Physical Plant Supervisors Dave Coffey and Gene Hartl, and Skroch.

5. The interviews were "structured" -- that is, questions concerning the same subject matter were asked of each candidate for the position. The interviewers recorded their observations of the candidates' responses on worksheets. Meier, who made the final selection, accorded substantial weight to the ratings on the worksheets.

6. Three of the five interviewers (Sprang, Coffey and Skroch) rated appellant first among the candidates they interviewed.

7. Following the interviews, Meier performed an analysis of the worksheet ratings which indicated to him that William Critchley had received the highest scores from the raters. Appellant was ranked second

based on this analysis. As part of this analysis, Meier gave equal weight (to his own) to the totalled scores of Sprang and Hartl. However, Meier discounted Coffey's and Skroch's evaluations to some extent. In this regard Meier subtracted Coffey's ratings from the score totals because Coffey had not seen the first two candidates. Meier did not include Skroch's ratings because, according to Meier's testimony, he "was only brought in for the limited purpose of assessing the locksmithing skills of the applicants." Skroch's ratings of the candidates in this category (based only on Skroch's scoring of the candidates on question 4 at the oral interview) show that he placed Critchley at the bottom and Pearson at the top. After Meier took the above steps this left him with two raters who had placed Critchley first and one rater (Sprang) who had placed Pearson first. These steps led Meier to rank the candidates for the disputed positions as follows:

William Critchley
Michael Pearson
David Meyer
Steven Schultz
Thomas Carolan
Gary Pasch

8. Based on the above analysis, together with Meier's general view that Critchley was the best all-around candidate for the vacant position, led Meier to check Critchley's references and finally, to offer him the position. Critchley accepted said job offer and currently occupies the disputed position.

9. James Meier and appellant have a poor working relationship and do not get along very well. Meier does not believe appellant adheres to the work rules. In this regard Meier does not think appellant is a good employe. Contrary to his treatment of other employes, Meier applied the work rules strictly to appellant and did not give him much leeway.

10. Sometime prior to appellant applying for the disputed position, he applied for a federal job. At the time appellant asked Meier for a reference. Meier replied that he would be sure to give him a bad recommendation.

11. At the time of the interview on September 10, 1984, appellant handed his job application to Meier who threw it to the side and said he was not interested in it. During the course of appellant's interview, Meier asked him if he could work with somebody that he disliked to which appellant replied in the affirmative.

12. At a grievance meeting on January 22, 1985, appellant asked Meier if he had checked any of his references when filling the aforesaid disputed position. Meier answered, "no, because I wouldn't hire you anyway."

13. Meier had an animus toward appellant which affected his decision to hire William Critchley instead of the appellant, and slanted the hiring process to achieve that result. In part, this animus in Meier toward appellant was the result of appellant exercising his contractual grievance processing rights. Examples of Meier's bias include, but are not limited to, the following:

a. Meier not including Ed Skroch's ratings of the candidates in his ranking of the candidates. Skroch rated the appellant (54 total score) much higher than Critchley (27 total score) in point totals.

b. Meier wrote down phone numbers of references on his interview worksheet for William Critchley, who was the first applicant interviewed, but no other candidates for the disputed position.

c. Meier's ratings of the candidates on the first factor (question) on the rating sheet entitled "Previous Supervisory Experience." In this regard the record indicates that both Pearson and Pasch gave the same basic response (Pearson said "2½-3 years, 4 people"

while Pasch replied "2-3 years, 3-5 people) yet Meier rated Pasch two points higher, seven points versus five points given appellant. At same time Meier gave Critchley five points for previous supervisory experience involving "Riot Squad - 10 people". Appellant's previous supervisory experience involved other locksmiths.

d. Meier's rating of the candidates on the third factor on the rating sheet entitled "Experience In Training Others." Critchely for "training the owner's son" received seven points while appellant, who had 2 apprentice locksmiths under him, received only six points. When asked about this difference in scoring at the hearing, Meier could not remember any reason why he scored Critchley and appellant this way.

