STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * *

ARTHUR J. VARRIALE,

Appellant,

v.

Attorney General, DEPARTMENT OF JUSTICE,

Respondent.

Case No. 85-0056-PC

* * * * * * * * * * * * * * * * *

FINAL ORDER

This matter is before the Commission on consideration of the proposed decision of the hearing examiner. The Commission has considered the parties' objections and arguments, and consulted with the examiner. The Commission adopts as its final disposition of this matter the proposed decision and order, a copy of which is attached hereto and incorporated by reference, and adds the following additional opinion.

The Commission is convinced from its examination of the record that the respondent had a rational basis for its rejection of Mr. Varriale's request for reinstatement, and that the rejection did not constitute an abuse of discretion. One point that was not mentioned in the proposed decision is that there was uncontradicted evidence in the record that Mr. Linssen's opinion concerning Mr. Varriale as a disruptive influence on co-employes had at least some support amongst persons on the staff.

With respect to the issue of jurisdiction, the Commission concurs in the conclusions set forth in the proposed decision, and adds the following discussion on the same point from Wing v. DER, Wis. Pers. Commn. No. 84-0084-PC (4/3/85):

In Seep, other applicants for the position in question were certified, even though the Ms. Seep was not. In the present case, the appellant was not certified, nor was anyone else certified for the BMA position. The appointment process was restricted to those persons seeking transfer, reinstatement and demotion to the BMA position. All of the applicants were interviewed by the appointing authority. No examination was given and, therefore, no eligibles were certified.

Even though no certification actually occurred with respect to the BMA position, the point of obtaining a group of eligible applicants was passed. This was done by having the appointing authority select an applicant from among all of those who sought to transfer, reinstate or demote into the position. This procedure took the BMA appointment process past the point of certification and into the realm of the exercise of selection discretion by the appointing authority.

The apparent intent of §230.44(1)(d), Stats., is to permit, inter alia, appeals of appointment decisions. Those decisions are made in all instances by the appointing authority. There are no apparent policy reasons for interpreting §230.44(1)(d), Stats., to permit appeals of appointment decisions only when an actual certification by the administrator preceded the selection decision. An interpretation of the phrase "personnel action after certification" to exclude appointment decisions that were not preceded by a particular certification would result in an illogical distinction within one category of personnel selection decisions. An employe seeking reinstatement, voluntary demotion, or transfer into a position could appeal an alleged abuse of discretion in the appointment decision if the appointing authority's consideration of eligibles included those certified as a result of competition, but could not appeal if there was no such certification because the appointing authority had requested only the names of those interested in transfer, reinstatement or voluntary demotion, pursuant to §ER-Pers 12.02(3), Wis. Adm. Code:

> The administrator may submit the names of persons interested in transfer, reinstatement or voluntary demotion along with a certification or, at the request of the appointing authority, in lieu of a certification.

The Commission is convinced that no such distinction was intended and that the legislature utilized the phrase "after certification" to refer to a certain segment of the appointment process. Compare, Nichols v. Lee, 26 P. 157, 160, 16 Colo. 147 (1891), where the Colorado probate law provided, inter alia:

> Whenever, after inventory and appraisement therein, as herein provided, it shall appear that the personal estate of any decedent is insufficient to discharge the just debts... resort may be had to the real estate.

The court discussed the effect of the absence of an "inventory and appraisement" on the right of the estate administrator to sell real estate as follows:

> Since the petition in this case fails to show the making of an inventory, and does not state therein was an appraisement, and the record affirmatively shows that nothing of the sort was done, it is contended that it could not serve as a basis for proceedings to sell real estate. This can only be contended for on the hypothesis that the making of the inventory and the appraisement are conditions precedent to the exercise of the right by the administrator to resort to the real estate for satisfaction of the debts. This contention cannot be supported by the phraseology of the statute, for it does not provide that it shall appear by the inventory and appraisement that the personal estate is insufficient, but the right to resort to the realty is given whenever it appears that the personalty is insufficient for the purpose. The words 'after inventory and appraisement' can properly be taken only as a designation of the time at which, or before which, the administrator may not make his application. It is simply a statutory method of fixing the order of proceedings, and in no sense can be so held to be a condition precedent as to make a failure to observe that statutory provision necessarily fatal to the proceedings. The reasoning of the principal opinion on the lack of necessity for an inventory and appraisement under the facts existing in this is entirely satisfactory and convincing." (emphasis added) (On Rehearing).

