

STATE OF WISCONSIN

PERSONNEL COMMISSION

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COLLEEN J. DUGAN,  
 ROBIN J. FISHER,

Appellants,

v.  
 Administrator, DIVISION OF  
 MERIT RECRUITMENT & SELECTION,

Respondent.

Case Nos. 88-0043, 0044-PC

\* \* \* \* \*

ORDER

The Commission has considered the objections of the appellants, has consulted with the hearing examiner and has decided to adopt the Proposed Decision and Order with the addition of the following language for purposes of clarification in response to such objections:

Appellant objects in regard to Finding of Fact #4 that "there was absolutely no testimony in the file as to the proctor giving instructions that the parties could not be seated next to each other." However, the record shows that Mr. Miller testified (Tape 2, at approximately #900) that the proctors had "said at the beginning that everyone should be a seat apart."

Appellant objects in regard to Finding of Fact #4 that "it is a long established policy that people who are not taking the exam cannot be in the same room as the exam-takers and must leave." Appellant cites no authority in the record to support such a statement and the Commission finds no support in the record for such a statement.

Appellant states in regard to Finding of Fact #5 that Mr. Snyder "knew Ms. Dugan was on the list because of expanded certification, and that her expanded certification was due to her handicap. He knew her handicap to be of a mental nature (manic depression)." Again, appellant cites no authority in the record to support such a statement. Mr. Snyder's testimony (Tape 3 at approximately #450) indicates that he believed that Ms. Dugan was certified as a result of expanded certification. Mr. Snyder's testimony does not indicate that he had or should have had a belief as to the type of or basis for the expanded certification used to certify Ms. Dugan. In fact, the record does not indicate the type of or basis for the expanded certification used in certifying Ms. Dugan and the first mention in these appeals of Ms. Dugan's mental handicap appears in appellants' objections to the Proposed Decision and Order.

Appellant is correct in asserting that the hearing examiner misstated the nature of the appellants' burdens in these appeals. Through an error, the word "not" was omitted from the first sentence of the third full paragraph of the Decision section of the Proposed Decision and Order. This sentence should be corrected to read as follows:

The appellants have the burden to prove by the greater weight of the credible evidence that respondent was not justified, pursuant to §§230.17, Stats., and ER-Pers 6.10(7), Wis. Adm. Code, in removing appellant's names from the subject register.

Appellant offers in regard to the assessment of Mr. Pippin's credibility that "He made a decision of great importance, which results not only in this appeal, but also a notice of claim for violation of the due process requirement for DER to hold a hearing prior to the time they removed the name of someone from the list pending in a different jurisdiction. Pippin needs to justify his action. He wants his decision to be correct for the Personnel Commission to strengthen his case on the due process issue. He needs a credible story to

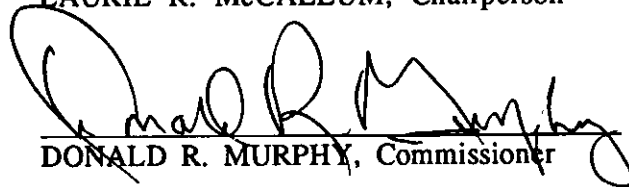
justify his actions should this matter go forward in the other jurisdiction."  
Again, there is no evidence in the record regarding an action in another  
jurisdiction arising from the same set of facts which form the basis for the  
instant appeals and the first mention in these appeals of such other action  
appears in appellants' objections to the Proposed Decision and Order.

Therefore, the attached Proposed Decision and Order, with the aforesaid  
modification, is adopted as the Commission's final decision of these matters.

Dated: January 13, 1989

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINNOTT, Commissioner

Parties:

Colleen J. Dugan  
202 N. Thornton Avenue  
Madison, WI 53703

Robin J. Fisher  
4349 Daentl Rd., Rt. 1  
DeForest, WI 53532

Dan Wallock  
Administrator, DMRS  
P.O. Box 7855  
Madison, WI 53707

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 COLLEEN J. DUGAN, \*  
 ROBIN J. FISHER, \*  
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 Appellants, \*  
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 v. \*  
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 Administrator, DIVISION OF \*  
 MERIT RECRUITMENT & SELECTION, \*  
 \*  
 Respondent. \*  
 \*  
 Case Nos. 88-0043, 0044-PC \*  
 \*  
 \* \* \* \* \*

PROPOSED  
 DECISION  
 AND  
 ORDER

NATURE OF THE CASE

These are appeals of respondent's decision to remove appellants from an employment register. A hearing was held on August 8, 1988, before Laurie R. McCallum, Commissioner. The briefing schedule was completed on October 7, 1988.