e. Meier's rating of the candidates on the second and fourth factors on the rating sheet entitled "Locksmith Training and Experience", and "Knowledge of Master Keying Systems", respectively. Meier gave Critchley eight points for each category, supposedly because Critchley had 17 years experience. According to the suggested rating scale at the bottom of the forms, these are ratings of "very good." However, the testimony of several of the interviewers and Critchely's applicantion shows, first, that Critchley did not have any training aside from attending some seminars and doing some reading. Second, Critchley did not have 17 years full-time experience doing the kind of work a locksmith does at UW, but rather had only occasional experience. He worked in a locksmith shop doing domestic locksmithing, gunsmithing, repairing reels, retail work and other things, none of which involves master keying systems. During this period of time,

Critchley performed not more than half a dozen jobs that involved master keying. Skroch, who was identified in Respondent's testimony as being present specifically as the expert for category four, gave Critchley five points, (and appellant eight points) and ranked him last among the candidates in this area. In contrast, appellant has 15 years of experience, nine of which involve working with master keying systems nearly full-time and served a full formal apprenticeship. Pearson's experience is clearly superior to Critchley's, as attested by Skroch's rating, but Meier gave him the same number of points as Critchley for the second item and only seven points, a rating of only "adequate" on the fourth item.

14. On October 31, 1984, appellant filed a timely appeal of respondent's hiring decision with the Commission.

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 proving that the hiring decision made by respondent was an illegal act or an abuse of discretion.

3. The appellant has sustained his burden of proof as to abuse of discretion.

4. Respondent's decision not to hire appellant was an abuse of discretion.

OPINION

This is an appeal pursuant to §230.44(1)(d), Stats. Therefore, the standard to be applied is whether the appointing authority's decision was "illegal or an abuse of discretion."

Appellant did not assert in the record, either specifically or by implication, the existence of any illegality. Nor can an illegality be reasonably inferred from the record in this proceeding. Appellant does, however, argue that the hiring decision made by respondent was an abuse of discretion.

Discretion is more than a choice between alternatives without giving the rationale or reason behind the choice. Reidinger v. Optometry Examining Board, 81 Wis. 2d 292 (1977). In McCleary v. State, 49 Wis. 2d 263 (1971), the court said:

> In the first place, there must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards. As we pointed out, in State v. Hutnik (1968), 39 Wis. 2d 754, 764, 159 N.W. 2d 733, '... there should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.'

The question before the Commission is not whether it agrees or disagrees with the appointing authority's 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. Harbort v. DILHR. No. 81-74-PC (1982). Rather, it is a question of whether respondent properly exercised its discretion. Hoppenrath v. DOT, No. 83-0065-PC (1984).

Appellant basically maintains that the respondent committed an abuse of discretion because one of the interviewers (Meier) had made up his mind prior to the interviews not to hire the appellant, and manipulated the process to prevent appellant from being hired despite the fact appellant was the best qualified candidate for the position. Respondent, on the

other hand, contends that there was no abuse of discretion; that Meier was not predisposed to in effect "blackball" the appellant from getting the job; that each of the six candidates received equal consideration and the best one was selected for the position.

The record supports the appellant's position.[2] In this regard the Commission notes that it is undisputed that Meier, who had the effective authority to make the hiring decision, and appellant had a poor working relationship.[3] As a result Meier treated appellant differently than other employes by enforcing work rules strictly and not giving appellant much leeway in the performance of his job. The record also indicates that, notwithstanding Meier's statements to the contrary at the hearing, Meier would not have hired the appellant under any circumstances, even if appellant had been the number one ranked candidate. Meier bore an animus toward appellant and was predisposed not to hire him. This animus by Meier toward appellant motivated Meier's conduct throughout the hiring process and evidenced itself in numerous statements and actions taken by Meier

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[2] In resolving the above issue, the Examiner has been presented with some conflicting testimony regarding certain material facts. As a result, it has been necessary to make credibility findings, based in part on such factors as the demeanor of the witnesses, material inconsistencies and inherent probability of testimony, as well as the totality of the evidence. Some of these credibility determinations are discussed within the context of the Commission's rationale in support of the Findings of Fact and Conclusions of Law. All other conflicts in the evidence, although not specifically detailed or discussed, have been considered in reaching the Commission's decision.

[3] At least one of the reasons for this poor working relationship was the result of animus engendered in Meier toward appellant as a result of appellant exercising his contractual grievance processing rights. See testimony of appellant and Meier.

before, during and after the interview which clearly indicate that appellant did not have a fair chance to compete successfully for the disputed position.[4] For example, Meier made statements both prior to and after the instant disputed hire decision which strongly suggest Meier would not have recommended appellant for a new job or hired him himself. In addition, when appellant presented himself for the interview, Meier tossed his application to one side indicating a lack of interest in it. During appellant's interview Meier asked Pearson if he could work with somebody he didn't like.