Another possible example of this type of provision is contained in §230.44(4)(c), Wis. Stats., which provides: "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." It would seem unlikely that this statute would be interpreted as requiring that the Commission actually conduct a hearing as a prerequisite to affirming, modifying or rejecting an appealed action, in cases submitted on briefs or decided by default or stipulation. Rather, the term "after conducting a hearing" would more likely be considered a point of demarcation in the processing of the appeal by the Commission.

The respondent has cited a number of cases in support of the contention that the Commission lacks jurisdiction over this appeal. In the opinion of the Commission, these cases are for the most part distinguishable or should be overruled.

In Cihlar v. DHSS, 79-106-PC (8/30/79), and Lundeen v. DOA, 79-208-PC (6/3/81), the Commission assumed jurisdiction over appeals of denials of reinstatement where the denials apparently followed certifications for the vacancies in question. However, the Commission never specifically addressed the question of whether such certifications were necessary from a jurisdictional standpoint. In Seep v. DHSS, 83-0032-PC (10/10/84), the

Commission assumed jurisdiction over a similar appeal, and, as noted above, suggested that there was no necessity for a certification.

In Kawczynski v. DOT, 80-181-PC (11/4/80), the appeal involved a non-appointment as a limited term employe (LTE). The Commission held it had no jurisdiction under §230.44(1)(d), Stats.:

> Certification is a process by which appointing authorities are informed of the names of the persons at the head of the register following a competitive civil service examination for a vacancy in the classified service. See §230.25. Limited-term appointments do not require formal civil service examination and certification procedures. See, e.g., §Pers. 8.02(3), Wis. Adm. Code. Therefore, the decision on hiring made here was not a personnel action after certification, and is not appealable pursuant to §230.44(1)(d).

Because LTE employment transactions generally do not require as much formal process as permanent employment, including the permanent appointment process, this holding is consistent with Seep. As was discussed in Seep, the point of certification normally marks a line of demarcation between the parts of the civil service staffing process that are the legal responsibilities of the administrator of DMRS and the appointing authorities, respectively. In an LTE staffing, this entire civil service staffing process normally is not followed, and there is no point of certification.

Both Ziemke v. DHSS, 80-390-PC (4/23/81), and Starczynski and Mayfield v. DOA, 81-275, 276-PC (12/2/81), have potentially distinguishing features.

In Ziemke, the appellant was certified for a particular position that was not in question on the appeal. Some months later, he apparently was inadvertently offered, in error, an appointment to a different vacancy to which he had not been certified and which was filled by appointment from a union transfer list.

In Starczynski and Mayfield, the appellants were Building Maintenance Helpers who accepted transfers. Several weeks after the transactions [they] were informed that their new salaries had been incorrectly computed and would have to be reduced, and they appealed.

However, to the extent these two decisions may constitute precedence that jurisdiction under §230.44(1)(d), Stats., requires the presence of a specific certification, as opposed to the certification stage in the civil service hiring or selection process, they are overruled for the reasons set forth above.

ORDER

The decision by respondent not to reinstate appellant is affirmed and this appeal is dismissed.

Dated: April 11, 1986 STATE PERSONNEL COMMISSION

Dennis P. McGilligan
DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

Laurie R. McCallum
LAURIE R. McCALLUM, Commissioner

AJT:jmf
ID5/1
Attachment

Parties:

Arthur J. Varriale
c/o Attorney Jeffrey A. Kremers
622 N. Water Street
Milwaukee, WI 53202-4978

Bronson LaFollette
Attorney General
DOJ
P. O. Box 7857
Madison, WI 53707

STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * *

ARTHUR J. VARRIALE,

Appellant,

v.

