

To the extent the foregoing appears to assert the proposition that an appointing authority does not "consider" a recommendation when the recommendation is utilized by an interview panel set up by the appointing authority with some degree of delegated authority to screen, evaluate, or rate certified candidates, this would not be an appropriate application of §230.20(2), stats. The appointing authority is responsible for delegated actions of his or her agents that are involved in the selection process. If these agents consider an evaluation in their appraisal of candidates as part of the overall selection process, this is attributable to the appointing authority.

The proposed decision also addresses the question of "whether Ms. Wittenmeyer's stated dissatisfaction with appellant's work performance as communicated to Mr. McCullough was 'objective'." The proposed decision delineates the framework for the commission's inquiry as follows:

"It is the Commission's role in such an inquiry to determine if there was a rational basis for Ms. Wittenmeyer's dissatisfaction, not whether the Commission would have reached the same conclusion as Ms. Wittenmeyer regarding appellant's work performance...."

Section 230.20(2), stats., permits an appointing authority to consider:

"...only those recommendations which he or she believes provide an objective evaluation of an applicant's character, training, experience, skills or abilities as they relate to the requirements of the position." (emphasis added)

This provision presents an interesting juxtaposition of "subjective" and "objective" concepts. Apparently, so long as the appointing authority believes a recommendation provides an objective evaluation, he or she may rely on it regardless of whether it is in fact an objective recommendation or would be considered an objective evaluation by objective standards. However, evidence concerning whether a recommendation is in fact objective or would be considered objective by objective standards could be material circumstantial

evidence on the issue of the appointing authority's state of mind -- i.e., whether he or she in fact had such a belief concerning the recommendation. For example, if a recommendation were shown to be clearly non-objective, this would cast doubt on the assertion of an appointing authority that he or she believed it to be objective.

Before determining how to decide whether an evaluation is objective, one must consider the meaning of the word "objective". The most relevant usage of the term "objective" is in the "objective test" that frequently is utilized to evaluate someone's conduct under a statutory standard. The objective test is usually stated in terms of how a "reasonable person" would act: "...would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances...." Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 692, 271 N.W. 2d 368 (1978); Mayer Tank Mfg. Co. v. Commr. of Internal Revenue, 126 F.2d 588, 591 (2d Cir. 1942):

In holding that [the debt was not deductible in toto], the Board [of Tax Appeals] said...: "In sum, the record does not present a picture of such hopelessness or worthlessness as, in our judgment, to warrant a reasonable man in concluding that the account was worthless." The taxpayer asserts that this 'objective' standard is not legally pertinent, but that the board should have applied a 'subjective test,' i.e., it should have determined whether this particular taxpayer, in good faith, believed in 1936 that the debt was worthless ... the views of the lawyers' jack-of-all-trades, 'the reasonable man,' constituted objectivity for legal purposes. Consequently, the Board correctly used as a yardstick what a reasonable man would have concluded as to the worthlessness of the debt in question here."

Therefore, an "objective evaluation" of an applicant's character, training, etc., is that which would be made by a "reasonable person" who was in an appropriate position to make such an evaluation.

Thus it follows that the Commission's role in an appeal of this nature

is to determine whether the appointing authority believed that any recommendation considered by the appointing authority provided an objective evaluation of an applicant's character, training, etc., in the sense that it was an evaluation that a reasonable person in an appropriate position would have made. As discussed above, it may be appropriate in a given case, such as this, for the commission to consider whether a recommendation could be considered objective, and, as set forth in the proposed decision, whether "there was a rational basis" for the recommendation. The latter may be relevant to the question of whether the recommendation was objective, which in turn may be relevant to the question of whether the appointing authority in fact believed the recommendation was objective. See Rosenthal v.

Helvering, 124 F. 2d 474, 476 (2d Cir. 1941):

"...we held, however, that the 'subjective test' as we called it, was the right one; that is, the proper year was that in which the taxpayer did 'ascertain' the fact, no matter how much earlier a reasonably prudent person would have done so...[however] the fact that a prudent person would have 'ascertained' that fact earlier is always evidence that the taxpayer did so himself...."

