



STATE OF WISCONSIN

PERSONNEL COMMISSION

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MATTHEW G. ZEBELL,

Appellant,

v.

Secretary, DEPARTMENT OF
INDUSTRY, LABOR AND HUMAN
RELATIONS,

Respondent.

Case No. 90-0017-PC

* * * * *

INTERIM
DECISION
AND
ORDER

Nature of the Case

This is an appeal of a hiring decision. A hearing was held before Laurie R. McCallum, Commissioner, on June 5, 1990, and the briefing schedule was completed on June 28, 1990.

Findings of Fact

1. On or around October 26, 1989, respondent announced a promotional recruitment for an Unemployment Compensation Associate 2--Leadworker position in the Combined Wage Claims Unit, Interstate Benefits Section, Bureau of Benefits, Unemployment Compensation Division. The job description provided in the announcement stated as follows:

Under the general supervision of the Interstate Benefit Section Claim Service Supervisor, perform leadworker duties in the Combined Wage Claim Payment and Transferring State Sub Unit. The leadworker is responsible for assigning and reviewing work; monitoring quality of work; providing training; and technical assistance to staff. This position is also responsible for reconciliation of account records for paying and transferring state claims; wage transfers for CWC claims; authorization of out of state wages for use in combined wage claims with Wisconsin as the paying state; and amendments of initial combined wage claim

monetary computations including related overpayment determinations.

2. An examination was administered and five names certified to respondent for this vacant position. These names were those of: appellant, Karen Vieweger, Paul Federer, John Witham, and Jeannine Sersch.

3. Respondent decided to interview each of the certified candidates as the next step in the recruitment and selection process. Respondent considered the interview phase as a critical part of the interview and selection process. The interviewers were Jane Ziegler, the first line supervisor for the subject position; Gary Dobbs, the Adjudication Supervisor for the Interstate Benefits Section; and Lee Shorey, the Section Chief of the Interstate Benefits Section.

4. Mr. Shorey drafted the interview questions and designed the scoring system. Mr. Shorey, with input from the other interviewers, also drafted specific benchmark responses which were listed on the scoring sheet beneath each question. If an interviewer felt that a particular benchmark response or a response closely akin to it had been mentioned by a candidate during his or her interview, the particular benchmark response was checked by the interviewer on that candidate's interview sheet. Each benchmark response was assigned a number value and the total value of the benchmark responses checked for a candidate constituted that candidate's interview score. The interview questions were designed to measure leadership skills, organization skills, judgment, and ability to get along with others and were as follows:

1. What experience, education or training, both work related and personal, have you had that would prepare you to be a leadworker in this unit?
2. What elements are important for a good relationship with your supervisor?
3. It is very possible that at first the staff in this unit will know as much if not more than you do about the work. How will you become an effective leadworker under these circumstances?

4. How would you deal with the following situation?

You are assigned to help find the cause(s) and to initiate corrections for any work related problems of a person who has not met the performance standards set for them.

5. Much of the work in the CWC paying state operation has been shifted from setting up initial claims to amending monetaries. If workload was so high that all amends could not be done on a timely basis, what order of priority would you set for the various types of amends?

5. Each of the five certified candidates was interviewed in accordance with the interview process described above. The interviewers were generally not favorably impressed with the quality of the interviews.

6. The interviewers' scores for each of the candidates were as follows:

	<u>Ziegler</u>	<u>Shorey</u>	<u>Dobbs</u>
Vieweger	220.50	185.50	169.50
Zebell	174.50	237.00	297.00
Witham	205.50	171.00	229.00
Sersch	202.25	234.50	167.50
Federer	199.50	211.50	219.50

7. The total scores for each candidate were as follows:

Vieweger: 575.50

Zebell: 708.50

Witham: 605.50

Sersch: 604.25

Federer: 630.50

8. Generally, the benchmark responses checked by the interviewers for a particular candidate were similar, i.e., generally, when one of the interviewers had checked a particular benchmark response, at least one of the

other interviewers had done so as well. The following represents those instances in which this did not occur, i.e., those instances in which an interviewer either checked a benchmark response which neither of the other interviewers checked (indicated in the chart below by a + mark followed by the number of times this occurred in regard to a particular candidate) and those instances in which an interviewer did not check a benchmark response which both of the other interviewers checked (indicated in the chart below by a - mark followed by the number of times this occurred in regard to a particular candidate):

	<u>Ziegler</u>	<u>Shorey</u>	<u>Dobbs</u>
Vieweger	+4	+1	
Zebell	-4		
Witham	+1		
Sersch			
Federer	-2		

9. After the interviews were completed, the interviewers discussed the results of the interviews and decided that, since they were not in agreement as to which candidate should be offered the position and were generally not favorably impressed with the quality of the interviews, they would contact present and past supervisors of the candidates to solicit their opinions and impressions of each candidates' leadership skills, organizational skills, judgment, and ability to get along with others. These contacts were made by Ms. Ziegler. She did not make any contacts in regard to appellant since appellant had been supervised by each of the interviewers during his employment with respondent.