Attorney General, DEPARTMENT OF JUSTICE,

Respondent.

Case No. 85-0056-PC

* * * * * * * * * * * * * * * *

PROPOSED
DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal from respondent's decision denying appellant's request for reinstatement to a Crime Lab Analyst (CLA) 3 position in the State Crime Lab (SCL) in Milwaukee, Wisconsin. By agreement of the parties, the issues for hearing were as follows:

1. Does the Personnel Commission have jurisdiction over appellant's appeal.

2. Whether there has been any illegal action or abuse of discretion in denying reinstatement to the appellant.

3. At what point in time was DOJ legally liable, if it ever was legally liable, for its failure to reinstate the appellant.

4. If the decision to deny reinstatement to appellant was either illegal or an abuse of discretion, what is the appropriate remedy.

Hearing in the matter was held on June 17 and 27, 1985, before Dennis P. McGilligan, Chairperson. The parties completed their briefing schedule on November 7, 1985.

FINDINGS OF FACT

1. In June 1984 Arthur J. Varriale, hereinafter referred to as appellant, was head of the serology section of the SCL in Milwaukee. His

civil service classification was Crime Laboratory Analyst IV. He was earning $13.09 per hour. He had received only favorable performance evaluations during the period from December 1976 through June 1984.

2. Appellant's immediate supervisor was John Linssen, the director of the SCL in Milwaukee. Linssen's immediate supervisor was Howard Bjorklund, administrator of the Division of Law Enforcement Services.

3. On June 25, 1984, appellant submitted his resignation effective on July 25, 1984. Appellant resigned because he was dissatisfied with the state compensation system and because John Linssen questioned his decisions concerning technical applications in the serology section. Primarily, Linssen wanted appellant to perform fewer tests or to eliminate tests that appellant believed were appropriate in order to reduce work backlog. Appellant insisted that Linssen put his requests in writing. Linssen refused to do so.

4. On August 17, 1984, the Department of Justice (DOJ), hereinafter referred to as respondent, recruited for two crime laboratory analysts for the SCL in Milwaukee. Respondent indicated a preference to appoint candidates at the CLA 3 level rather than the CLA 1 or 2 levels.

5. In early September 1984, John Linssen promoted appellant's wife, Marie Varriale, to replace appellant as head of the serology section. Also in September, because Marie became ill, appellant decided to seek reinstatement to one of two aforesaid vacant crime laboratory analyst positions in the SCL in Milwaukee.

6. On September 11, 1984, appellant informed John Linssen's assistant, Ben Harbach, that he wanted to be reinstated to one of the two vacant positions in the serology section. On September 12, 1984, appellant reiterated his request for reinstatement directly to Linssen.

7. On September 25, 1984, appellant spoke with Howard Bjorklund concerning his request for reinstatement. Bjorklund stated that he was

concerned about the welfare of the crime lab, and that it was very important to have cooperation and compatibility between employes and management. He further stated that he was aware of a personality conflict between appellant and Linssen, and that he wondered whether the breach was too widespread to mend. Appellant responded that he had lost or had started to lose all professional and personal respect for Linssen, and that he was not sure himself whether the personality conflict could be resolved.

8. Howard Bjorklund then discussed appellant's request for reinstatement with John Linssen. Bjorklund instructed Linssen to evaluate the request carefully and to offer a clear recommendation.

9. By memo dated October 10, 1984, John Linssen recommended to Howard Bjorklund that appellant not be reinstated for the following reasons:

> . . .Since Mr. Varriale's resignation on July 25, 1984, I have come to focus much attention on the role Art played within the lab and upon its consequence. My observations and conclusions, as confirmed independently by other persons, lead me to believe his presence was disruptive and counterproductive, but more important, was intimidating and destructive to other laboratory personnel. As a result, it has become my firm conviction that reinstating Mr. Varriale would not be in the best interests of the laboratory or its staff.

