STATE OF WISCONSIN PERSONNEL COMMISSION

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DOUGLAS J. SMITH,

Appellant,

v.

Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,

Respondent.

Case No. 90-0032-PC

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INTERIM DECISION AND ORDER

This matter is before the Commission following the promulgation of a proposed decision and order. The Commission has considered the parties' written objections and oral arguments concerning the proposed decision and order, and now adopts the same as its final substantive disposition of this matter, with the following comments.

Respondent's objections to the proposed decision and order run primarily to the conclusion concerning abuse of discretion and the scope of the relief ordered.

As noted in the proposed decision, the parties stipulated to the issue of "[w]hether it was illegal or an abuse of discretion for DMRS to have included Mr. Drummond in the certification for this position." (stipulation dated September 12, 1994). The proposed decision first analyzes the question of illegality and then, after having concluded that this action was illegal, goes on to address the question of whether the action constituted an abuse of discretion. Implicit in this approach, as well as in the stipulated issue, is the premise that respondent had discretion to exercise with respect to the question of whether to certify a non-resident (Mr. Drummond) for this position. In the Commission's opinion, for the reasons set forth below, this decision did not involve a discretionary transaction. Therefore, the issue of whether there was an abuse of discretion is essentially superfluous.

In applying and interpreting the statutory framework for the classified civil service merit system, DMRS no doubt not infrequently must exercise its discretion. However, the question of whether to allow a nonresident to compete for a position does not require the exercise of discretion, because the controlling statute clearly prohibits this (in the absence of the determination

of a critical need, which did not occur here). Section 230.16(2), Wis. Stats., provides:

> (2) Competitive examinations shall be free and open to all applicants who at the time of application are residents of this state and who have fulfilled the preliminary requirements stated in the examination announcement. To assure that all residents of this state have a fair opportunity to compete, examinations shall be held at such times and places as, in the judgment of the administrator, most nearly meet the convenience of applicants and needs of the service. If a critical need for employes in specific classifications or positions exists, the administrator may open competitive examinations to persons who are not residents of this state. (emphasis added)

Even assuming, arguendo, the possibility of ambiguity with respect to the language in the first sentence, as respondent apparently asserts, this is resolved definitively by the language in the last sentence of this subsection.[1]

As pointed out in the proposed decision: the general rule is that "an administrative officer has no discretion to disregard the language of a statute in performing his duties." Milwaukee Co. v. Schmidt, 52 Wis. 2d 58, 66, 187 N.W. 2d 777 (1971); see also, Clintonville Transfer Line v. Public Service Commission, 248 Wis. 59, 70, 21 N.W. 2d 5 (1945) ("We find no statutory authority by virtue of which the Public Service Commission may make orders limiting the exercise of its own statutory powers"); Dillard v. Industrial Commission of Virginia, 416 U.S. 783, 795, 94 S. Ct. 2928, 2035, 40 L. Ed. 2d 540 (1974) ("commission is without power to promulgate a rule that would repeal a section of the Act." (citation omitted)).

It is undisputed that Mr. Drummond was allowed to compete and subsequently to be certified because of respondent's decision not to follow this statutory provision, in reliance on an attorney general's opinion that this

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[1]The Attorney General's opinion which concluded that the residency requirement ran afoul of the equal protection clause did not allude to any ambiguity in the law:

> You point out that section 230.16(2), Stats., requires that all applicants for positions in the classified service be residents of Wisconsin at the time of application. The application and examination process may be opened to non-residents if there is a critical need for employes in specific classifications or positions. Sec. 230.16(2), Stats., The application process for unclassified positions, on the other hand, is not limited to residents of Wisconsin. 76 OAG, 45, 45 (1987).

residency requirement for positions in the classified civil service was unconstitutional. As the proposed decision noted:

> Respondent has cited no authority for the proposition that an administrative agency may decline to enforce a statute it is charged to enforce because of an opinion that it is unconstitutional, and Nodell Ins. Corp. v. Glendale, 78 Wis. 2d 416, 426, 254 N.W. 2d 310 (1977), suggests the contrary: "the administrative agency has no right to repeal or declare unconstitutional zoning ordinances enacted by the legislative body from which [it] derives its existence." (footnote omitted).

