

ERIC R. THOMPSON,

Appellant,

v.

Administrator, DIVISION OF
MERIT RECRUITMENT & SELECTION
and Secretary, DEPARTMENT OF
NATURAL RESOURCES,

Respondents.

Case No. 87-0204-PC

DECISION
AND
ORDER

This matter is before the Commission following the promulgation of a proposed decision and order by the hearing examiner. The Commission has considered the appellant's objections and arguments with respect to the proposed decision and has consulted with the examiner. The Commission now adopts the proposed decision and order, a copy of which is attached hereto and incorporated by reference, with the following language added to the opinion section of the proposed decision to more completely explain the basis for the Commission's decision.

The following language is added at the end of the first full paragraph on page 5 of the proposed decision:

In order to properly understand the previously quoted first sentence in §230.15(1), Stats., it should be read in the context of the subsequent subsection:

(1) Appointments to, and promotions in the classified service, shall be made only according to merit and fitness, which shall be ascertained so far as practicable by competitive examination. . . .

(2) If a vacancy occurs in a position in the classified service when peculiar and exceptional qualifications of a scientific, professional, or educational character are required, and if presented with satisfactory evidence that for specified reasons competition in such special cases is impracticable, and that the position can best be filled by the selection of some designated person of high and recognized attainments in such qualities, the administrator may waive competition requirements unless the

vacancy is to be filled by promotion. Any actions taken under this subsection shall be reported to the board.

These two subsections, when read together, indicate that the reference to ascertaining merit and fitness by competitive examination "so far as practicable" in sub. (1) is to the exception which is described in sub. (2). "Merit and fitness" may be ascertained without a competitive examination when: 1) a vacancy requires "peculiar and exceptional qualifications"; 2) competition is impracticable; and 3) a designated person has such qualities. These are all conditions being referred to in the phrase "so far as practicable" in sub. (1). For any selection decision in the classified service where any of those conditions do not exist, competition is required in order to ascertain merit and fitness.

The appellant's reading of §230.15(1), Stats., would go a long way towards eliminating the exercise of discretion by an appointing authority when making a selection decision. This discretion was recognized as early as 1911 by the Wisconsin Supreme Court in State ex rel. Buell v. Frear, 146 Wis. 291 (1911). In Buell, the Court was applying comparable statutory language to that found in §230.15(1), Stats. Section 2 of ch. 363, Laws of 1905, provided:

"appointments to, and promotions in the civil service of this state shall be made only according to merit and fitness, to be ascertained as far as practicable by examinations, which so far as practicable, shall be competitive. . . . No person shall be appointed, transferred, removed, reinstated, promoted or reduced as an officer, clerk, employee or laborer in the civil service under the government of this state, in any manner, or by any means, other than those prescribed in this act."

The Court then went on to describe the discretion to be exercised by the appointing officer (i.e. appointing authority):

The contention is specifically made that the act is invalid in that it deprives the person exercising the power of appointment to public office of the right to employ a reasonable discretion in making a selection of persons qualified for office. . . . Sec. 16 provides that upon notice by an appointing officer to the commission of the existence of a vacancy in the competitive class, the commission within ten days "shall certify from the register of eligibles appropriate for the group in which the position to be filled is classified, the three names at the head thereof which have not been certified three times to the department or office in which the vacancy exists". . . . The statute , , , exempts from the operation of the statute certain positions, including . . . "all other

offices or positions, except laborers, for the filling of which competitive or non-competitive examinations shall be found by the civil service commission to be impracticable on account of the temporary character of the employment or for special reasons satisfactory to the commission. . . ."


* * *

The opinion doubtless also prevailed in the legislature that a selection from three candidates on the certified eligible list would provide a sufficient scope for the exercise of a reasonable discretion by the appointing officer in making appointments of persons found to be qualified to perform services under the appointing officer. . . . We perceive no unreasonable restriction in the nature of this regulation for the exercise of the discretion of the appointing officer to select an appointee found to possess the qualifications pursuant to the tests prescribed by the law. The tests are to be practical in their nature and appropriate to ascertain the fitness and skill of the applicant and impose no unreasonable conditions or restrictions on the appointing officer in the exercise of his power, and clearly serve to aid him in selecting competent servants.