10. The interviewers met again after Ms. Ziegler had completed the contacts described above. Ms. Ziegler recommended that Ms. Vieweger be offered the position since her contacts had indicated that Ms. Vieweger worked well with others and Ms. Ziegler felt that she and the staff of the CWC unit could work more easily with Ms. Vieweger than with appellant. The other interviewers accepted Ms. Ziegler's recommendation and offered the position to Ms. Vieweger. Ms. Vieweger accepted this offer.

11. On February 2, 1990, appellant filed a timely appeal of the subject hiring decision.

12. Approximately one week after the subject hiring decision was made, Ms. Ziegler prepared a narrative summarizing and justifying the hiring decision. This narrative stated as follows, in pertinent part:

Matthew Zebell

Positives: Knows work well;

Likes to work on enhancements to system and has ability to recognize potential problems;

Is taking some computer courses that could possibly be helpful.

Negatives: Has never established a good rapport with me. He continues to by-pass me with problems, questions, suggestions, etc.

He is cooperative as long as things are going his way but if he is questioned about some of his actions or if something he requests is turned down, such as a complaint he wants immediate action on, a change in procedure he wanted enacted, or a personal request for time off, he becomes very belligerent and uncooperative for a period of time. He gets mad very quickly and allows his temper to affect his dealings with peers, other local office staff, other administrative office staff and superiors.

We have been asked by one of the units that communications must remain open with not to allow Matt to come into their unit because he has insulted the staff and they do not want to deal with him.

He has recently been in a position with more expertise than his co-workers and was asked to help them with their questions. They have informed me that they are uncomfortable going to him for help because his response to them depends on his mood. Even when he is in a good mood, he often just tells

them what to do without explaining why or how they will recognize the situation the next time.

He has always had the reputation for being gone from his work area a great deal of time and had a problem in the past of setting his own schedule and leaving early whenever he wanted to. He continued to do so even when the acting supervisor at the time told him to adhere to his scheduled hours.

Result - Not hired

The most important quality looked for in hiring for this position since all of the candidates have the technical ability is the ability to get along with all the people this person will have to work very closely with, including the supervisor, the members of the unit, other unit supervisors and members, local office staff and the public. This person must be able to establish and maintain a good working relationship with these people and it was agreed on by the panel that Matt has not shown this ability.

Karen Vieweger

Positives: Did an excellent job while employed in IB/CWC.

Has done an excellent job in present position. Had opportunity to use organizational skills and applied them above expectations.

Deals with public over the phone and has proven herself to be very good at it. Was able to do job as originally assigned as well as taken on additional duties which led to a re-class.

Gets along well with peers, other units, supervisory personnel and the public.

Her present supervisor also felt that Karen determines priorities very well.

Per her 1988 evaluation she also has some basic computer and software knowledge.

Negatives: The only negative would be the potential for lack of cooperation from some of the staff by bringing in a person not currently in the unit. However, it was felt that since she got along well with everyone in the unit during her prior experience there that this could be overcome.

Result - Hired

She most closely had the attributes we were looking for in a lead worker, the ability to get along with people at all levels, organizational skills, good judgment and leadership.

13. At the hearing in this matter, Ms. Ziegler was asked to describe specific incidents in which appellant had demonstrated his inability to get along with her. Ms. Ziegler described only one such incident in which appellant became upset when she denied his request to use vacation time for a

trip he had planned to take to the Caribbean and for which he had already purchased the tickets. Mr. Shorey testified that appellant had had problems working with a former employee in the CWC unit and could recall an instance where appellant put a current CWC unit employee in an uncomfortable position.

14. At the hearing in this matter, each of the individuals employed in the CWC unit at the time the subject hiring decision was made testified regarding their working relationship with appellant. Each of them testified that they had not had problems getting along with appellant, and one testified that he did not have a reputation in the unit for having problems getting along with other staff. Several of these witnesses also testified that when they had questions regarding their work, they went to appellant for assistance since he was the only one in the unit who had the necessary expertise. One of these witnesses testified that, despite this, she had been directed by Ms. Ziegler not to request assistance from appellant. At the hearing, each of these witnesses showed affection and respect for appellant. One of these witnesses testified that appellant had had a problem working with a former CWC unit employee. Appellant did not have problems getting along with his co-workers in the CWC unit and was the acknowledged expert on the issues dealt with by the CWC unit.

15. At the hearing in this matter, several individuals employed by other units which had frequent contact with the CWC unit testified as to their working relationship with appellant. Each of these witnesses testified that they had had no problems working with appellant and they respected his abilities. Appellant did not have problems getting along with staff in other units and was regarded by them as a technical expert on the issues dealt with by the CWC unit.