Respondent argues that it did not determine that §230.16(2) was unconstitutional, but rather it relied on the attorney general's opinion. In the Commission's opinion, this is not a persuasive distinction. While the attorney general's opinion is entitled to a certain amount of deference, that officer does not have the authority to effectively invalidate a statutory provision in the sense that the judiciary can. Whether it relied on the opinion of the attorney general, house counsel, or some other source, respondent's action of refusing to enforce §230.16(2) because of an opinion concerning its unconstitutionality has the practical effect of an administrative invalidation of a legislative act, which is inconsistent with the authorities cited above.

In addition to these authorities, in the Commission's opinion, an agency decision to decline to follow a statute because of a nonjudicial opinion of its unconstitutionality would be inconsistent with basic principles of the separation of governmental power into the legislative, executive and judicial branches. See e.g., 16 Am Jur 2d Constitutional Law §150.

> It is within the especial province and duty of the courts and the courts alone, to say what the law is, and to determine whether a statute or ordinance is constitutional, and no express constitutional authority for such action is necessary; it is a necessary consequence of our system of government. (footnotes omitted)

In conclusion, because respondent acted without legal authority when it certified Mr. Drummond's name, the Commission concurs in the conclusion reached in the proposed decision that respondent thus acted illegally and arbitrarily, and to the extent that the concept of abuse of discretion is applicable here, its action constituted an abuse of discretion.

With respect to the remedy[2], respondent contends that compliance would require screening for state residency tens of thousands of job

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[2]The proposed decision and order requires respondent "to cease and desist from a similar violation of the civil service code with respect to any

applicants at the point of filing their application and thus would create an intolerable administrative burden, However, the remedy does not require respondent to utilize any particular method of enforcing the residency requirement, it simply prohibits respondent from violating the law with respect to exams in which appellant participates. Respondent has made no showing that this goal could not be accomplished without employing the draconian measures it cites.[3]

Respondent also contends that since appellant suffered no injury as a result of the violation of §230.16(2), that he is not entitled to a remedy. As the proposed decision discussed, appellant did not suffer a tangible injury, because due to his relatively low test score, he was not in a position to have been certified even if Mr. Drummond's name had not been placed on the register. That is, on this record it can not be concluded that appellant would have been either appointed or certified in the absence of the violation of §230.16(2). However, appellant was affected by the violation at least to the extent that his exam rank was lower than it would have been had Mr. Drummond been excluded from the process because of his non-resident status. Appellant is entitled in the future to be able to compete without the potential effect of a violation by respondent of §230.16(2).

Appellant objects that the remedy does not go far enough, that Mr. Drummond should be removed from the position in question, and that appellant should be appointed to it. For the reasons set forth in the proposed decision, the Commission agrees that this record does not support a conclusion that §230.43(1), Wis. Stats., has been violated and thus there is lacking a prerequisite to the removal of the incumbent, and that such relief would exceed a make-whole remedy.

ORDER[4]

The proposed decision and order, a copy of which is attached, is adopted as the Commission's final disposition of this case (with the correction of

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future examinations and certifications in which appellant may participate." p.16.

[3]For example, if appellant passed an examination for a position in the classified service, respondent presumably then could screen for residency anyone ahead of appellant on the register.

[4]This is being promulgated on an interim basis pursuant to §227.485(5) Wis. Stats., so the prevailing party will have the opportunity to submit an application for costs.

certain typographical errors), and this matter is remanded to respondent for action in accordance with this decision.

Dated: August 3, 1995 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT:rcr

Parties:

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STATE OF WISCONSIN PERSONNEL COMMISSION

DOUGLAS J. SMITH,

Appellant,

v.

Secretary, DIVISION OF MERIT, RECRUITMENT and SELECTION

Respondent.

Case No. 90-0032-PC

PROPOSED DECISION AND ORDER

NATURE OF THE CASE

This case involves an appeal pursuant to §230.44(1)(a), stats. of an examination and certification. Pursuant to stipulation, this case has been held in abeyance for a period of time while appellant attempted to pursue other remedies.

The stipulated issues for hearing in this case are as follows:

> 1. Whether it was illegal or an abuse of discretion for DMRS to have included Mr. Drummond in the certification for this position [Administrative Officer 2-Supervisor (Safety Director)].
>
> 2. Whether DMRS's administration of the examination was in accordance with the civil service code, and specifically sec. 230.16(4) and (5), Stats.
>
> 3. What remedy, if any, is appellant entitled to if he prevails. (Stipulation dated September 12, 1994) (brackets in original)

The following findings are based both on the parties' stipulation of facts and on the evidence presented at hearing.