FINDINGS OF FACT

1. On October 3, 1987, an exam was administered by respondent for the Electronics Technician 4 (ET 4) classification. Appellant Dugan, appellant Fisher, Dan Miller, and Ron Porter were all present for and completed the exam. Appellant Dugan completed the exam before appellant Fisher did.

2. As of October 3, 1987, Mr. Miller was employed by Alpha Distributors. From around April of 1986 to around October of 1986 and again from around April of 1987 to around August of 1987, Mr. Miller was employed by the Wisconsin Department of Transportation (DOT) as an LTE in a position classified as an Electronics Technician (ET) and located in the Radio Shop. During his 1987 employment at DOT, appellant Dugun was a

co-worker of Mr. Miller's in the Radio Shop but she was employed in a permanent ET 2 position. Appellant Dugan and Mr. Miller attended the Wisconsin School of Electronics at the same time and were acquainted with each other there. During Mr. Miller's 1987 employment at DOT, Melvern Bankes was his first-line supervisor. During both periods of Mr. Miller's employment at DOT, Geoffrey Snyder was a co-worker who was employed as an Electronics Technician 4. Mr. Miller and Mr. Snyder are friends and Mr. Snyder assisted Mr. Miller in getting the job at Alpha Distributors.

3. Mr. Miller was ranked number 26 on the subject exam and was not certified for any position as a result of the subject exam. Appellant Dugan received a score of 73.30 and appellant Fisher a score of 70.60 on the subject exam.

4. Mr. Miller completed the subject exam in approximately an hour and a half. After he completed the exam, Mr. Miller left his seat and sat in the back of the room to wait for the person with whom he was riding. In both locations, Mr. Miller had a nearly unobstructed view of appellant Dugan and appellant Fisher. Mr. Miller observed the appellants sitting in adjacent seats rather than with a seat between them as the proctors had instructed; and turning pages together and whispering while making eye contact, looking at each others' exam booklets and pointing with their pencils to sections of their exam booklets for two periods of time one lasting for 10 seconds and one for 20 seconds. Mr. Miller did not report his observations to the exam proctors. Some time after October 3, 1987, Mr. Miller reported his observations to Mr. Snyder during a lunch meeting. Mr. Miller, on one occasion, expressed his opinion that he'd have a better opportunity to be hired for a permanent position if he weren't a white male. Mr. Miller had applied for the ET 2 position at DOT occupied by

appellant Dugan and for at least one of the positions for which she was certified as a result of the subject exam. Mr. Miller had not been certified for the ET 2 position because he had ranked 80th on the exam.

5. Some time in or around January of 1988, Mr. Snyder was appointed to an Electronics Supervisor 4 position with the DOT. Prior to that appointment, Mr. Snyder was employed in an Electronics Technician 4 position at DOT for six years. Until 1985, Mr. Snyder's first-line supervisor was Mr. Bankes. Mr. Snyder, during his employment at DOT, was a co-worker of appellant Dugan's although for most or all of such time, they were employed in different units and had different supervisors. On the Monday following the exam, Mr. Snyder and appellant Dugan had a conversation during which appellant Dugan indicated she had taken the subject exam, she felt it was difficult, and she and appellant Fisher had exchanged answers during the exam. After he became a supervisor, and after the above-described lunch meeting with Mr. Miller, Mr. Snyder became concerned about the information he had concerning the alleged cheating incident involving appellants and the knowledge others at DOT might have regarding such incident or regarding his knowledge of such incident, so he reported what he knew of such incident to Mr. Bankes. After February 29, 1988, Mr. Snyder had another conversation with appellant Dugan during which she denied the fact of and the content of the earlier conversation, i.e., the conversation between appellant Dugan and Mr. Snyder the Monday after the exam. Mr. Snyder had heard Mr. Miller make his comment about having a better opportunity to be hired for a permanent position if he weren't a white male. Mr. Snyder was aware at the time of his report that appellant Dugan had been certified for a position for which he was the first-line supervisor. Mr. Snyder did not believe at that time that the removal of

