

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 THOMAS J. THORNTON,
 Appellant,
 v.
 Secretary, DEPARTMENT OF
 NATURAL RESOURCES,
 Respondent.
 Case No. 88-0089-PC
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INTERIM
 DECISION
 AND
 ORDER

This matter is before the Commission on an appeal, pursuant to §230.44(1)(d), Stats., of a denial of an appointment. The following findings of fact, conclusions of law, opinion and order are based upon the evidentiary record made at the hearing on this appeal. To the extent that any of the opinion constitutes findings of fact and conclusions of law, they are adopted as such.

FINDINGS OF FACT

1. At all times relevant to this appeal, appellant has been employed by respondent, Department of Natural Resources (DNR) in the classified civil service as a conservation warden.

2. Respondent, Department of Natural Resources (DNR) is a state agency, which has primary responsibility for protecting and enhancing the state's natural resources.

3. On January 6, 1988, DNR, in a Promotional Announcement began departmental recruitment for three vacant Conservation Warden Supervisor I positions located in the Southeast District, (Milwaukee); the Northwest District, (Cumberland); and the South District, (Dodgeville). The

announcement also advised that applicants would be considered for similar future vacant positions over the following six to twelve months.

4. Appellant applied for the positions and took an examination for Conservation Warden Supervisor 1 and 2, which consisted of a multiple choice test and an achievement history questionnaire.

5. The examination was scored by the Department of Employment Relations (DER). After the scoring was completed, DER provided DNR with a listing of all the candidates and combined scores - scores of the achievement history test and the multiple choice test - of each candidate.

6. From the DER testing candidates and scores, Ruth Anderson, DNR Personnel Specialist established a register by putting the candidates and scores in rank order. The candidates on the register were those candidates who received a score of 70 or above and were, therefore, deemed qualified for the warden supervisor position.

7. Twenty-six candidates were placed on the register for the vacant positions. Appellant ranked fifth on the register. Thomas W. Wrasse, who was ultimately selected for the Dodgeville warden supervisor position, ranked nineteenth.

8. From the register, Anderson certified the top five candidates for each vacant position. These three certified lists were developed from the examination scores and the area preference of each candidate.

9. The appellant, Randy Rossing, John Lacenski, Barbara Wolf and Rick Koch were certified as the top five candidates for the Dodgeville position. Tom Hansen, a lateral transfer, was also included in that certified list. Tom Wrasse was ranked eighth and initially could not be considered for this position.

10. Approximately twelve certified candidates were interviewed for the three vacant positions on April 5, 1988 by an interview panel consisting of Chief Warden Ralph Christensen; Northwest District Warden John Plenke; Southern District Warden Tom Harelson and Southeast District Warden Doug Hoskins. The interview panelists were not given the examination scores of the candidates.

11. Each candidate was asked the same base questions. Base questions were followed up by clarifying questions from an individual panel member, depending upon the initial response of the candidate. Also, each candidate was given the opportunity for an opening and closing statement.

12. No specific criteria were established for grading the answers to the interview questions. However, the interviewers were asked to take notes and to be consistent in their grading of each answer.

13. After all interviews were completed, the interviewers discussed each candidate and came to a general agreement regarding the appropriate candidate for each vacant position.

14. At the time of the interview, the appellant had 22 years service with the respondent as a warden; the last 9 years were as a Conservation Warden 3. He had completed 2 years of college. Tom Wrasse served 4 years as a conservation warden and was a college graduate.

15. Prior to discussing the candidates with other interview panelists Christensen ranked the candidates. His rankings for the three positions were:

<u>Milwaukee</u>	<u>Dodgeville</u>	<u>Cumberland</u>
Krsnich	Hansen	Zabel
Wolf	Wolf	Thornton
Lacenski	Lacenski	Dauterman
Goldsworthy	Dauterman	Wrasse
Kalmerton	Wrasse	Koch
Koch	Thornton	
	Rossing	
	Koch	

16. Christensen ranked the appellant (Thornton) lower than Wrasse in the ranking of Dodgeville candidates because he believed the appellant would not move his family to the Dodgeville area, but would work out of a rented local apartment.

17. The following is John Plenke's ranking of candidates for the three positions:

<u>Milwaukee</u>	<u>Dodgeville</u>	<u>Cumberland</u>
Lacenski	Hansen	Zabel
Krsnich	Lacenski	Thornton
Wolf	Dauterman	Dauterman
Goldsworthy	Thornton	Wrasse
Koch	Wolf	Koch
Kalmerton	Rossing	
	Wrasse	
	Koch	

18. Tom Harelson discarded his interview notes in December after Wrasse was hired. However, he recalled he had ended up with the following ranking for the Dodgeville position: 1) Hansen; 2) Wolf; 3) Wrasse; 4) Dauterman; 5) Thornton. He could not remember his ranking for any candidates for the Cumberland position. He believed the appellant would not move his family to the Dodgeville area.