This animus toward appellant and predisposition not to hire him is, in the opinion of the Commission, the most logical explanation for some of Meier's decisions during the hiring process and for his grading of the applicants, particularly Critchley and appellant, which led to the hire of Critchley for the disputed position. For example, Meier did not include Ed Skroch's ratings of the candidates in his rankings of the candidates. If he had, this would have propelled appellant into the number one ranking among applicants for the job.[5] Meier's stated reason for not counting Skroch's ratings of the candidates but only consulting his ranking of the candidates on question four of the interviewers' worksheet was that Skroch "was only brought in for the limited purpose of assessing the locksmithing skills of the applicants." However, if that were true Meier should have been interested in Skroch's grading of the candidates on question two entitled "Locksmith Training and Experience" as well. More likely, Meier

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[4] See, in particular, Findings of Fact 7-13.

[5] Appellant's Exhibit Numbers 3 and 6.

was aware that Skroch felt appellant was a good choice to fill the disputed position and sought to reduce the impact of Skroch's opinion as a rater accordingly.[6] Nor does it make much sense to limit Skroch's input to the technical area since Skroch had previous supervisory experience as the former occupant of the disputed position, and presumably would be well qualified to comment on the other factors (questions) that the interviewers graded the applicants on. Finally, neither Meier nor any other representative of respondent ever informed Skroch that his input was solely limited to the technical aspect of the job and, in fact, Skroch, to his knowledge, participated fully in the interview process. In conclusion, there is no persuasive reason to count Skroch's rating of the candidates less than the other interviewers, as explained by respondent, except to limit appellant's chances of getting the job under the circumstances noted above.

The record also indicates that Meier's testimony regarding why he wrote down phone numbers to use as references for Critchley and not the other candidates was vague and inconsistent.[7] At first he testified that he didn't know why he failed to ask for telephone numbers from any of the other candidates.[8] Later, he stated that he did not ask for telephone numbers from some of the other candidates because they were not qualified.[9]

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[6] Prior to the instant hire process, Skroch had mentioned to Meier that he thought appellant was well qualified to fill the position. Undisputed testimony of Ed Skroch.

[7] Meier's testimony was consistently vague and often inconsistent ("I don't know why" or "I don't remember" being his most repeated phrases) as to why he took certain actions during the interview and scoring process.

[8] Meier testimony on direct

[9] Ibid.

Yet, Meier at the same time also stated that he did not know whether Critchley volunteered these phone numbers or how he obtained them.[10] On cross, Meier again volunteered that he did not know why he only wrote Critchley's phone numbers down because he had the intention to write down a lot of phone numbers for the candidates. How does one interpret this conflicting testimony by Meier with respect to his recording on his interview worksheet of only Critchley's phone numbers? Both explanations offered by Meier at hearing are difficult to believe. If you accept the explanation that Meier "didn't know" because it was his intention to get phone numbers from other candidates this is hard to believe since he didn't get the phone numbers from any of the other candidates. (emphasis added) If you accept the other reason proffered by Meier that it was based on qualifications how could Meier make that decision so early in the interview process after interviewing only one candidate (Critchley was the first candidate interviewed)[11] especially since Meier also testified that he did not make up his mind as to the most qualified applicant for the job until the interviews were completed. The most logical explanation regarding Meier's use of the phone numbers is that he had made up his mind prior to the interviews who he would select for the job (Critchley) and that Pearson had no chance at being chosen no matter how well he performed (scored) during his interview.

The record further shows that Meier's grading of the candidates, particularly Critchley and appellant, is suspect. Meier sometimes gave different people different scores for the same basic answer or information

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[10] Ibid.

[11] Unrebutted testimony of Meier.

provided by the candidate. Other times he gave different candidates the same score where the answers, on their face, were unequal.[12] He usually gave Critchley the same or more points than appellant, even where appellant's responses, on their face, appear better and he (Meier) could offer no explanation of his scoring at the hearing. Finally, Meier's scoring of Critchley and appellant's locksmith skills (Factors 2 and 4 in the interviewer's worksheet) is also open to serious challenge.[14]

Meier's grading of the candidates is important because said scoring figured prominently in his decision that Critchley was the best candidate and the final ranking of candidates was offered at hearing to justify hiring Critchley instead of appellant.