FINDINGS OF FACT

1. The position which is at issue in this proceeding is the position of Administrative Officer 2-Supervisor (AO 2-Supv), Safety Director, for the U.W. Madison, Safety Department. Prior to June 1990, this position was held by Mr. Robert Radtke.

2. Sometime in 1989, Mr. Radtke announced to his supervisors that he planned to retire in June 1990. At that time the Safety Director position was a classified civil service position and it was decided that the vacancy would be filled by administering a competitive examination.

3. Respondent DMRS retained responsibility for the examination and certification process, as opposed to delegating formal responsibility for the exam to the employing agency pursuant to §230.05(2)(a), stats. However, Joanne Hartwig of the UW-Madison classified personnel office assisted Robert Boetzer of DMRS in the exam process.

4. After Mr. Radtke announced that he would be retiring, the first step in the process to fill the expected vacancy was to review Mr. Radtke's position description and to decide whether it needed any changes or amendments. A new position description (PD) was developed for the position of Safety Director by Mr. Phillip Michalski (who at that time was Mr. Radtke's immediate supervisor) and Mr. Donald Sprang (who was then the Personnel Manager for the Physical Plant at UW-Madison), with some input from Mr. Radtke.

5. The new position description was then given to the Classified Personnel Office at UW-Madison and was used as the basis for developing the job vacancy announcement, the examination plan, the list of knowledges needed to perform the job, and the examination questions.

6. Ms. Hartwig was responsible for developing an examination plan, developing a list of rated knowledges necessary to perform the job and for assisting DMRS in the entire examination process. Mr. Boetzer was responsible for reviewing and approving the materials provided by Ms. Hartwig; for finding "job experts" to assist in developing questions, and to rate the AHQ's for the overall development and administration of the exam; and to ensure that the exam was job-related and valid.

7. Mr. Boetzer actively sought "job experts", both within and outside of the UW-Madison, to help provide these questions, and to rate the AHQ's. The "job experts" he used to assist in developing test questions were: Ms. Terry Moen, Mr. Ron Remy, and Dr. Paul DeLuca.

They were qualified to serve as "job experts" based on the following summary of their training and experience:

a. Moen: Chief, Section of Occupational Health, DHSS. BS and MS in molecular zoology and other training relating to safety

issues. She had familiarity with the position in question through having worked with Mr. Radtke in various capacities.

b. Remy: Director, Bureau of Safety Inspection, DILHR. He had worked closely with the UW Safety Department in enforcement and consultation on state occupational safety and health standards.

c. De Luca: Chariman, School of Medical Physics, UW-Madison, Ph.D. in nuclear physics, and former chairperson of campus committee on radiation safety. He had worked extensively with Mr. Radtke for many years.

8. These job experts provided Mr. Boetzer with information about what points the candidates should be asked about in the exam and the points (or areas) on which they should be rated. Mr. Boetzer and Ms. Hartwig then used this information to develop proposed test questions and benchmarks, which were reviewed and approved by the job experts before they were made final.

9. After the questions for the exam were developed and approved, the next steps in the examination process were:

12/89--Achievement History Questionnaires (AHQ's) were mailed out to candidates who had submitted an application form by the designated deadline;

1/5/90--Due date for applicants to submit the completed AHQ's to UW-Madison, Classified Personnel Office:

1/19-1/25/90--Week during which the three-person rating panel reviewed and rated the sixteen (16) AHQ's which had been submitted by 1/5/90;

1/31/90--Date the Register for AO 2 Supv. was established by DMRS and the candidates were notified of their scores and rankings on the examination.

10. After the AHQ's had been received, Mr. Boetzer and Ms. Hartwig convened a panel of three raters who would be responsible for rating the AHQ's. The rating panel members were Phillip Helmke, Darrell Pope, and Leonard Witke. These individuals were qualified to serve as exam raters on the basis of the following training and experience:

a. Helmke: Professor, Soil Science Department. Member of radiation safety committee. Ph.D. in chemistry and geology. He had experience in working with chemical, biological and radiological safety issues.

b. Pope: Director of Environmental Health, UW-Madison. He had worked closely with Radtke on various campus committees related to safety issues.

c. Witke: Chief Architect, DOC. Registered architect. He was familiar with the position in question through various work - related contacts.