In addition to the memo, Linssen explained briefly to Bjorklund that it was not a question of appellant's technical expertise, but rather, a question of appellant's interpersonal relationships, including in part, a personality conflict between appellant and Linssen. In reaching his conclusion that appellant should not be reinstated, Linssen also considered the fact that he and appellant had differing views on how to process cases, that appellant had no respect for Linssen in his role as lab director and the possible negative effect on Marie Varriale's ability to perform her new job.

10. Howard Bjorklund relied upon John Linssen's recommendation, and did not conduct any independent investigation of his own. Bjorklund concluded

that the "chemistry" between Linssen and appellant was not conducive to bringing Varriale back to the SCL in Milwaukee.

11. On October 11, 1984, John Linssen met with Howard Bjorklund and Deputy Attorney General Ed Garvey. At that meeting, a decision was made that appellant would not be reinstated. Bjorklund instructed Linssen to inform appellant of the decision as soon as possible.

12. On October 15, 1984, John Linssen called appellant. Linssen told appellant that he was recommending that appellant not be reinstated. Linssen never informed appellant that a decision had been made that appellant would not be reinstated.

13. The appellant was never informed by anyone else from respondent at any time material herein that his reinstatement request had been denied.

14. On November 13, 1984, the respondent's personnel director, Erik Erickson, certified to John Linssen the names of candidates for the two vacant positions in the SCL in Milwaukee. No candidates were certified at the CLA 3 level. Both positions were filled in early January 1985, at the CLA 1 level.

15. On December 17, 1984, appellant requested reinstatement to a vacant CLA 4 position in the SCL in Madison. Appellant was reinstated into that position on April 15, 1985 at a salary of 13.09 per hour.

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 reinstatement decision made by respondent was an illegal act or an abuse of discretion.

3. The appellant has failed to sustain his burden of proof.

4. Respondent's decision not to reinstate appellant was neither illegal nor an abuse of discretion.

OPINION

This is an appeal from respondent's decision denying appellant's request for reinstatement to a CLA 3 position in the State Crime Lab in Milwaukee, Wisconsin. The threshold issue in this case is whether the Personnel Commission has jurisdiction over appellant's appeal.

This appeal arises under §230.44(1)(d), Stats. which provides that:

> A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.

Respondent argues that since appellant's reinstatement request of September 11, 1984 was denied prior to any positions in the SCL in Milwaukee being certified on November 13, 1984 his denial appeal is not appealable under the above section because the decision not to reinstate him was not a "personnel action after certification." (emphasis supplied) Appellant contends that an interpretation of the statute in this manner would be an injustice to appellant and allow state agencies an easy method of negating employes' reinstatement rights.

The Commission addressed a similar jurisdictional objection in Seep v. DHSS, 83-0032-PC, 83-0017-PC-ER, 10/10/84, affirmed in part and reversed in part, on other grounds, Case Nos. 84-CV-1705 and 84-CV-1920, 10/3/85, Racine County Circuit Court. (This decision has been appealed to the Court of Appeals, District 1, on 10/22/85.) In reaching its holding finding jurisdiction, the Commission explained its decision as follows:

> The main jurisdictional question is whether the denial of Ms. Seep's application for reinstatement constituted a personnel action "after certification," inasmuch as Ms. Seep herself was not certified for the position.
>
> To begin with, §230.44(1)(d) uses the term "after certification." It does not say "after a certification" or "after certification of the appellant." This statutory language refers not to a specific event, but rather to a point in the selection process "after certification."

This particular line of demarcation has substantial significance, as can be seen from the roles of the administrator and the appointing authorities in the selection process.