16. Ms. Vieweger's relevant employment history was included in a resume which was available to and reviewed by the interviewers at the time the subject hiring decision was made. This resume stated as follows, in pertinent part:

Employed by the State of Wisconsin Department of Industry Labor and Human Relations as a permanent employee since June 1980.

Madison District Unemployment Office: June 1980 - June 1986. Varied duties including claims taking, claims entry, monetary computations, claim card processing, telephone and in-person inquiries, adjudication receptionist, disputed claims review, scheduling issues, disputed claims decision entry.

Safety and Buildings Plumbing Bureau: June 1986 - November 1986. Conducted a correspondence course training for Apprentice and Journeyman plumbers for licensing purposes.

Madison district U.C. Office: November 1986 - April 1987. Adjudication receptionist, disputed claims review, scheduling issues, disputed claims decision entry.

Combined Wage Claim Unit U.C. Division: April 1987 - February 1988. Monetary technician.

Bureau of Benefits U.C. Division: February 1988 - Present. Answer telephone and written inquiries from claimants, employers, legislative aides, and other agencies regarding a multitude of unemployment related questions including new law, general eligibility, delayed claim payments, disputed claims, benefit charges to employer accounts and forms.

17. Appellant's relevant employment history was included in a resume which was available to and reviewed by the interviewers at the time the subject hiring decision was made. This resume stated as follows, in pertinent part:

Nov. 1979 - Present Title: Unemployment Compensation Associate I. Department of Industry, Labor and Human Relations (DILHR), Job Service Division.

Duties: (1) Recompute benefit entitlement, reallocate charges among states and Wisconsin employers based on corrected or erroneous monetary data or legal determinations.

(2) Determine UC monetary rights for claimants with base earnings in more than one state under the interstate arrangement for combined wage claims (CWC)

(3) Request wage, separation and employment data necessary for CWC. Prepare documents for monetary determinations.

(4) Resolve daily system rejects, identify, work up and submit for investigation potential fraud issues.

(5) Expedite CWC's and related charges of liability through various intrastate and interstate communications networks.

(6) Provide expertise and advice to bureau and local office staff.

18. Appellant requested and received a meeting with Ms. Ziegler after the subject hiring decision was made. Appellant's union steward was also present at this meeting. At this meeting, Ms. Ziegler stated that, in the final analysis, the choice was between appellant and Ms. Vieweger for the subject position and Ms. Vieweger was chosen because, in Ms. Ziegler's opinion, she would be able to work better with Ms. Vieweger than with appellant.

Conclusions of Law

1. This matter is appropriately before the Commission pursuant to §230.44(1)(d), Stats.
2. Appellant has the burden to show that respondent's failure to appoint appellant to the subject position was illegal or an abuse of discretion.
3. Appellant has sustained this burden.
4. Respondent's failure to appoint appellant to the subject position was 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." Appellant has not alleged any illegality in this regard.

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, Case 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, Case No. 81-74-PC (1982).

In the instant case, respondent devised and implemented an elaborate interview process. Respondent specifically acknowledged at hearing that the interview phase was a critical part of the recruitment and selection process. However, when the results of this process did not accord with the interviewers' expectations or hopes, the process was abandoned. In its stead was substituted a process with only one criterion, i.e., whether the candidate was one with whom Ms. Ziegler thought she and the CWC unit staff could get along.

Even though the ability to get along with others could have been a legitimate selection criterion for the subject position [Harbort v. DILHR, Case No. 81-74-PC (4/2/82); Paul v. DHSS & DMRS, Case Nos. 82-156-PC, 82-PC-ER-69 (1986)]., the conclusion reached by Ms. Ziegler after application of this criterion to appellant's candidacy was inaccurate in view of the facts established by the record in this matter. Ms. Ziegler concluded, or at least has represented that she concluded, that appellant had problems getting along with others in a work setting. Ms. Ziegler testified at hearing that appellant had difficulty accepting Ms. Ziegler's decisions and difficulty taking direction from her. However, the only specific incident she could cite was that relating to the denial of permission for appellant to take vacation summarized above in