13. Both Mr. Pope and Mr. Helmke were professionally acquainted with Peter Reinhardt and Susan Engelhart, two candidates who were employed in the UW safety department and who were ranked first and second, respectively, on the examination. Neither Mr. Pope nor Mr. Helmke had any personal relationship with these candidates, and there was no reason why they could not be or were not objective in their evaluations of them.

14. The examination scoring guide that had been developed as set forth in finding #8, above, and which was used by the raters, provided benchmark training and experience for each of the four questions. The "more than acceptable" portion of the benchmarks could be scored nine through seven; the "acceptable" six through four and the "less than acceptable three through one. All of the "more than acceptable" and "acceptable" benchmarks were based on actual experience and did not identify training or education as a factor.[1] The "less than acceptable" benchmark for all questions was: "candidate has no relevant training and experience."

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[1] E.g., the "more than acceptable" benchmark for the first question was: "candidate has directed a staff of professional level employes and technical staff in several speciality areas, i.e., safety, occupational, health, chemistry, etc...." (Joint Exhibit 13)

15. The raters had some different ideas as to how the candidates' training or education should figure in the scoring. Mr. Helmke understood that pursuant to the benchmarks, training or experience alone could not put a candidate in the acceptable (four or higher) range, but could result in a score of either one, two or three in the "less than acceptable" range depending on the exercise of the rater's discretion. Mr. Witke's understanding was similar to Mr. Helmke's. Mr. Witke understood that some degree of training and education was implicit in the benchmarks, and he believed that in the exercise of his discretion, training or education could be considered a positive factor in evaluating candidates. Mr. Pope's testimony did not address the question of how he would distinguish between a score of one, two or three for a candidate in the less than acceptable category. He understood that a candidate with some relevant training but no relevant experience could be rated as high as four.

16. There was some inter-rater discussion of how they were scoring candidates, in the context of trying to ensure they had a mutual understanding of the benchmarks and how they were to be applied. However, the raters evaluated and scored the exams separately, and there was no attempt by anyone to influence the rater's scores. The exams did not have the candidates' names on them, but some of the AHQ's would have been familiar to some of the raters on the basis of their familiarity with some of the candidates' backgrounds.

17. Question #4 on the exam related to chemical and biological safety. This question was job-related because even though the Biological Safety Program was not in the Safety Department at the time, there was a good deal of overlap between biological safety issues and the duties and responsibilities of the Safety Department Director.

18. After the raters had completed scoring the exam, Ms. Hartwig forwarded the rated AHQ's and rating sheets to Mr. Boetzer. Mr. Boetzer then reviewed the panel members' scores to check for inter-rater reliability. This is a standard statistical analysis which is followed by DMRS after every examination.

19. Mr. Boetzer's analysis of the statistical reliability of the examination found that there was a high level of inter-rater reliability (.962) which substantially exceeded the minimum "acceptable" level of reliability used by DMRS. Mr. Boetzer's analysis was then reviewed and approved by Dr. Denny Huett, Director, Technical Services, DMRS. Dr. Huett has formal training in

statistical analysis and holds a Ph.D. in the area of Industrial and Organizational Psychology, with an emphasis in psychometrics.

20. After the examination was determined to be statistically valid, DMRS created the register on 1/31/90 and certified the top 5 candidates to the UW-Madison for interviews.

21. The top five candidates were: #1 Peter Reinhardt, #2 Susan Engelhart, #3 David Drummond, #4 Gerald Conway and #5 Kenneth Reinebach. Both Mr. Reinhardt (#1) and Ms. Engelhart (#2) were employed at UW-Madison in the Safety Department in January 1990. Mr. Drummond (#3) was from Iowa City, Iowa and was not a resident of the state of Wisconsin at the time he applied to take the AO 2-Supv. (Safety Director) exam.

22. Two of the top five candidates certified to the UW-Madison were not interviewed. Ms. Engelhart (#2) indicated that she was not interested in interviewing for the position and Mr. Conway (#4) failed to respond to the letter inviting him to be interviewed. Ms. Hartwig then asked Mr. Boetzer to certify two more names. (Employing agencies are permitted to interview at least five qualified candidates for a vacancy.) Mr. Boetzer then certified the next two names on the register to the UW-Madison (i.e., candidates #6 and #7).

23. The UW-Madison then interviewed the five interested candidates certified by DMRS and made its selection from the group of candidates. Mr. Drummond was the candidate selected to fill the Safety Director position and he was appointed to that position effective June 25, 1990.