The decision in Buell clearly does not require the appointment of the candidate who received the highest test score in a pre-certification examination. It underscores the "reasonable discretion" available to the appointing authority when making selection decisions, a concept which is inconsistent with the appellant's suggested interpretation of the phrase "so far as practicable." The appellant's version of the phrase would lead to the result that the appointing authority would have to appoint the applicant who ranked number one on the exam if it were "practicable" to do so, i.e., "possible to practice or perform: feasible." Webster's New Collegiate Dictionary (1977), p. 902. This is completely inconsistent with the notion that it is discretionary with the appointing authority whom to appoint among those certified.

Dated: April 28, 1989

STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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PROPOSED
DECISION
AND
ORDER

This appeal arises from the information provided as part of the certification for a vacant position. The issue for hearing was as follows:

Whether the [respondents'] action in failing to provide the appointing authority with the applicants' ranking and/or examination scores as part of the certification for vacant Real Estate [Agent] 5 positions violated the state civil service code.

The parties stipulated to certain facts. After the conclusion of the hearing, the parties filed post-hearing briefs.

FINDINGS OF FACT

1. The responsibilities of the administrator of the Division of Merit Recruitment and Selection include certifying names of eligible candidates to appointing authorities in accordance with the provisions of ch. 230, Stats.

2. Until approximately 1982, respondent DMRS performed its certification responsibility by sending the names of the candidates to the appointing authority without any information as to the candidate's ranking or score on the examination which served to generate the certification list. Beginning in approximately 1982 and due to the computerization of the certification process, both the ranking and score were provided to the appointing authority.

3. By the end of 1984, respondent DMRS had concerns about the ability of the persons making hiring decisions to properly use the ranking and score information which was being provided on the certification list. DMRS had a long-standing policy that all of the persons who were certified were to receive fair and equal consideration in the selection decision. The DMRS administrator believed that supervisors, who were effectively making selection decisions, were relying far too much on the candidates' examination scores rather than on information conveyed during the candidate interviews.

4. On April 29, 1985, DMRS promulgated bulletin MRS-20 entitled "Civil Service Rank and Score Information for Certified Candidates." That bulletin read, in part, as follows:

Effective May, 1985, all agencies are to adhere to the following procedures regarding candidates certified as eligible for appointment. This policy is designed to reinforce the concept that all certified candidates are entitled to equal employment consideration.

Certification from Registers Held by DMRS

The Division of Merit Recruitment and Selection (DMRS) provides the agency personnel office with a ranked list of names which contains the civil service score, race and sex of each certified candidate as well as the certification option (if any) under which the person is certified (e.g., Veterans Preference, HEC). DMRS also provides the agency personnel office with a randomly ordered list of names.

The agency personnel office is responsible for providing the random list of names for the position vacancy to the appointing authority. Race, sex, veterans points and handicapped status may also be included.

* * *

The agency personnel office may use the information on the ranked list provided by DMRS to monitor compliance with the agency's affirmative action hiring policy. In addition, this information is used to determine if there is any need for verification by the appointing authority of an applicant's claimed status relative to the certification option under which they were certified.

* * *

Certification from Registers Held by Agencies

The agency personnel office provides the random list of names to the appointing authority. This list includes the names of those persons eligible for employment consideration and may include information on applicants' race, sex, veterans points and handicapped status. This information may be used to monitor compliance with the agency's affirmative action hiring policy.

5. At all relevant times, the appellant has been employed by respondent Department of Natural Resources (DNR).

6. On May 20, 1987, DNR posted a lateral transfer and promotional announcement for the classification of Real Estate Agent 5 in the Department . The announcement directed applicants to submit their applications to Ruth Anderson of the DNR Personnel Office by June 10, 1987.

7. DMRS delegated the authority and responsibility for recruitment, examination, applicant notification, register establishment and certification of eligibles relative to the Real Estate Agent 5 opportunities, to DNR.

8. DNR's Personnel Office developed the (oral) examination for the applicants. DMRS approved the exam and set the passing point.

9. DNR's Personnel Office administered the examination on September 23 and 24, 1987. DNR then sent the applicants' raw scores to DMRS which converted them to civil service scores. The civil service scores were then sent to DNR.