appellant Dugan from such list would have resulted in Mr. Miller's certification for such position because he was aware of Mr. Miller's low ranking on the exam and because he believed that appellant Dugan was certified for the subject position as a result of expanded certification. Mr. Snyder at that time was not aware that appellant Fisher had been certified for such position. Mr. Snyder and appellant Dugan had had minor conflicts while co-workers. The only incident cited in the record involved the selection of a radio station.

6. Mr. Bankes relayed the information that had been reported to him by Mr. Snyder regarding the alleged cheating incident involving appellants to Shelagh Cullen, an employe of the DOT personnel unit, who relayed such information to the Department of Employment Relations (DER). Gerald Pippin, a Personnel Specialist 5 with DER, was assigned to investigate the matter.

7. As part of his investigation, Mr. Pippin first contacted appellant Fisher by phone. He identified himself, explained that an allegation had been made that she and appellant Dugan had cheated on the subject exam, indicated that he also intended to contact appellant Dugan, and explained the potential sanctions. Appellant Fisher admitted talking to appellant Dugan during the exam but denied that they had exchanged answers. Mr. Pippin's notes of this conversation include this admission.

8. As part of his investigation, Mr. Pippin subsequently contacted appellant Dugan by phone. He identified himself and explained that an allegation had been made that she and appellant Fisher had cheated on the subject exam and that appellant Fisher had admitted talking to her during the exam. Appellant Dugan gave Mr. Pippin a general denial and told him

she did not want to talk to him any further without a union representative present.

9. As part of his investigation, Mr. Pippin contacted Mr. Snyder who provided the following written statement on February 29, 1988:

This last fall at 7:30 a.m. at the State Patrol radio shop Colleen Dugan stated that she had taken the ET 4-5 test over the weekend. She also stated that her friend was there and they exchanged answers. It sounded like neither one felt they did well on the test. I think that's what she was trying to tell me and the other part just came out.

Around three weeks later a friend, who was a LTE for the BOC radio shop, Dan Miller told me that he saw Colleen when she was taking the test. He stated she was talking to her friend during the test. Dan sat behind them.

I recently explained the situation concerning Colleen to Melvern Bankes on 02/08/88. He is presently Colleen's supervisor. I felt it was necessary to bring this up at this time because she is being considered for a position as an ET 4. Many people know of this situation and I felt it would look bad for me as a supervisor not to bring it up before others took action against this.

10. As part of his investigation, Mr. Pippin contacted Mr. Miller who provided the following written statement on March 8, 1988:

I Dan Miller testify that the following statement is true.

Colleen Dugan and an unknown party sat with no chair between the two of them at the Wisconsin State Electronic Technician test on March 10, 1987. At both positions (seated while completing exam and seated in the back of the room) I saw the two of them turning pages together, making eye contact and mumbling. I first noticed this during the test. I finished the test in approximately one and one half hours. I had to wait for my ride, who was still taking the test. After my test was turned in I waited in the lobby for about 10 minutes. I Then went back into the testing room and sat in the back of the class. There I witnessed a collaboration as far as turning of pages and both looking at each other's papers. I could see when standing up the pointing of pencils (not marking papers as though to fill in answers) to various sections of the test booklet.

11. On March 3, 1988, Mr. Pippin met with appellant Dugan, Don Frisch, a union representative; and Michelle Godfrey, a vocational rehabilitation counselor. Appellant Dugan provided the following written statements at such meeting:



- a. The following written statement she had authored:

I Colleen Dugan, wish to have these statements included in the record of investigation.

I also wish to reiterate that I believe the two individuals, Dan Miller and Geoff Snyder who made these allegations against me have personal reasons for wanting me to lose the opportunity for this job.

Dan Miller applied for the ET 2 position I now hold and also for the ET 4 position I am applying for now.

Geoff Snyder and I have had personal conflicts on the job.

- b. The following written statement of appellant Fisher:

Colleen and I didn't discuss anything during the state exam for Electronic Technician 4 and 5 during the test.