24. The Appellant ranked #10 on the exam for AO 2-Supv (Safety Director) and therefore, his name was not among those certified to the UW-Madison for an interview.

25. At the time appellant took the exam, he was employed in an Administrative Assistant 3 position in the UW Safety Department.

26. The Safety Director position was converted from a classified civil service position to an unclassified, Academic Staff position, effective July 1, 1991. The position is now called the Director of Safety in the Division of Facilities Planning and Management at the UW-Madison. Mr. Drummond currently occupies this position.

27. Mr. Drummond, although a non-resident, was permitted to take the examination because of respondent's reliance on a March 16, 1987 legal opinion of the attorney general, which concluded that "[t]he residency requirement for classified civil service positions when no similar requirement exists for classified positions in the unclassified service

constitutes a violation of the equal protection clause of the fourteenth amendment to the United States Constitution." (Joint Exhibit 17). A subsequent, (March 21. 1988) memo from DER legal counsel to the DMRS administrator included the following:

> Comity among the separate branches of government obligates executive agencies to administer their statutory programs in a manner consistent with the Attorney General's construction of those statutes....[T]he Attorney General held that the residency requirement violates the U.S. Constitution. Ceteris paribis, nonresidents denied the opportunity to take examinations have the right to file 1983 actions in state or federal court demanding money judgements against those public officials who denied them the opportunity to take the examination. As I indicated to you, as a general rule, public officials have a qualified immunity from suit demanding monetary damages for actions relating to their official duties. However, (again generally) the defense of qualified immunity is not available to those public officials who knew or should have known that their conduct violated clearly established federal law. In my opinion the Attorney General's opinion and the cases cited therein clearly establish that the statute is unconstitutional. Accordingly, in the event that you or other DMRS staff were sued under 1983 by nonresidents denied the opportunity to take an examination, there is a real possibility that the immunity defense would not be available, which would jeopardize public funds. (Joint Exhibit 20).

28. Mr. Drummond had found out about the vacancy through a copy of the State Current Opportunities Bulletin announcing the vacancy that Mr. Radtke had sent to his counterparts at a number of institutions around the country, including the University of Iowa. Mr. Radtke sent out the copies of this bulletin on his own volition. No one in DMRS, UW-Personnel, or in UW management was either aware of or authorized this mailing.

29. No one in DMRS approved "nation-wide recruitment" under §230.14(2), stats., with respect to this position.

30. On or around January 26, 1990, the Appellant filed a written complaint with the Department of Employment Relations (DER) in which he raised a number of concerns about the examination and recruitment and selection process used for the AO 2-Supv. vacancy. This complaint was sent to DER before the Appellant knew how he had ranked on the examination.

31. Jesus G.Q. Garza, DMRS, conducted an investigation into the Appellant's allegations and concerns about the examination procedure. Mr. Garza issued a written report with the results of his investigation on May 14,

1990. (Joint Exhibit 11) Mr. Garza concluded that there had been no violation of the civil service code and that no further action was indicated..

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(a), stats.

2. Appellant has the burden of proof.

3. Appellant has sustained his burden of proof with respect to part of the issues in this case.

4. Respondent acted illegally in violation of §230.16(2), stats., and abused its discretion when it included Mr. Drummond, a non-resident, in the certification for this position.

5. Respondent's administration of the exam for this position otherwise was in accordance with the civil service code, and specifically §230.16(4) and (5), stats.

6. Appellant is entitled as a remedy to a cease and desist order directed against respondent with respect to its violation of §230.16(2).

OPINION

Since a non-state resident was allowed to take the exam and ultimately was appointed, this raises the question of whether respondent acted illegally when it allowed him to take the exam and certified him for appointment. Section 230.16(2), stats., provides, inter alia, that "[c]ompetitive exams shall be free and open to all applicants who at the time of application are residents of this state." DMRS acted in contravention of this subsection in reliance on an Attorney General's opinion (OAG 11-87, Joint Exhibit 17) that this residency requirement violated equal protection in the context of the absence of a residency requirement for unclassified positions. Respondent now takes the position that declining to follow §230.16(2) "was not 'contrary to law' because to ignore the AG's opinion would put DMRS in the position of violating a different law -- the US Constitution -- in order to avoid violating a state law, sec. 230.16(2)." (Respondent's post-hearing brief, p.9)