Finding of Fact 13. It is not surprising that an employee who had planned to take a trip and had already purchased tickets for this trip^{FN} would be very disappointed when he learned that he wouldn't be able to go on the trip and for this employee to express his disappointment to the supervisor communicating the decision to him. Ms. Ziegler did not indicate that appellant's reaction was abusive, violent or sustained but described it as angry and discourteous. Such behavior, although inappropriate in a work setting, hardly seems to constitute an adequate or convincing basis for sustaining a general conclusion that an employee has problems getting along with his supervisor. Ms. Ziegler also concluded, or at least represented that she had concluded, that appellant had problems getting along with other staff in the unit. However, at the hearing, each of the individuals who was employed in the unit at the time the subject hiring decision was made testified that they had never had a problem getting along with appellant, that he didn't have a reputation in the unit for having problems getting along with other staff, and, in fact, that they had affection and a great deal of respect for him. This successfully rebutted Mr. Shorey's testimony that appellant had had a problem getting along with a then-current CWC unit employee. In addition, the specificity and consistency of this testimony successfully rebutted Ms. Ziegler's testimony that appellant had a reputation for having problems working with others. Ms. Ziegler also concluded, or at least represented that she concluded, in her post-hiring narrative, that appellant had a problem dealing with staff in other units. However, at the hearing, staff from other

^{1FN} The record does not specifically indicate how or why appellant obtained these tickets prior to receiving approval for the requested leave. The record does indicate that appellant initially made his request for leave far in advance of the requested leave dates but that Ms. Ziegler did not make the final decision on the request until some time later.

units which interacted on a regular basis with appellant and with the CWC unit testified that they had never had a problem working with appellant and that they respected his abilities. Respondent did not rebut this testimony with any specifics to confirm Ms. Ziegler's representation in the narrative on this point or to rebut the testimony in this regard.

It is disturbing as well to realize that, in regard to the subject hiring decision, the specter of pre-selection or pre-elimination appears. First of all, it appears as though Ms. Ziegler's scoring of the candidate interviews gave the benefit of the doubt to Ms. Vieweger's interview but the converse to the appellant's. The chart in Finding of Fact 8 confirms this. Despite this, appellant received the highest total interview score and Ms. Vieweger the lowest. Once this result became apparent, the results of the interview process were ignored in making the subject hiring decision. The objectivity and structure of the interview process was abandoned and some sort of popularity contest was substituted which resulted in the lowest-ranked candidate being selected for the subject position. Such a result could be understandable if the interview scores of the candidate were compressed and close or if the relevant work backgrounds of the candidates were similar. However, such is not the case here. Appellant's total interview score was 23% higher than Ms. Vieweger's. In addition, Ms. Vieweger had worked for respondent for 10 years but had worked in the CWC unit and with the issues encountered in the CWC unit for only 10 months. In contrast, appellant had worked in the CWC unit for over 10 years and was the acknowledged expert on the issues encountered in the CWC unit. Ms. Ziegler's representation that these two candidates' technical backgrounds vis a vis the technical requirements of the subject position were similar is also inconsistent with the record in this regard.


The Commission concludes on this record that respondent, acting through Ms. Ziegler, manipulated the subject hiring process to avoid hiring appellant and that, absent this manipulation, appellant would have been the successful candidate. This constitutes an abuse of discretion within the meaning of §230.44(1)(d), Stats., and requires the rejection of the subject hiring decision.

As a remedy, appellant has requested a pay adjustment and a reprimand for the interviewers. The imposition of discipline is within the discretion of the employer and outside the Commission's authority and, as a result, the Commission leaves that matter to respondent. In Pearson v. UW, Case No. 84-0219-PC (9/16/85); aff'd by Dane County Circuit Court, Pearson v. UW & Pers. Comm. 85-CV-5312, (6/25/86); aff'd by Court of Appeals District IV, 86-1449, (3/5/87), the Commission held that in a successful appeal under §230.44(1)(d), Stats., it lacked the authority to remove an incumbent (see §230.44(4)(d), Stats.) but ordered the respondent to "appoint the appellant, if still qualified, to the disputed position (or comparable promotional position) upon its next vacancy." The Commission went on to reject the appellant's request for back pay because the appointment decision did not have the "direct and immediate impact of removing her (him) from employment," distinguishing Yanta v. Montgomery Ward and Co., 66 Wis. 2d 53, 61 (1974). [See also Seep v. DHSS, Case Nos. 83-0032-PC, 83-0017-PC-ER (10/10/84); aff'd in part, reversed in part by Racine Circuit Court, Seep v. State Pers. Comm., 84-CV-1705, 84-CV-1920 (6/20/85); supplemental findings were issued by the Commission on 2/2/87; aff'd in part, reversed in part by Court of Appeals District II, 140 Wis. 2d 32, 5/6/87)]. The Commission will follow this precedent here.

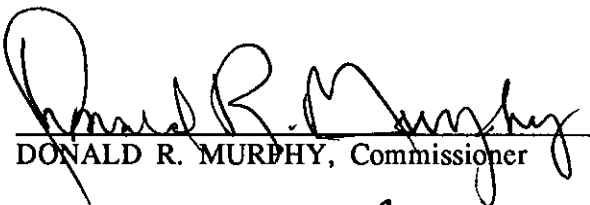
Order

The action of respondent in not appointing appellant to the subject 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

LRM:gdt/2


DONALD R. MURPHY, Commissioner


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