- c. The following written statement of Ron Porter:

I Ron Porter was at the electronic tech 4 and 5 test in which Colleen Dugan is being accused of cheating at. I sat 3 to 4 rows behind her with no one in between to block my view of her. I heard and saw nothing being discussed by her or anyone else.

12. Subsequent to the March 3 meeting, Mr. Pippin contacted Mr. Miller and Mr. Snyder to inquire about any conflicts either may have had with appellant Dugan. Both concluded that any conflicts were minor. The only specific incident either recalled involved the selection of a radio station. Mr. Bankes was unaware of any conflicts between appellant Dugan and either Mr. Miller or Mr. Snyder.

13. Subsequent to the March 3 meeting, Mr. Pippin tried to contact Mr. Porter once by phone but was unable to reach him.

14. In his testimony, Mr. Porter indicated that he was not watching the appellants during the subject exam because he was concentrating on his own exam but that he had heard no conversation during the exam. Mr. Porter also testified that, after the subject exam, he heard rumors at DOT that appellant Dugan had cheated on the exam.

15. As part of his investigation, Mr. Pippin checked with Joe Cissel, an Executive Personnel Officer 1 at DER whose duties included test

administration, to determine whether the proctors had reported any incidents in relation to the subject exam. Mr. Cissel advised Mr. Pippin that no reports had been filed but that he would check with one of his subordinates to confirm that none had been prepared. Mr. Pippin did not wait for this confirmation before concluding his investigation.

16. The directions for the subject exam included the following language, inter alia:

No books, calculators or reference material of any kind may be used during the examination unless the directions by the proctor specifically permit it. No talking, smoking, eating or drinking are permitted. You may not leave the room without first securing permission from the proctor. No examination question, in part or in whole, may be copied from the booklet. Violation of any of the above will result in disqualification and/or a course of legal action pursuant to s. 230.43(1), Stats.

17. Mr. Pippin recommended to Dan Wallock, Administrator, Division of Merit Recruitment and Selection, that the appellants' names be removed from the subject register.

18. In letters dated March 17, 1988, Mr. Wallock advised appellants that their names had been removed from the subject register.

19. Appellants filed timely appeals of such removals with the Personnel Commission on April 5, 1988.

#### CONCLUSIONS OF LAW

1. These matters are appropriately before the Personnel Commission pursuant to §230.44(1)(a), Stats.

2. Appellants have the burden to show that respondent violated §§230.17, Stats., and ER-Pers 6.10(7), Wis. Adm. Code, when respondent removed appellants' names from the subject employment register.

3. Appellants have failed to sustain their burden.

DECISION

Section 230.17(1), Stats., provides:

230.17 Applicants and eligibles may be barred; bonds may be required. (1) The administrator shall provide by rule, the conditions, not otherwise provided by law, under which an applicant may be refused examination or reexamination, or an eligible refused certification. These conditions shall be based on sufficient reason and shall reflect sound technical personnel management practices and those standards of conduct, deportment and character necessary and demanded to the orderly, efficient and just operation of the state service.

Section ER-Pers 6.10, Wis. Adm. Code, provides, in pertinent part:

ER-Pers 6.10 Disqualification of Applicants. In addition to provisions stated elsewhere in the law or rules, the administrator may refuse to examine or certify an applicant, or may remove an applicant from a certification:

(1)...

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(7) Who practices, or attempts to practice, any deception or fraud in his or her application, certification, examination, or in securing eligibility or appointment;

The appellants have the burden to prove by the greater weight of the credible evidence that respondent was not justified, pursuant to §§230.17, Stats., and ER-Pers 6.10(7), Wis. Adm. Code, in removing appellants' names from the subject register. Clearly, if the greater weight of the credible evidence supports respondent's conclusion that appellants acted as Mr. Miller alleged they acted during the administration of the subject exam, the Commission must decide that respondent's decision to remove appellants' names from the subject register was so justified. Exchanging answers during an exam clearly involves deception or fraud within the meaning of §6.10(7), Wis. Adm. Code.