However, the question of whether there was a rational basis for the recommendation is not, per se, the test the Commission applies in an appeal involving §230.20(2), stats. To reiterate, that test is whether the appointing authority believed that any recommendation considered by the appointing authority provided an objective evaluation of the applicant's character, training, experience, skills or abilities as they relate to the requirements for the position, in the sense that it was an evaluation that a reasonable person in an appropriate position or vantage point would have made.

The Commission agrees with the proposed decision that there was a

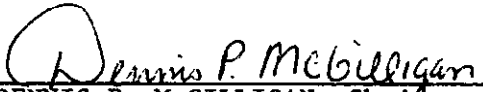
rational basis for the recommendation here in question, and that it was an "objective" evaluation. It also is apparent from the record that the appointing authority believed that it was an objective evaluation.

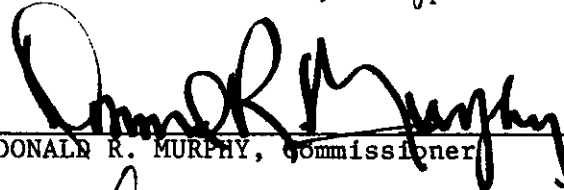
ORDER


The Commission adopts the proposed decision and order, with the rescission of so much of the decision as is inconsistent with the foregoing, as its final disposition of this matter.

Dated: April 15, 1987

STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. MCCALLUM, Commissioner

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3. Appellant's position's first-line supervisor was the Director of the Office of Program Support. From May 29, 1984, until April of 1985, appellant's supervisor was Philip McCullough. From April of 1985 when Mr. McCullough became the Acting Director of the Bureau of Community Programs until July of 1986, appellant's supervisor was Dennis Bobo.

4. The evaluations of appellant's performance prepared by Mr. McCullough and Mr. Bobo all indicate that appellant's work performance met or exceeded expectations. Such performance evaluations were based on Mr. McCullough's and Mr. Bobo's observation of and opinions regarding appellant's performance, not on the observations or opinions of others. Such performance evaluations covered appellant's entire tenure in the subject PIO position.

5. Prior to January of 1986, appellant had a good working relationship with Jayn Wittenmeyer, the Executive Director of the Council on Developmental Disabilities and she was satisfied with appellant's work performance. In January of 1986, appellant and Ms. Wittenmeyer had a disagreement over an article appellant had prepared for the Blueprint, a publication of the Council on Developmental Disabilities. Ms. Wittenmeyer felt that the unedited question and answer format in which appellant's interview of a mother of a developmentally disabled child appeared did not accurately portray what the mother was trying to communicate to the interviewer. Appellant expressed to Ms. Wittenmeyer a reluctance to change the article, citing professional ethics and other concerns. This disagreement was never resolved and another unrelated article was substituted. Mr. Bobo became aware of this disagreement on or around February 28, 1986. Mr. McCullough was aware of this disagreement prior to the date of the subject

selection decision and he agreed with Ms. Wittenmeyer's opinion and actions in this regard.

6. Subsequently, Ms. Wittenmeyer was dissatisfied with appellant's failure to complete the Council on Developmental Disabilities' 1984-1985 annual report by the January 31, 1986, deadline. The annual report was finally completed by appellant on or around May 1, 1986. Appellant attributed the delay to failure of others involved to meet deadlines and to a creativity block on the part of appellant. Mr. Bobo became aware of this situation on or around April 28, 1986. Mr. McCullough was aware of this situation prior to the date of the subject selection decision.

7. During April of 1986, Ms. Wittenmeyer expressed to appellant her dissatisfaction with appellant regarding his failure to include in the May issue of Spotlight, a publication of the Council on Developmental Disabilities, notice of three upcoming events. Appellant attributed this failure to an oversight on his part as to two of the events and to a lack of information from other sources as to the third. Mr. Bobo became aware of this situation on or around April 30, 1986. Mr. McCullough was aware of this situation prior to the date of the subject selection decision.