The administrator is responsible for recruitment, §230.14, Stats., examination, §230.16, Stats., and the certification of eligibles to the appointing authorities, §230.25, Stats.[2] The appointing authorities have the authority to appoint persons to vacancies, see §230.06(1)(b), 230.25(2), Stats.

The point of certification marks the extent of the administrator's legal authority in the selection process. The appointing authority is generally responsible for actions in the selection process which occur after the point of certification. Actions which occur at or prior to certification, and which typically concern the examination process, are appealable pursuant to §230.44(1) (a) or (b) as actions of the administrator. Actions which occur after the point of certification (and which meet the other criteria set forth in §230.44(1)(d)) are appealable pursuant to §230.44(1)(d), Stats.

A reinstatement is a form of appointment. §ER-Pers 16.01(1), Wis Adm. Code. It is a permissive act at the discretion of the appointing authority. §ER-Pers 16.01(2), Wis. Adm. Code. An original appointment also is a discretionary act, as the appointing authority has the discretion to choose from among those certified. See Jacobson v. DILHR, Wis Pers. Comm. No. 79-28-PC (4/10/81):

> In such a post-certification hiring decision, it is a 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). p. 25.

An appointing authority, in considering whom to appoint to a vacancy, can choose from among those certified following examination, and from among those eligible for reinstatement. While applicants for reinstatement are not themselves certified, their names may be submitted to the appointing authority in conjunction with a certification, See §ER-Pers 12.02(3), Wis. Adm. Code:

> The administrator may submit the names of persons interested in transfer, reinstatement or voluntary demotion along with a certification or, at the request of the appointing authority, in lieu of a certification.

From a purely statutory standpoint, it would appear that a decision by the appointing authority on reinstatement is a "personnel action," that it is "related to the hiring process

> in the classified service, "and that it is "after certification" in the sense, discussed above, that certification refers to a point in the staffing process. Even if "after certification" were interpreted as a reference to a particular certification, the record in this case shows that the denial of reinstatement occurred after a certification related to the position in question. Finally, the statute does not by its terms require that the appellant be actually certified as a prerequisite for appeal pursuant to §230.44(1)(d), Stats., and the commission can discern no reason for finding such a requirement by implication.
>
> From a policy standpoint, there is a good deal of similarity between decisions on reinstatements and on original appointments. The major point of similarity is that both decisions are committed to the sound exercise of the appointing authority's discretion. The commission cannot discern any substantial policy reason why the legislature would not want a decision on reinstatement to be appealable under §230.44(1)(d), Stats.

---

[2]These functions may be delegated to the appointing authorities, see §230.05(2)(a), Stats.

Although, unlike the Seep case, respondent herein denied reinstatement to appellant prior to the certification of candidates for the two vacant positions, the Commission finds that the rule described above in Seep is applicable to the instant dispute. Based on same, respondent's procedural objection is denied.

With respect to the merits of the case, the first question is whether there has been any illegal action or abuse of discretion in denying reinstatement to the appellant. The appellant has alleged no illegality and none can be reasonably inferred from the record in this proceeding. A question remains as to whether respondent properly exercised its discretion.

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 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 decision of the appointing authority may be said to have been "clearly against reason and evidence." Harbort v. DILHR, No. 81-74-PC (1982).

Respondent, in effect, denied appellant's request for reinstatement because of a personality conflict between John Linssen and appellant, a difference of opinion in Linssen and appellant's philosophy to handling cases, appellant's admitted lack of respect for Linssen, a concern about the possible adverse effect on Marie Varriale's ability to function independently as head of the serology section and Linssen's belief that appellant intimidated, dominated or agitated other employes. Although appellant poked some holes in these theories, the Commission finds, for the reasons listed below, that there was a reasonable basis for respondent to deny appellant's reinstatement to a vacant CLA position in the SCL in Milwaukee.