It is certainly at least questionable whether respondent had a legal basis to have violated §230.16(2) because of concerns about its constitutionality. As a general rule, administrative agencies have no power or

authority to consider or question the constitutionality of an act of the legislature, such as their own enabling legislation, and may not declare unconstitutional the statutes which they are empowered to administer or enforce." 73 CJS Public Administrative Law and Procedure §65, p.536 (footnotes omitted); see also Nodell Ins. Corp v. Glendale, 78 Wis. 2d 416, 426, 254 N.W. 2d 310 (1977) ("administrative agency has no right to repeal or declare unconstitutional zoning ordinances enacted by the legislative body from which [it] derives its existence.").[2] For these reasons, this Commission concluded in McSweeney v. DOJ & DMRS, 84-0243-PC (3/13/84), that it lacked the authority to entertain a substantive constitutional challenge to §230.16(2), Stats., by a nonresident who had been unable to compete for a position in the classified service. Partially because of the foregoing authority, it would not be appropriate for this Commission to address the substantive question of whether §230.16(2), Stats., is unconstitutional, as would apparently be required to sustain respondent's contention that its failure to adhere to that statute was not illegal because it was premised on the avoidance of a constitutional violation.

In addition, the Commission notes that it originally stayed proceedings in this matter while appellant pursued certain remedies in another forum concerning the same subject matter. Appellant's civil proceeding has resulted in three rulings by the Dane County Circuit Court (Appellant's Exhibits 4-6). In the decision of November 9, 1992 (Appellant's Exhibit 4), the Court addressed the constitutional issue in question and specifically held that the residency restriction is reasonably related to the furtherance of legitimate state interests and is not unconstitutional. This decision reaffirmed the Court's earlier decision (October 27, 1992) (Appellant's Exhibit 5), in which the Court specifically mentioned this matter pending before this Commission, as follows:

> Plaintiff informs the Court that he has challenged defendants' actions in a proceeding before the Wisconsin Personnel Commission. As the parties have failed to file the stipulation that they proposed and as the Personnel Commission is especially suited to evaluate factual disputes involved in state personnel

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[2] There is authority for the proposition that an agency may question, under certain circumstances, the constitutionality of a statute it enforces, Fulton Foundation v. Department of Taxation, 13 Wis. 2d1, 108 N.W.2d 312 (1961). However, that case addresses only the question of whether an administrative agency may challenge the constitutionality of such a statute in a court proceeding, and it it questionable whether it constitutes authority for an agency to decline sua sponte to comply with a statute because of a non-judicial opinion that it is unconstitutional.

> hiring decisions, the Court will stay plaintiff's action pending resolution of the administrative proceeding. Because the Court has now ruled on the constitutional issues in this case, the Commission's reservations on proceeding in light of those issues are moot. (October 22, 1992, memorandum decision and order, P.3).

Whether the Court's action of staying proceedings pending Commission processing of the instant appeal is viewed as falling under the heading of primary jurisdiction or of administrative exhaustion, the resultant posture of these proceedings involves considerations of comity between judicial and administrative entities, see, e.g., 73 CJS Public Administrative Law and Procedure §§37 and 38. Regardless of whether the Court's decision concerning the constitutionality of §230.16(2), stats., is considered the "law of the case" per se, that decision at the very least reinforces the Commission's conclusion that it will not itself address the constitutionality of §230.16(2), and that respondent acted illegally when it allowed Mr. Drummond to compete and subsequently certified him for consideration for appointment.

The stipulated issues in this case also include the question of whether respondent abused its discretion when it allowed Mr. Drummond to be examined and then certified him for appointment.

An abuse of discretion has been characterized as: "a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence. Murray v. Buell (1889), 74 Wis. 14, 19, 41, N.W. 1010." Bernfeld v. Bernfeld, 41 Wis. 2d 358, 365, 164 N.W.2d 259 (1969). An agency acts outside the scope of a proper exercise of, or abuses its discretion, when it bases a discretionary decision on an erroneous view of the law relating to the transaction in question. Hartung v. Hartung, 102 Wis. 2d 58, 66, 306 N.W. 2d 16 (1981) ("A discretionary determination, to be sustained, must demonstrably be made and based ... in reliance on the appropriate and applicable law."); Galang v. Medical Examining Board, 168 Wis. 2d 695, 700, 484 N.W. 2d 375 (Ct. Appl 1992) ("And where the record shows that the agency looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable tribunal could reach, and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree." (citation omitted)).