19. Doug Hoskins was not called as a witness and his interview notes were not a part of the hearing record.

20. Respondent's Manual Code 9121.2 provides:

Housing locations, telephone requirements and assigned work areas for specified law enforcement personnel are as follows:

1. Assigned work areas will be agreed upon by the Bureau of Law Enforcement and the district to provide complete law enforcement coverage.
2. All field wardens and warden supervisors will live within 10 miles of their assigned headquarters city (work station), will live within their assigned administrative area, and will have a listed home telephone in their name under the specified local prefix serving their specific assigned work station.
3. Field wardens and warden supervisors presently living in locations which do not meet these requirements are not required to

move; however, they must have a listed home telephone in their name on the exchange available to them.

4. Transfers or moves by field wardens and warden supervisors must conform to the requirements of numbers 1 and 2.
5. If for valid reasons these provisions cannot be complied with, the Secretary may grant an exception.

21. In a letter, dated April 14, 1988 from Tom Harelson, the applicant was advised that Tom Hansen was offered and had accepted the Dodgeville Warden Supervisor position. In addition, Harelson wrote: "I have always admired your character and dedication to the warden force and was impressed with your honest and straightforward answers in the interview. Your long and distinguished career could have been a fine addition to the Southern District."

22. On May 26, 1988, Tom Hansen, in a letter to James Huntoon, the Southern District Director, withdrew his acceptance of the Dodgeville position. He decided to remain at Green Bay.

23. After Hansen's withdrawal, Christensen consulted with interview panelist Tom Harelson, who supervised the Dodgeville position. They talked with James Huntoon and Ruth Anderson. It was decided to offer the position to Barbara Wolf.

24. Wolf declined and all the remaining candidates for the position were contacted to make certain their interest in the position.

25. When contacted, candidates Rick Koch and John Lacenski said they were no longer interested in the position.

26. Tom Wrasse became eligible as one of the top five candidates for the Dodgeville position after Rick Koch withdrew.

27. From a newly constructed list of five candidates, which included Tom Thornton, Tom Rossing, John Lacenski¹, Jeff Dauterman and Tom Wrasse,

Christensen and Harelson, after consulting with Huntoon and Anderson, selected Wrasse for the position effective June 8, 1988.

28. Respondent did not send letters to the unsuccessful candidates advising them of the Wrasse appointment.

29. On July 26, 1988, appellant filed this appeal with the Commission.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over appellant's appeal pursuant to §230.44(1)(d), Stats.

2. The appellant has the burden of proving the hiring decision made by respondent was illegal or an abuse of discretion.

3. The appellant has sustained his burden of proof by proving respondent's hiring decision was an abuse of discretion.

4. Respondent's hiring decision was an abuse of discretion.

OPINION

MERITS

The issue in this controversy is whether respondent's decision not to hire appellant at Conservation Warden Supervisor 2 as its Dodgeville station was illegal or an abuse of discretion.

Appellant, in his post hearing brief, does not claim respondent violated any law or acted illegally, but asserts that respondent's method

¹ Even though Mr. Harelson testified that Mr. Lacenski declined further consideration for the Dodgeville position, the certification list maintained by Ms. Anderson showed that Mr. Lacenski was not selected rather than not interested in the position. If, in fact, Mr. Lacenski did withdraw from consideration, no fifth name was ever added to the remaining four persons being considered for the Dodgeville vacancy.

of selecting Mr. Wrasse for the Dodgeville position was unusual and an abuse of discretion.

In Murray v. Buell, 74 Wis 14, 19(1889) the term, abuse of discretion, was defined as: "... a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence".

Applying this definition to the evidence in this case, the Commission must conclude that respondent's non-selection of appellant for the Dodgeville position was an abuse of discretion. The basis for this conclusion follows.

Respondent violated its own in-house selection procedure, when it hired Tom Wrasse for the Dodgeville position. Previously, respondent had selected the successful candidate by obtaining a consensus of the four-person interview panel. After Tom Hansen declined the Dodgeville appointment, this procedure was dropped. Instead of interview panel consensus, panelists Christensen and Harelson made the successive selections for the Dodgeville position and eventually hired Tom Wrasse. It is the belief of the Commission that this change in the selection process, which meant that two of the four panelists were not consulted prior to Mr. Wrasse's selection, was an abuse of discretion.

The evidence also clearly establishes that Christensen and Harelson gave appellant a poor rating for the Dodgeville position for reasons other than job competency. Both panelists testified they were concerned about appellant's statements during the oral interview regarding residency, and believed he would not move his family to the Dodgeville area. It was their belief that appellant's failure to move to the Dodgeville area if appointed to this position would violate Manual Code 9121.2. This general language of this section of the code requires warden supervisors to live within 10

miles of their assigned work stations. For the warden position at Cumberland, where residency was not an issue, Christensen ranked appellant two names higher than Wrasse. Harelson could not remember how he ranked appellant or Wrasse for the Cumberland position, but in a letter to appellant, written after the Dodgeville position was offered to Tom Hansen, he writes: "I ... was very impressed with your honest and straightforward answers in the interview. Your long and distinguished career could have been a fine addition to the Southern District." While the legitimacy of the question about residency was not raised as an issue by the appellant, the Commission believes Christensen's and Harelson's decision to virtually place a substantive value on the answer to that non-job related question was a abuse of discretionary authority.