The record clearly supports a finding that there was a personality conflict between John Linssen and appellant. Although Linssen testified that the personality conflict between them was not irresolvable and that it did not mean they could not work together, said personality conflict reasonably could and did constitute one of Linssen's reasons for recommending against appellant's reinstatement. More importantly, however, in recommending against reinstatement, Linssen reasonably could and did consider reasons other than the personality conflict (although related to same); namely, appellant's admitted and open lack of respect for Linssen, and their differing philosophies and approaches to handling cases. Appellant argued that his emphasis on "quality" instead of "quantity" (Linssen wanted appellant to do fewer tests and handle more cases) was the proper way to do his work. However, appellant did not persuade the Commission that Linssen

acted improperly in attempting to increase the number of cases disposed of by appellant while, presumably, maintaining the same quality. This difference of philosophy in processing cases would seem to be a factor that Linssen could consider in deciding whether he wanted Varriale working for him again.

In addition to the personality conflict between John Linssen and appellant, and their philosophical differences, appellant admitted that he had started to lose some professional respect for Linssen. Based on these considerations, the Commission finds it reasonable to conclude that respondent properly exercised its discretion not to reinstate appellant.

Such a conclusion is supported by an examination of the other reasons given by respondent for denying reinstatement to the appellant. Primarily, these reasons concerned the possible adverse effect on Marie Varriale's ability to function independently as head of the serology section, and John Linssen's perception that appellant intimidated, dominated and/or agitated other staff members. It is true that appellant appears to have a strong personality. However, the record does not support a finding that Marie's ability to perform her job would necessarily be affected by appellant's reinstatement to the disputed position. In addition, as appellant pointed out in his brief, when pushed for specifics Linssen could only name 3 employes out of 28 as examples of appellant's negative relationship with co-employes. Nevertheless, Linssen testified credibly that these were genuine concerns of his in recommending against appellant's reinstatement. Based on same, the Commission finds respondent properly exercised its discretion in considering the above factors when deciding not to reinstate appellant.

Appellant argues that Howard Bjorklund should have made an independent investigation to determine whether Linssen's statements that the appellant was counterproductive or obstructive were based on proper reasons and

evidence. The Commission disagrees. It seems reasonable for Bjorklund to have solicited the recommendation of the director of the SCL in Milwaukee (Linssen) when appellant was seeking reinstatement to a vacant position in that lab and to have relied on that recommendation. Moreover, Bjorklund testified that he had learned of the personality conflict between appellant and Linssen from Ben Harbach, as well as from the two principals. Finally, appellant himself confided to Bjorklund that he had lost all respect for Linssen and that he was not sure whether the personality conflict could be resolved. It is true that 4 months later Bjorklund appointed the appellant to an Analyst 4 section head position requiring more ability and more responsibilities than the Milwaukee position he had previously denied to the appellant. However, in the Milwaukee situation Bjorklund concluded that the "chemistry" was not right to reinstate appellant and this decision seems to be a reasonable exercise of discretion.

Appellant's technical competence is undisputed. However, on the basis of this record, it is clear that the respondent properly exercised its discretion--it considered various factors before making its final decision, these factors noted above were reasonable in view of the nature of the decision to be made, and the conclusion reached after application of the factors to the facts under consideration was reasonable, i.e., it was reasonable for respondent to conclude that it did not want to reinstate appellant.

In view of all of the above, the Commission finds that the answer to the second issue as stipulated to by the parties is NO, there has not been any illegal action or abuse of discretion by respondent in denying reinstatement to appellant. Having answered this question in the negative, the two remaining issues with respect to the appropriate remedy become moot.

ORDER

The decision by respondent not to reinstate appellant is affirmed and this appeal is dismissed.

Dated: _____, 1985 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

DPM:vic
VIC01/2

Parties

Arthur J. Varriale
c/o Attorney Jeffrey A. Kremers
622 N. Water Street
Milwaukee, WI 53202-4978

Bronson LaFollette
Attorney General
Department of Justice
P. O. Box 7857
Madison, WI 53707