10. Appellant applied for and was examined for the Real Estate Agent 5 opportunity.

11. DNR Personnel Office created a register from the scores and issued each applicant a "Notice of Examination Results" which listed the applicant's final grade without veteran's preference and listed the applicant's ranking. The appellant was ranked third.

12. DNR Personnel Office created a certification of eligibles, randomly listing the certified applicants with no information as to the examination scores or rankings. The appellant was one of those applicants who was on the certification list.

13. On September 28, 1987, the certification list was provided to the appointing authority in DNR's Bureau of Real Estate for use in filling two vacancies in Madison.

14. Although he was among those certified and was interviewed on October 20, 1987, appellant was not selected for either of the two vacancies and on November 3, 1987, he was notified orally of his non-selection.

15. On November 16, 1987, appellant filed a letter of appeal with the Commission, asking the Commission to rescind MRS-20 in light of his experiences relative to the Real Estate Agent 5 selection decisions and to reinstate the practice of providing examination scores and rankings to the appointing authority.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §230.44(1)(a), Stats.

2. The appellant has the burden of establishing that the respondents' conduct violated the state civil service code.

3. The appellant has failed to sustain his burden.

OPINION

The civil service code draws a distinction in the selection process between certification of eligibles, which is a responsibility assigned to DMRS, and to the appointment decision, which is to be made by the various appointing authorities. This distinction is apparent in the language of §230.25, Stats., which provides, in part:

(1) Appointing authorities shall give written notice to the administrator [of DMRS] of any vacancy to be filled in any position in the classified service. The administrator shall certify, under this subchapter and the rules of the administrator, from the register of eligibles appropriate for the kind and type of employment, the grade and class in which the position is classified, the 5 names at the head thereof if the register of eligibles is less than 50

(2) Unless otherwise provided in this subchapter or the rules of the administrator, appointments shall be made by appointing authorities to all positions in the classified service from among those certified to them in accordance with sub. (1). . . .

The appellant contends that the respondent DMRS (or respondent DNR, when DMRS delegates its authority to DNR) must accompany its certification of names of eligibles with the examination scores and ranks of each eligible. In support of this contention, the appellant relies on §230.15(1), Stats., which provides, in part:

Appointments to, and promotions in the classified service, shall be made only according to merit and fitness, which shall be ascertained so far as practicable by competitive examination.

Appellant argues that because DMRS has given a competitive exam as part of the process for determining which candidates to certify as eligible for appointment, DMRS should be required to convey the results of that examination when it informs the appointing authority of the certification.

The Commission cannot read §230.15(1), Stats., as requiring DMRS to provide an appointing authority with scores and rankings of certified eligibles. The language of §230.15(1), Stats., applies to the making of appointments and promotions, a responsibility which is assigned to the appointing authority pursuant to §230.06(1)(b), Stats. The statute which requires the administrator of DMRS to certify eligibles, §230.25, Stats., very specifically refers to the certification of names and makes no mention of certifying the scores and ranks of those persons named.

Testimony established that DMRS made a conscious decision not to provide appointing authorities with the exam score and ranking information because the persons actually making the appointment decisions were relying far too heavily on this numerical information and were neglecting the information relating to "merit and fitness" which was being generated in the (post-certification) candidate interviews, i.e. via competitive examination. The respondents established, via testimony, that the only way to eliminate the potential for misinterpretation of the civil service exam score and ranking (other than simply not listing them) was to provide a technical consultant to the person or persons making the appointment decision to explain the percentage of the total job domain of the vacant position that was addressed by the civil service test, the reliability of the test results, the actual differences in absolute scores among the certified candidates and the statistical significance of those differences in terms of the standard deviation of the test scores as a whole.

DMRS justifiably concluded that it was impractical to provide this information to the appointing authorities on a regular basis. It should be noted that MRS-20 does not prevent DMRS from providing an appointing authority with scores and rankings on a case-by-case basis in response to a specific request.

Therefore, the Commission finds that the policy embodied in MRS-20 not to supply exam scores and rankings along with the names of the certified eligibles does not violate the civil service code. Appellant's other contentions, including that MRS-20 should have been promulgated as an administrative rule, are outside the scope of the issue for hearing.

ORDER

This appeal is ordered dismissed.

Dated: _____, 1989 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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