The decision of these cases rests primarily upon a determination of the relative credibility of appellants and Mr. Porter on the one hand and Mr. Miller, Mr. Snyder, and Mr. Pippin on the other. A key inquiry in this

regard must involve an analysis of the motives of these individuals. What motive would Mr. Miller have to misrepresent appellants' actions during the exam? Appellants argue in this regard that Mr. Miller had competed for the ET 2 position held by appellant Dugan, had competed for the ET 4 positions for which appellants had been certified pursuant to the subject exam, had had conflicts with appellant Dugan while they were co-workers, and had made a comment about how white males were at a disadvantage competing for permanent positions. However, the record shows that Mr. Miller had not been certified for appellant Dugan's ET 2 position because his exam score was too low; that he had not been certified for the ET 4 positions for which appellants had been certified because his exam score was too low; that the only specific conflict between appellant Dugan and Mr. Miller reflected in the record involved the selection of a radio station; and that Mr. Bankes, who supervised appellant Dugan and Mr. Miller while they were co-workers, was not aware of any conflicts between the two. More importantly, the only information available to Mr. Pippin which placed Mr. Miller's motives in question was a statement by appellant Dugan that she and Mr. Miller had had conflicts while they were co-workers. Mr. Pippin investigated this allegation and was advised by Mr. Miller that only very minor conflicts had occurred. There is nothing in the record to rebut this characterization by Mr. Miller of his working relationship with appellant Dugan and nothing from which to conclude that Mr. Pippin did not properly investigate Mr. Dugan's allegations in this regard or did not draw a proper conclusion from the information he received in this regard. Moreover, there is no question that Mr. Miller made the "white male" statement on one occasion. However, this isolated instance would be a tenuous basis for a conclusion that Mr. Miller's motives are suspect. More importantly, once

again, there is nothing in the record from which it is possible to conclude that Mr. Pippin was, or should have been, aware at the time he completed his investigation that Mr. Miller had ever made such a statement.

What motive would Mr. Snyder have to discredit the appellants? Appellants argue that Mr. Snyder was a friend of Mr. Miller's and wanted to hire Mr. Miller for the vacant ET 4 position for which appellants were certified and for which he was the first-line supervisor; and that Mr. Snyder had had conflicts with appellant Dugan while they were co-workers. Appellants point to Mr. Snyder's delay in bringing the subject incident to Mr. Bankes' attention as evidence of the existence of some questionable motive on Mr. Snyder's part. However, the record reveals that, at the time Mr. Snyder made his report to Mr. Bankes, he believed that appellant Dugan had been placed on the certification list for the ET 4 position he supervised as a result of expanded certification and that her removal could not result in Mr. Miller's certification for the position. Mr. Snyder was not even aware of the identity of appellant Fisher. In addition, Mr. Snyder's explanation for his delay in reporting the subject incident is credible: he believed that his role in reporting any knowledge he may have regarding incidents such as the one under consideration here changed once he became a supervisor, especially since that incident was a matter of common knowledge in the work unit. Appellants argue that there is nothing in the record which confirms that the subject incident was a matter of common knowledge in the work unit. However, Mr. Porter, appellants' own witness, testified that he had heard a rumor at DOT that appellant Dugan had cheated. Again, more importantly, the only reason offered to Mr. Pippin by the appellants for questioning Mr. Snyder's credibility was that related to appellant Dugan's alleged work-related conflicts with Mr.

Snyder. Mr. Pippin investigated this and was advised that only minor conflicts had occurred. Again, there is nothing in the record to rebut this; nothing from which to conclude that these allegations were not properly investigated by Mr. Pippin or that he did not draw a proper conclusion from the information he received in this regard; and, in fact, the record reflects that supervisor Bankes was not aware of any such conflicts.