8. Sometime during the summer of 1985, Christine Metzler indicated to respondent that she did not intend to return to the subject PIO position. In response, respondent decided to fill the position through a permanent appointment. A written examination was administered by the Department of Employment Relations on February 22, 1986, and a list of certified candidates prepared and forwarded to Mr. McCullough who had the effective authority to make the selection decision for the subject position. Sometime in May of 1986, Mr. McCullough requested that Mr. Bobo, Ms. Wittenmeyer, and Ruth Murphy, a training officer for the Bureau of

Community Programs, serve on the interview panel for the subject position. Mr. McCullough chose Ms. Wittenmeyer for the panel because the majority of the subject position's work assignments came from her.

9. On April 29, 1986, Ms. Wittenmeyer contacted Mr. McCullough by phone to advise him of her dissatisfaction with appellant's work performance, and to request a delay in the hiring process for the purpose of giving her an opportunity to further monitor appellant's work performance and for the purpose of giving her an opportunity to request a transfer of the supervision of the subject position to her. Mr. McCullough was aware of prior complaints by other staff regarding appellant's refusal to assist with the preparation of news releases or other writings unless he was given substantial leave time and a request in writing. Mr. McCullough felt appellant's demands in this regard were unreasonable.

10. Appellant received the highest examination score of those candidates certified for the subject position and he was interviewed by the panel on May 28, 1986.

11. Immediately prior to conducting the interviews for the subject position, the panel members met for a few minutes to review the interview questions Mr. Bobo had prepared. Ms. Wittenmeyer requested that a question soliciting comments regarding a press release and agenda be added and it was. The press release had been prepared by appellant. Mr. Bobo asked each candidate interviewed the same questions. The first question dealt with the candidate's experience in the public information area; the second with the candidate's experience in the developmental disabilities area; and the third question with the press release and the agenda. The panel members independently ranked the candidates interviewed and, after all the

interviews were completed, the panel members discussed the rankings and decided which three names to forward to Mr. McCullough.

12. Appellant was ranked No. 3 by Ms. Murphy. Although she was not impressed with appellant's interview, particularly the fact that he was late and her feeling that he put little effort into the interview because he felt the job was already his, she included him in the top three because of his experience in the position. Ms. Murphy was not aware at the time that Ms. Wittenmeyer was dissatisfied with appellant's work performance and it was not mentioned or apparent during the interview of appellant. Ms. Murphy was acquainted with the appellant as a result of their employment in the same bureau and she was of the opinion that his work had been satisfactory. Appellant was not ranked in the top three by Ms. Wittenmeyer. Ms. Wittenmeyer based her ranking on the fact that appellant showed very little enthusiasm for the position during the interview, he was late for the interview, he gave incomplete answers to interview questions, and on her dissatisfaction with his work performance in the subject position. Appellant was ranked No. 2 by Mr. Bobo. Mr. Bobo based his ranking on the fact that appellant showed very little enthusiasm for the position and he gave incomplete answers to the interview questions, but Mr. Bobo felt that appellant had performed well in the subject position.

13. Each of the interviewers ranked Elizabeth Snider-Allen No. 1. Ms. Murphy ranked Ms. Allen No. 1 because she felt Ms. Allen's responses to the interview questions were thorough and well organized and she was impressed with the portfolio Ms. Allen had brought to the interview with her which described and provided examples of some of her recent work in areas including public information and developmental disabilities. Ms. Murphy knew of Ms. Allen through the minority community. Ms. Wittenmeyer

ranked Ms. Allen No. 1 because she felt Ms. Allen demonstrated an enthusiastic attitude during her interview, she had good outreach and journalism training and experience, and she presented an impressive concept of developmental disabilities. Mr. Bobo ranked Ms. Allen No. 1 because of her background in public information, journalism, and developmental disabilities; she answered questions thoroughly and well; and she showed more enthusiasm and analytical ability than appellant.