The general rule is that "an administrative officer has no discretion to disregard the language of a statute in performing his duties." Milwaukee Co. v. Schimdt, 52 Wis. 2d 58, 66, 187 N.W. 2d 777 (1971). Respondent has cited no

authority for the proposition that an administrative agency may decline to enforce a statute it is charged to enforce because of an opinion that it is unconstitutional, [3] and Nodell Ins. Corp. v. Glendale, 78 Wis. 2d 416, 426, 254 N.W. 2d 310 (1977), suggests the contrary: "the administrative agency has no right to repeal or declare unconstitutional zoning ordinances enacted by the legislative body from which [it] derives its existence." Under these circumstances, the Commission must conclude that respondent's action also constituted an abuse of discretion as it did not act "consistent with applicable law," Galang, 168 Wis. 2d at 700.

Another question concerning Mr. Drummond's participation in this examination involves the question of whether respondent also violated §230.14(2), Stats., which provides that: "The administrator may recruit outside of this state only if the administrator determines that there is a critical shortage of residents of this state possessing the skills or qualifications required for the position."

It is undisputed that there was no determination of a "critical shortage" of qualified residents. Mr. Drummond found out about the vacancy because Mr. Radtke, the retiring incumbent, mailed copies of the announcement to, among other institutions, the University of Iowa, where Mr. Drummond was employed. It is undisputed that Mr. Radtke took this action on his own volition, without the approval or even knowledge of DMRS or the UW classified personnel office, which participated in the staffing process under the direction of DMRS.[4] Mailing copies of job announcements to institutions likely to employ prospective candidates undoubtedly would be considered part of a recruitment process,[5] but Mr. Radtke's action cannot be attributed to DMRS, which neither authorized it nor was aware of it at the time, see Ryan v. DOR, 68 Wis. 2d 467, 470, 228 N.W. 2d 357 (1975) (representation by employe of Tax Appeals Commission not attributable to Department of Revenue for purposes of equitable estoppel); Millard v. Wisconsin Personnel Commission, Dane Co. Cir. Ct. No. 93CV1523 (1/26/94) (employe of DOT personnel office not agent of DER for purposes of equitable estoppel.) There are many ways that nonresidents

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[3] As noted above, Fulton Foundation v. Department of Taxation, 13 Wis. 2d 1, 108 N.W. 2d 312 (1961), directly addresses only the question of whether an agency can challenge the constitutionality of a statute in court.

[4] DMRS had not delegated authority to the UW pursuant to §230.05(2)(a), stats., to conduct this process.

[5] Under certain circumstances it could by hypothesized that such an undertaking in and of itself could constitute an entire recruitment process.

can find out about vacancies in the Wisconsin Civil Service for which DMRS has not conducted out of state recruitment. Mr. Radtke's unauthorized mailing was essentially similar to word of mouth or other informal means of communication. There is simply no basis on which to hold DMRS responsible for this kind of informal, unsanctioned means of communication by an employe of a different agency to whom respondent had delegated no authority.

Appellant also contends that certain aspects of the exam process were improper. First, he contends that using exam graders from the UW was inappropriate because of their "close working relationships to candidates." (Appellant's brief, p.10) The record does not establish that the graders from the UW had "close" relationships of any kind with any of the candidates, although they had some professional dealings with some of them. There is nothing in the record, including the exam results, which would show that this in any way affected their ability to score the exams objectively, see, e.g., Ring v. DP, 79-49-PC (11/19/81).

Appellant also contends as follows:

> The examination scoring guide failed to define the relative rating value associated with relevant educational levels. Exam graders were left with making "subjective" ratings as to what they thought a good score might be for a certain level of relevant training. Other exam graders took the scoring guide strictly and gave the appellant no credit for relevant educational experience and stated that the exam was only intended to count job experience and training was "assumed" for those who had more experience. (Appellant's brief, p. 11).

The exam benchmarks related acceptable and higher scores to certain relatively specific types of experience. A less than acceptable rating could have resulted in a score of 1, 2, or 3, depending to some extent on the candidate's training and education. The determination of whether to award a 1, 2, or 3 was left to the graders' discretion. The DMRS exam experts testified that in an examination for a position like this, it is normal to utilize graders with substantial subject matter expertise, and to expect them to exercise some discretion in assigning numerical grades. Each of the three general brackets had a three point range of numerical scores -- more than acceptable, 9-7; acceptable, 6-4; less than acceptable, 3-1. There is nothing in the record that would show that allowing the exam graders to use their discretion in deciding on the exact scores within these brackets either conflicted with §230.16(5), stats., which requires the use of "appropriate scientific techniques and

procedures in administering the selection process, in rating the results of examinations and in determining the relative ratings of competitors," or resulted in any unreliability in the exam outcome.