What motive would Mr. Pippin have to have the appellants removed from the subject register? Appellants allege that Mr. Pippin represented that appellant Fisher admitted talking during the exam to appellant Dugan because "to have one of the parties 'admit' to wrongdoing relieves Pippin of the obligation to conduct a fair investigation," and "Of the two parties (Fisher and Pippin) Pippin has a greater interest in maintaining his version of events than Fisher." This reasoning of appellants' is simply not persuasive. Mr. Pippin clearly did not have a personal interest in the outcome of his investigation. He had to report to his supervisor on his methodology and his conclusions and to be deficient in either would not serve his interests as an employee. Common sense dictates that it would have been less troublesome for Mr. Pippin and for DMRS if Mr. Pippin had not recommended removal. Furthermore, it is illogical to assert that Mr. Pippin had a greater interest in the outcome of the investigation than appellant Fisher. Appellants point to alleged inadequacies in Mr. Pippin's investigation as evidence of his bias against appellants' position in this regard. These alleged inadequacies include: Mr. Pippin's failure to interview any witnesses other than those witnesses who supported "his position;" the fact he disregarded Ms. Fisher's written statement; his failure to contact Mr. Porter; his failure to investigate alleged conflicts

between appellant Dugan and Mr. Miller and Mr. Snyder; his failure to check into the possible motivation of any of the witnesses; and his failure to wait until he received a report from the proctors before making his recommendation for removal to Mr. Wallock. However, the only witness offered to Mr. Pippin by appellants in support of their position (other than the appellants themselves) was Mr. Porter. Mr. Pippin testified that he attempted to reach Mr. Porter by phone but was unsuccessful. In view of the fact that he was provided a written statement from Mr. Porter, it is not too surprising or revealing that Mr. Pippin was not more diligent in trying to reach Mr. Porter. Mr. Pippin did not ignore appellant Fisher's written statement but chose instead to believe the statement made by appellant Fisher to him on the phone. In view of the fact that the telephone statement was made closer in time to the date of the subject exam and before appellant Fisher had had an opportunity to reflect on the ramifications of making such a statement, Mr. Pippin was clearly justified in regarding it as more believable than her written statement. As the record reflects, Mr. Pippin did not fail to investigate alleged conflicts between appellant Dugan and Mr. Miller and Mr. Snyder or the motivations of Mr. Snyder or Mr. Miller. Mr. Pippin was, however, told by Mr. Miller and Mr. Snyder that any conflicts were very minor and he accepted their statements as believable. It is interesting to note that Mr. Bankes' testimony at the hearing bears this out. Mr. Pippin did make his recommendation for removal before receiving the requested report from the proctors. Mr. Pippin's explanation for this is very credible. He had concluded prior to receiving the requested report that the proctors had not observed the appellants exchanging answers because there was no report of any such incident on file

and one would have been filed by the proctors if they had observed such an incident.

Appellants also point to direct evidence to support their positions. Appellants point to the written statement and the testimony of Mr. Porter. However, although Mr. Porter stated that he did not observe appellants interacting during the exam, he also testified that he had been concentrating on his exam and not paying attention to what went on around him. Appellants point to the difference in appellants' scores and the difference in time they took to complete their exams as evidence of a lack of collusion on the exam. However, Mr. Miller did not state that they exchanged answers during the entire exam but only for two short periods of time, one for 10 seconds and one for 20 seconds. Appellants point to the fact that the exam proctors did not report any interaction between the appellants during the exam. This is not inconsistent with Mr. Miller's observations in view of the fact that, if the appellants were indeed exchanging answers, they would be careful not to do so when the proctors were looking at them but would have no such hesitation vis a vis Mr. Miller.

The greater weight of the credible evidence supports a conclusion that respondent was justified in concluding that appellant Fisher told Mr. Pippin she talked to appellant Dugan during the exam but recanted once she discovered what the ramifications were; that appellant Dugan told Mr. Snyder that she and appellant Fisher had exchanged answers during the exam but recanted once she discovered what the ramifications were; that Mr. Miller observed the appellants interacting with each other during the exam; and, was justified, pursuant to §230.17, Stats., and §ER-Pers 6.10(7), Wis. Adm. Code, in removing appellants from the subject register on this basis.



ORDER

These appeals are dismissed.

Dated: \_\_\_\_\_, 1988      STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson

LRM:jmf  
JMF05/2

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DONALD R. MURPHY, Commissioner

\_\_\_\_\_  
GERALD F. HODDINOTT, Commissioner

Parties:

Colleen J. Dugan  
202 N. Thornton Avenue  
Madison, WI 53703

Robin J. Fisher  
4349 Daentl Rd., Rt. 1  
DeForest, WI 53532

Dan Wallock  
Administrator, DMRS  
P. O. Box 7855  
Madison, WI 53707