14. The panel members forwarded the following three names to Mr. McCullough: Elizabeth Snider-Allen, appellant, and Susan Riederer. Ms. Wittenmeyer argued to the panel that appellant's name should not be included among the top three candidates. Once appellant's name was forwarded to Mr. McCullough, Ms. Wittenmeyer contacted Mr. McCullough and again requested the transfer of supervision of the subject position to her which Mr. McCullough denied. Ms. Wittenmeyer also threatened to pull the funding for the position if Mr. McCullough selected appellant which Mr. McCullough did not take seriously because Ms. Wittenmeyer didn't have the authority to do so.

15. Mr. McCullough interviewed the three candidates whose names were forwarded to him by the interview panel around the middle of June, 1986. Mr. McCullough felt that the appellant demonstrated a good knowledge of the subject area. However, Mr. McCullough felt that appellant did not demonstrate a good attitude. Specifically, when he asked appellant if appellant wanted the job, appellant replied that, under the circumstances, he wasn't sure. When Mr. McCullough asked appellant to suggest how things could be done differently to get the job done, appellant demonstrated great rigidity and inflexibility in Mr. McCullough's opinion. Mr. McCullough felt that Ms. Allen's interview was better than appellant's. In his opinion, Ms. Allen showed great creativity and enthusiasm and presented an impressive

portfolio of her training, experience, and achievements, including a B.A. in journalism; experience in the area of developmental disabilities, including a report for the respondent on stereotypes and myths regarding developmentally disabled children; extensive public information work, including work for the University of Wisconsin and the preparation of a public information campaign for respondent revolving around an adoptive black child. Mr. McCullough checked the employment references Ms. Allen had provided and none cited any problems with her work performance. On the basis of the results of his interviews of the candidates and the information he had regarding the problems with appellant's work performance and a lack of problems with Ms. Allen's, Mr. McCullough selected Ms. Allen as the successful candidate for the subject position. Ms. Allen was offered the position and she accepted it.

16. Appellant filed a timely appeal of the subject selection decision with the Commission on July 15, 1986.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this matter pursuant to §230.44(1)(d), Stats.
2. The appellant has the burden of proving that the selection decision made by respondent was an illegal act or an abuse of discretion.
3. The appellant has failed to sustain this burden of proof.
4. Respondent's decision not to select appellant for the subject position was neither illegal nor an abuse of discretion.

DECISION

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."

Illegality

In his letter of appeal, appellant states that the subject selection decision violated §§230.16, 230.20, and 230.44, Stats.

Section 230.16, Stats., sets out certain requirements which the Division of Merit Recruitment and Selection (DMRS) of the Department of Employment Relations (DER) must satisfy in receiving and processing applications for admission to competitive examinations and in administering competitive examinations for positions in the classified service. This section does not grant to an appointing authority any authority over either of these processes. (See Romaker v. DHSS, Case No. 86-0015-PC (1986)). Not only is it not possible to infer from the record in the instant appeal how appellant feels the examination application or administration processes for the subject position failed to meet the requirements of §230.16, Stats., but any such failures could only be attributed to DMRS which is not a party to this action.

Section 230.20, Stats., provides:

Recommendations. (1) Selection of classified state employes shall be based solely on merit and no employment recommendation shall be based on political or religious affiliations or on membership in associations not primarily related to merit in employment.

(2) An appointing authority may consider only those recommendations which he or she believes provide an objective evaluation of an applicant's character, training, experience, skills or abilities as they relate to the requirements for the position.

(3) Applicants for promotion shall not solicit recommendations from any source.

Appellant does not allege either specifically or by implication, that the subject selection decision was based on political or religious affiliations or on membership in associations not primarily related to merit in employment. Appellant does allege, however, that Ms. Wittenmeyer's recommendations to both the interview panel and to Mr. McCullough were not objective.