During the oral interview, appellant was asked whether, if appointed to the Dodgeville position, he would move to that area. Based on his response, Christensen and Harelson decided appellant, if appointed, would not comply with the agency's residency requirement.² This decision was made before verifying their belief with appellant, giving appellant the option of presenting his position to the agency head or providing the secretary the opportunity to decide this matter. Regarding residency, respondent's Manual Code 9121.2 also provides: "If for valid reasons these provisions cannot be complied with, the secretary may grant an exception." There is no evidence that Christensen and Harelson were unaware of this provision in respondent's code on residency. Their conclusion that the

² The appellant testified his response to the residency question during the interview was that he would rent an apartment in Dodgeville.

appellant would violate the residency requirement was clearly against reason and evidence, and not justified.³

For the reasons above and based upon the record, the Commission believes the respondent abused its discretion during the process of selecting Tom Wrasse for the position of Dodgeville.

REMEDY

Pursuant to §230.44(4)(d), Stats., the Commission is precluded from removing the incumbent (Mr. Wrasse) because there has been no showing of obstruction or falsification as enumerated in §230.43(1), Stats. However, the fact that the Commission cannot remove the incumbent does not mean that it is prevented from awarding any relief to the appellant.

In Pearson v. UW, 84-0219-PC, 9/15/85⁴, after concluding that the respondent had abused its discretion in the hiring process, the Commission ordered the respondent to "appoint the appellant, if still qualified, to the disputed position (or comparable promotional position) upon its next vacancy." The Commission reasoned as follows:

The Dane County Circuit Court has held in the past that the Commission lacked the authority to require as a remedy for an abuse of discretion in a non-appointment that the appellant be appointed, if still qualified, to the position upon its next vacancy. DHSS v. Wis. Pers. Comm. (Fred Paul), 81CV1635, (Dane County Circuit Court,

³ The effect of the Commission's decision is not to prevent the respondent from applying a valid residency requirement to prospective employees. However, the existence of the exception which can be granted by the department secretary means that no candidate can be excluded by action of the rule until the candidate has been provided an opportunity to obtain such an exemption.

⁴ The appellant in Pearson appealed that portion of the Commission's decision denying him back pay, front pay and attorneys fees. The Commission's decision was affirmed. Pearson v. UW & Wis. Pers. Comm., Dane County Circuit Court, 85-CV-5312, 6/25/86; Court of Appeals, 86-1449, 3/5/87.

9/18/81). However, the Commission specifically declined to adhere to this holding in Seep v. DHSS, Case Nos. 83-0032-PC & 83-0017-PC-ER, 10/19/84, citing its relatively broad remedial authority, following the rejection of the action which is the subject matter of an appeal, to "issue an enforceable order to remand the matter to the person taking the action [i.e., the respondent] for action in accordance with the decision." (emphasis supplied.)

Appellant pointed out in its reply brief that:

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

One of the findings which served as a basis for the Commission's order in Pearson was:

[T]he evidence suggests appellant would have been chosen for the job if all interviewers' ratings were counted, if the ratings were correctly analyzed and if the choice had actually been made on the basis of training and experience.

In the present case, it is not altogether clear whether the appellant would have been selected if the residency requirement had not been considered and if all the panelists had input into the selection decision. There is no evidence as to how Doug Hoskins ranked the final five candidates for the Dodgeville position. We do know that Mr. Christensen ranked the appellant ahead of both Mr. Dauterman and Mr. Wrasse in terms of filling the Cumberland vacancy where the residency requirement was not a consideration but we do not know Mr. Christensen's ranking of Mr. Lacenski (if, in fact, Mr. Lacenski was still being considered for the Dodgeville vacancy). Panelist John Plenke ranked the appellant ahead of Mr. Wrasse in terms of the Dodgeville position, although he ranked the appellant behind both Mr. Lacenski and Mr. Dauterman. The fourth panelist, Mr. Harelson recalled that he ranked the appellant fifth, Mr. Wrasse third and Mr. Dauterman fourth among the final five candidates for the Dodgeville position. The


implication from Mr. Harelson's testimony is that his low ranking of the appellant reflected the belief that the appellant would not comply with the residency requirements. However, Mr. Harelson had discarded his notes from the various interviews at some point prior to the hearing in this matter and there is no indication Mr. Harelson should have ranked the appellant ahead of Mr. Dauterman. When these bits of information are considered together, there is still insufficient evidence on which the Commission could conclude that the appellant would have been selected had the respondent properly ranked the five candidates for the Dodgeville position, i.e. if the respondent had not weighed the responses to the residency question and if all four panelists had been consulted.

Based upon the above analysis, the only appropriate remedy in this matter is to order the respondent to cease and desist from continuing those practices in the selection process that have been found to constitute an abuse of discretion.


ORDER


The respondent shall cease and desist from engaging in those practices identified in this decision as constituting an abuse of discretion.

Dated: November 15, 1989 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:gdt
ID5/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

Thomas J. Thornton
1201 Prissel Street
Durand, WI 54736

Carroll Besadny
DNR - 5th Floor, GEF 2
P.O. Box 7921
Madison, WI 53707