Based on all of the above and the entire record, it is clear that the respondent failed to properly exercise its discretion. In making the hiring decision, Meier, acting as a representative of respondent, took certain actions which were clearly unreasonable and prevented appellant from having an opportunity to fairly compete for the disputed position. These actions include, but are not limited to, the following as noted above: Meier was antagonistic toward appellant before the interviews and had made up his mind not to hire appellant prior to same; Meier's ratings of the candidates were biased against appellant, and the evidence suggests he chose the candidate who was hired before he had interviewed the other five candidates for the job; Meier manipulated the process and the data to

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[12] See Finding of Fact 13c.

[13] See Finding of Fact 13d and Appellant's Exhibit 9

[14] Appellant's Exhibit 9

remove appellant as the leading candidate, and the evidence suggests appellant would have been chosen for the job if all interviewers' ratings were counted, if the ratings were correctly analyzed and if the choice had actually been made on the basis of training and experience. The above actions were not reasonable in view of the nature of the decision to be made,,and the conclusions reached after the hiring process was completed were not reasonable, i.e., it was not reasonable for respondent to conclude that Critchley was best qualified to perform the duties of Maintenance Supervisor 1-Locksmith in the UW-Madison Physical Plant Locksmith Shop and to hire him to fill said position.

A question remains with respect to the proper remedy.

The authority of the Wisconsin Personnel Commission to act in the instant matter is found at 230.44(4)(c), Stats.

> After conducting a hearing on an appeal under this section, the commission shall either affirm, modify or reject the action which is the subject of the appeal. If the commission rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision. Any action brought against the person who is subject to the order for failure to comply with the order shall be brought and served within 60 days after the date of service of the commission's decision.

In addition, 230.43(4), Stats., addresses the issue of back pay.

> Rights of employe. If an employe has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been restored to such position or employment by order of the commission or any court upon review, the employe shall be entitled to compensation therefor from the date of such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled by law but for such unlawful removal, demotion or reclassification. Interim earings or amounts earnable with reasonable diligence by the employe shall operate to reduce back pay otherwise allowable. Amounts received by the employe as unemployment benefits or welfare payments

> shall not reduce the back pay otherwise allowable, but shall be withheld from the employe and immediately paid to the unemployment reserve fund or, in the case of a welfare payment, to the welfare agency making such payment. The employe shall be entitled to an order of mandamus to enforce the payment or other provisions of such order.

It is clear that the Commission may not remove an incumbent as a remedy to a successful appeal under Section 230.44(1)(d), Stats. The Dane County Circuit Court has held in the past that the Commission lacked the authority to require as a remedy for an abuse of discretion in a non-appointment that the appellant be appointed, if still qualified, to the position upon its next vacancy. DHSS v. Wis. Pers. Comm. (Fed Paul), 81CV1635, (Dane County Circuit Court, 9/18/81). However, the Commission specifically declined to adhere to this holding in Seep v. DHSS, Case Nos. 83-0032-PC & 83-0017-PC-ER, 10/10/84, citing its relatively broad remedial authority, following the rejection of the action which is the subject matter of an appeal, to "issue an enforceable order to remand the matter to the person taking the action [i.e., the respondent] for action in accordance with the decision." (emphasis supplied.)

Appellant pointed out in its reply brief that:

> Since submitting the post-hearing brief, appellant was informed that another campus unit may be seeking a locksmith, not through a statewide competitive search but on a basis that may allow a status change and promotion for a locksmith already employed on campus. Appellant requests that the Commission consider ordering the University to submit his name as an applicant for this position, to be given full consideration for that position as Locksmith 4.

In view of the Seep case, and based on all of the facts of this case, the Commission finds it appropriate to order the respondent to appoint the appellant, if still qualified, to the disputed position (or comparable promotional position) upon its next vacancy.