It may be instructive at this point to determine whether the interview panel or Mr. McCullough "considered" either of Ms. Wittenmeyer's recommendations in reaching their respective decisions. It is clear from the record that, despite Ms. Wittenmeyer's recommendation to the contrary, the interview panel forwarded appellant's name to Mr. McCullough as one of the top three candidates. Although Ms. Wittenmeyer's recommendation to the panel may have influenced the ranking of the three candidates forwarded to Mr. McCullough, Mr. McCullough did not rely on this ranking or on the panel's interviews of the candidates in making the subject selection decision but conducted his own interviews. Therefore, it must be concluded that Ms. Wittenmeyer's recommendation to the interview panel regarding appellant's candidacy for the subject position was not "considered" by the appointing authority in making the subject selection decision. However, Ms. Wittenmeyer not only made a recommendation regarding appellant's candidacy to the interview panel but to Mr. McCullough as well. Mr. McCullough acknowledges that he considered such recommendation in making the subject selection decision. What then was Ms. Wittenmeyer's recommendation to Mr. McCullough and was it "objective" within the meaning of §230.20(2), Stats.? In making such recommendation, Ms. Wittenmeyer expressed to Mr. McCullough her dissatisfaction with appellant's work performance, related several incidents to Mr. McCullough as the basis for her dissatisfaction with appellant's work performance, and stated her intention of "pulling funding" for the subject position if appellant were selected for it. Mr. McCullough did not "consider" Ms. Wittenmeyer's funding "recommendation" in making the subject selection decision because he was aware that she did not have such authority over the position's funding. The final question in this regard then is whether Ms. Wittenmeyer's

stated dissatisfaction with appellant's work performance as communicated to Mr. McCullough was "objective."

It is the Commission's role in such an inquiry to determine if there was a rational basis for Ms. Wittenmeyer's dissatisfaction, not whether the Commission would have reached the same conclusion as Ms. Wittenmeyer regarding appellant's work performance. In making her recommendation, Ms. Wittenmeyer related the following incidents to Mr. McCullough as the bases for her dissatisfaction with appellant's work performance:

1. Appellant refused to rewrite an article for the Blueprint despite Ms. Wittenmeyer's instructions to do so;
2. Appellant failed to meet the deadline for completing the 1984-85 annual report of the Council on Developmental Disabilities;
3. Appellant failed to include certain information relating to upcoming events of some significance in an issue of Spotlight through an oversight on his part; and
4. Appellant refused to assist other staff in the preparation of news releases or other writings unless he was afforded substantial lead time and received a written request, despite the fact that the need for such writings often arose on short notice.

There is no question that each of these incidents actually occurred and, as described by Ms. Wittenmeyer to Mr. McCullough, would offer a rational basis for Ms. Wittenmeyer's recommendation. Appellant attempted to rebut this by offering the following explanations for his actions in regard to these incidents. Appellant stated that changing the Blueprint article as suggested by Ms. Wittenmeyer would have compromised his professional ethics. However, it is not unreasonable to conclude from the record that Ms. Wittenmeyer's concerns regarding the interview were valid, i.e.,

although the article as originally prepared by appellant is not in the record, Mr. McCullough testified that his concerns paralleled those of Ms. Wittenmeyer, particularly in regard to the fact that the verbatim text of the interview portrayed the mother as confused and indecisive and some of her statements as contradictory; and that Ms. Wittenmeyer's suggestions to appellant could be achieved through a format change as opposed to a fictionalization of the interview as claimed by appellant. Appellant attributes his failure to meet the annual report deadline to the failure of other staff and other sources of services to meet their deadlines and to a creativity block on his part. However, it is clear from the record that completion of the annual report was appellant's responsibility and that he was aware of the deadline many months in advance. It was not unreasonable, therefore, for appellant to be held accountable for the failure to meet the deadline and for Ms. Wittenmeyer to expect appellant to plan and monitor the activities of contributors so that the deadline would not be exceeded. Appellant acknowledges his failure to include certain information in the Spotlight but explains that certain parts of the information appeared in other publications so its absence from the Spotlight was not significant. The fact remains, however, that appellant, through an acknowledged oversight on his part, failed to include information in a publication which he was responsible for including. Appellant finally alleges that it is not possible to adequately plan for and complete work assignments if he receives last-minute requests for the preparation of news releases and other writings from other staff. However, Ms. Wittenmeyer's and Mr. McCullough's assertions that appellant's adherence to his rules is unresponsive to the needs of the department since not every need for news releases and other writings can be anticipated is not unreasonable. The Commission concludes,

