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On time for interview. Fair appearance. Seems fairly motivated. Has janitorial experience -- worked at Hospital before as LTE. Came across fairly well during interview. Slow in comprehending information. Eager to get some permanent job. Working odd jobs on farm in area.

7. Mr. Nedlose usually hired applicants with a rating of 7 or more. Nedlose's first choice for the position was an applicant, other than appellant, but he declined.

8. Mr. Nedlose then requested a second certification list. That list also included appellant's name. No one responded to respondent's notices of interview.

9. After Mr. Nedlose received a third certification list, he decided to offer the position to appellant.

10. Appellant was scheduled for a physical examination on November 30, 1989, at 1:00 p.m.

11. While waiting for his physical examination, appellant encountered Mr. Talarek, the head of the department in which appellant was attempting to gain employment. The appellant told Mr. Talarek he was going to be working at the hospital again.

12. Appellant was twenty years old when first employed by respondent in March 1979. He worked in the same department as the current vacant position.

13. At that time Mr. Talarek was the Assistant Director of the department and was involved in hiring and training appellant, but never directly supervised him.

14. In May 1979, appellant was involved in a gun incident with a neighbor. He was arrested, charged, and in October 1979, convicted of some criminal offense.

15. Shortly afterwards, appellant resigned from his position with respondent because he was depressed and at the insistence of his father.

16. Due to a shortage in staff, appellant continued to work for respondent after his date of resignation, finally leaving in November 1979.

17. During this same period Mr. Talarek and his supervisor recommended appellant's discharge, and Talarek believes the recommendation

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Based on the record, appellant does not claim respondent committed any act in violation of Chapter 230, Stats., but contends respondent abused its discretion when it decided not to consider him for the BMH 2 position. We agree.

In McCleary v. State, 49 Wis. 2d 263 (1971), the court said:

"Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards."

The evidence shows appellant ceased to be considered by respondent for the BMH 2 position because the director of the hiring unit believed appellant had been terminated by that unit from a similar position in 1979, and his employment application indicated he had been unemployed five years. Mr. Talarek testified he recalled appellant was terminated for work problems and emotional instability, but could not be more definitive. Talarek also testified that it was his unit's policy not to rehire an employee it terminated.

Appellant denied being terminated by respondent. He testified that he gave respondent a two-week notice of resignation, but remained an additional two or three weeks because of a shortage in staff. Appellant attempted to obtain verification of his separation from employment with respondent, but was informed the only information available referenced only his date of appointment.

It is clear that respondent had authority to appoint a person to the BMH 2 position, subject to Subch. II Civil Service, Chapter 230, Stats., and concomitant rules. Also it is clear that respondent as an appointing authority is invested with discretion in making appointments. In the instant case, respondent exercised its hiring discretion when it concluded appellant should not be considered for the BMH 2 position.

The Commission in Pearson v. UW, No. 84-0219-PC (1985), said it was not a question of whether it agreed or disagreed with the appointing authority's decision, but rather whether the appointing authority properly exercised its discretion. In the present case before the Commission, respondent based its

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discretionary conclusion primarily on its belief that terminated appellant in 1979 from a similar position because of "work problems and instability."¹

The Commission, based on the facts of record, views respondent's hiring action against appellant as an abuse of discretion. Appellant was attempting to obtain a job at the base level of the civil service employment ladder. The particular job required no special training or job experience prerequisite. The duties included cleaning and sanitizing rooms and offices of the hospital, using various cleaning solutions and equipment, cleansing and maintaining areas immediately surrounding the building. Appellant, who had an irregular work record, was rejected by respondent essentially because Mr. Talarek believed appellant had been terminated 10 years ago from a similar job and it was respondent's policy not to rehire anyone it terminated. Standing alone, respondent's "no rehire" policy, however onerous, may not be illegal, but the particular facts in this case are insufficient to justify respondent's action. The particular facts are: Appellant was 20 years old when the alleged termination took place. The position involved menial tasks which posed relatively low risks for respondent. Mr. Talarek only vaguely recalled the reasons for appellant's termination. Appellant denied he was terminated and testified that he resigned. Appellant gave a detailed account of the circumstances surrounding his resignation. Respondent's records of appellant's prior employment show only his date and type of appointment.


The Commission has found that appellant indeed resigned rather than having been terminated. The facts of record show that respondent primarily based its action of not appointing the appellant on the application of its "no rehire" policy to an unsubstantiated recollection of events which took place 10 years ago to a person 20 years of age. It is the Commission's opinion that respondent's action under these circumstances was unjustified and an abuse of discretion.

¹ Testimony of Mr. Thomas M. Talarek, Tape No. 1: 1238.

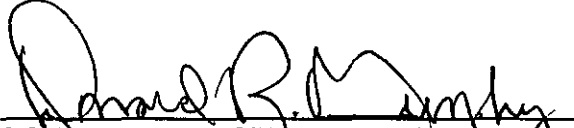
ORDER


The decision of respondent in not appointing appellant to the Building Maintenance Helper 2 position is rejected and this matter is remanded for action in accordance with this decision.

Dated: October 4, 1990 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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