Appellant also makes various claims for make whole pay. There are two schools of thought on this issue. The Commission in Seep delineated the rationale for rejecting backpay for the period following denial of appellant's reinstatement as follows:

> Section 230.43(4), Stats., provides in part:
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> > If an employe has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been restored to such position or employment by order of the Commission...the employe shall be entitled to compensation therefore from the date of such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled by law but for such unlawful removal, demotion or reclassification.
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> The respondent points out that the legislature in this subsection has enumerated certain specific transactions with respect to which an employe is entitled to back pay, and argues as follows:
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> > Under the maxim expressio unius est exclusio alterius, express mention of one matter excludes other similar matters not mentioned. State v. Smith, 103 Wis. 2d 361, 309 N.W.2d 7 (Ct.App. 1981), affirmed 196 Wis. 2d 17, 325 N.W.2d 343 ( ). For purposes of statutory construction, the legislature's failure to specifically confer a particular power in a statute defining the authority of appropriate offices is evidence of a legislative intent not to permit the exercise of the particular power. State ex rel. Harris v. Larson, 64 Wis. 2d 521, 219 N.W.2d 335 (1974). While Harris, id., is the "flip side" of the instant case, both Smith, supra, and Harris support the argument that because the legislature expressly empowered the commission to use the remedy of back pay in civil service cases only when dealing with issues of an employee's removal, demotion or reclassification (all clearly different from a reinstatement), it chose not to make that remedy available in a civil service reinstatement appeal. Inasmuch as an employee's right to monetary relief after a successful appeal to the Commission under §230.44, Stats., is governed exclusively by §230.43(4), Stats., and the appellant has not been removed, demoted or reclassified from or in a position, the Commission has no authority to award her back pay. See also DER v. Wisconsin Personnel Commission (Doll), Dane County Circuit Court, Case No. 79-CV-3860, September 2, 1980. pp. 30-31.

While arguments can be made in support of the Commission's authority to award back pay in cases of this nature, there are at least three court decisions which may be cited that in essence hold that the recitation of situations in §230.43(4), Stats., with respect to which back pay may be awarded, is exclusive. In addition to DER v. Wisconsin Personnel Commn. (Doll), see also Nunnelee v. State

Personnel Board, Dane Co. Circuit Court No. 158-464 (9/14/78), and DER v. Wis. Pers. Commn. (Cady), Dane Co. Circuit Court, No. 79 CV 5099 (7/24/81). Due to this considerable weight of precedent, the Commission must conclude that on these facts, back pay is not available in this forum.

The Circuit Court, however, held that the Commission was in error, as a matter of law, in rejecting back pay as noted above. The Court offered the following rationale in support of its decision:

> The Court is in agreement with Petitioner's interpretation regarding 230.43(4), Stats. This provision of the Wisconsin Statutes does specifically provide a basis for the Commission to award back pay. In the instant case the employee was not working for the employer when she sought reinstatement to the same position she was in when she retired. None of the 3 prior circuit court cases (Department of Employment Relations v. Wisconsin Personnel Commission, Case No. 79-CV-5099 (Dane Cty. Cir. Ct., 9/81), Nunnelee v. State Personnel Board, No. 158-8464, (Dane Cty. Cir. Ct., 1978), and Employment Relations Commission v. The Personnel Commission (Doll), No. 79-CV-3860 (Dane Cty. Cir. Ct. 8/80) have dealt with this situation.
>
> The effect of the employer's refusal (an abuse of discretion) to reinstate Petitioner had the direct and immediate impact of removing her from employment. This is the situation contemplated in 230.43(4), Stats. Petitioner is, as a matter of law, eligible for pay back and the Commission was in error in holding to the contrary. Petitioner had a right to reinstatement under 230.31(a), Stats. To deny her back pay while at the same time finding that she should have been reinstated would be inconsistent and simply not just. To secure the job (albeit much later) is only a partial remedy for the wrong committed. Yanta v. Montgomery Ward and Co., 66 Wis. 2d 53 at 61 (1974).

The overwhelming precedent (Commission and case law) argues against granting back pay to the appellant herein. Even the circuit court case noted above can be distinguished from the instant case. Appellant was (and still is) working for respondent when he unsuccessfully sought promotion to the disputed position. In that sense, the effect of the respondent's action denying appellant a fair opportunity to compete for the aforesaid position did not have "the direct and immediate impact of removing her (him) from employment" as discussed by the court above. For these reasons the Commission rejects the appellant's request for back pay.

ORDER

The decision of the respondent in not appointing the appellant to the position of Maintenance Supervisor 1 - Locksmith is rejected and this matter is remanded for action in accordance with this decision.

Dated: _____,1985 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DPM:jmf
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