therefore, that Ms. Wittenmeyer offered a rational basis for her dissatisfaction with appellant's work performance as communicated to Mr. McCullough in her recommendation which appellant did not convincingly rebut, i.e., that Ms. Wittenmeyer's "recommendation" to Mr. McCullough regarding appellant's candidacy for the subject position was "objective" and appellant has failed to prove a violation of §230.20, Stats.

Abuse of 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).

Mr. McCullough had the effective authority to make the subject selection decision. Once the interview panel forwarded the names of the top three candidates, including appellant, to him, he conducted his own interviews and based the subject selection decision on these interviews, not on the panel's. Appellant contends that he was not given fair and equal consideration for the subject position as the result of Ms. Wittenmeyer's service on the interview panel. However, the panel's only real impact on the subject selection decision was its forwarding of the names of its top three candidates to Mr. McCullough. Since appellant was one of these

three, it cannot be concluded that Ms. Wittenmeyer's service on the panel affected his candidacy in any adverse way.

Mr. McCullough used as his selection criteria the candidates' enthusiasm for the subject position, their experience and training in the areas of public information and developmental disabilities, and their creativity. These were all reasonable selection criteria in view of the duties and responsibilities of the subject position. Mr. McCullough acknowledges that appellant's and Ms. Allen's experience and training in the areas of public information and developmental disabilities were both good. This is consistent with the record which shows that appellant had performed the duties and responsibilities of the subject position for at least one year while Ms. Allen had a B.A. in journalism, had worked as a public information assistant at the University of Wisconsin, had prepared a report while employed for respondent on developmentally disabled children, and had developed a public information campaign regarding adoptive children while employed for respondent. Mr. McCullough felt, however, that appellant lacked enthusiasm for the position, citing appellant's statement to Mr. McCullough that, under the circumstances, he wasn't sure that he wanted the job. Mr. McCullough felt that Ms. Allen, on the other hand, demonstrated a great enthusiasm for the position during her interview with Mr. McCullough. Mr. McCullough's conclusion in this regard is consistent with that of Ms. Murphy and Mr. Bobo who had served on the interview panel. Both had felt that appellant had a lackluster, "flat" interview while Ms. Allen had exhibited much energy and enthusiasm and preparation for her interview. It is interesting to note in this regard that Ms. Murphy had not been aware at the time of the interviews that Ms. Wittenmeyer or anyone else was dissatisfied with appellant's work performance and that Mr. Bobo had felt at the

time that appellant's work performance met or exceeded expectations. Mr. McCullough also felt that appellant demonstrated resistance to changing the status quo during his interview while Ms. Allen demonstrated great creativity and flexibility. In making the subject selection decision, Mr. McCullough considered his opinion and Ms. Wittenmeyer's regarding appellant's work performance and the opinion of Ms. Allen's references regarding hers. Ms. Allen's references did not cite any problems with her work performance but Mr. McCullough was aware of several problems, as already discussed above, with appellant's. It has already been concluded that these problems were substantial and real. On this basis, it was clearly not against reason and evidence for Mr. McCullough to conclude that Ms. Allen was the better candidate for the subject position. The Commission concludes, therefore, that the respondent did not abuse its discretion in making the subject selection decision.

ORDER

The decision by respondent not to select appellant for the subject position is affirmed and this appeal is dismissed.

Dated: _____, 1987 STATE PERSONNEL COMMISSION

DENNIS P. MCGILLIGAN, Chairperson

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DONALD R. MURPHY, Commissioner

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