The only real confusion or misunderstanding on the part of the raters was that one rater testified that, as he understood the benchmarks, it would have been possible for a candidate with no experience matching the benchmarks for an acceptable or more than acceptable rating to receive a grade of 4 (the low end of the acceptable range) on the basis solely of training and education. This understanding conflicted with that of the other raters and the DMRS personnel specialist who oversaw the exam process. However, appellant has not pointed out how this misunderstanding affected in any way the scoring or the overall exam reliability.

In a related contention, appellant argues that the measure of inter-relater reliability -- 0.963 -- was so high (1.0 is a perfect score) that it indicated collusion of some sort among the graders. However, Dr. Huett, the respondent's psychometric expert, testified that this figure was not problematical. The record reflected that while there was some initial discussion by the raters to ensure they had a common understanding of the benchmarks, this was a common and accepted practice, and there was neither collaboration in scoring nor any attempt made to influence any examiner's score.

Appellant also contends, in conclusory fashion, that "[t]he exam was not developed in a manner to establish a relationship between skills and knowledges required for successful performance on the job." (Appellant's brief, p.10) However, the exam was developed in conjunction with well-qualified job experts, and there is simply no basis to support appellant's contention. To the extent that appellant's position relies on the argument that question #4 (chemical and biological safety) was not job-related because at the time the position was not in charge of campus biological safety, this contention is refuted by evidence that the Safety Department Director still had a number of biological safety-related concerns, and that background in this area would have been helpful in performing the job.

Finally, appellant asserts that respondent should have canceled the exam process under §ER-Pers 6.095(3), Wis. Adm. Code,[6] after he "alerted" DMRS

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[6] This section, which has been retitled to §ER-MRS 6.095(3), provides:

to the problems he perceived with the process. Respondent did conduct an investigation and found no basis for taking action (Joint Exhibit 11). Since the Commission finds after a de novo hearing that the exam was appropriately administered,[7] it follows that there is no basis on which to conclude that DMRS was required to have cancelled the exam process on the basis of the issues discussed above.

REMEDY

Appellant seeks appointment to the position in question and the concomitant removal of the incumbent. While the Commission concludes that Mr. Drummond's appointment was illegal as in contravention of §230.16(2), stats., there are two reasons why this remedy cannot be provided.

First, §230.44(4)(d), stats., provides that "[t]he Commission may not remove an incumbent or delay the appointment process as a remedy to a successful appeal under this section unless there is a showing of obstruction or falsification under §230.43(1)." The latter subsection provides:

> (1) Obstruction or falsifications of examinations. (a) Any person who willfully, alone or in coopertion with one or more persons, defeats, deceives or obstructs any person in respect of the rights of examination or registration under this subchapter or any rules prescribed pursuant thereto, or
>
> (b) Who wilfully, or corruptly, falsely marks, grades, estimates or reports upon the examination or proper standing of any person examined, registered or certified, pursuant to this subchapter, or aids in so doing, or
>
> (c) Who willfully or corruptly makes any false representations concerning the same, or concerning the person examined, or
>
> (d) Who willfully or corruptly furnishes any person any special or secret information for the purpose of either improving or injuring

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> Cancellation of register or certification. The administrator may cancel a register or certification at any time the administrator determines that:
>
> (1) The register was not established in compliance with s. 230.16(4), Stats.; or
>
> (2) One or more applicants gained knowledge of the content of the examination not available to every applicant; or
>
> (3) The establishment of a register was not consistent with the principles of merit and fitness as set forth in the law and these rules.

[7] With the exception of allowing Mr. Drummond to have been examined and certified.

> the prospects or chances of any persons so examined, registered or certified, being appointed, employed or promoted, or
>
> (e) Who personates any other person, or permits or aids in any manner any other person to personate him or her in connection with any examination, registration, application or request to be examined or registered, shall for each offense be guilty of a misdemeanor.

On the basis of the findings in this case, the only even colorable argument that there was any "obstruction or falsification" under §230.43(1) would be with respect to respondent's violation of §230.16(2), stats., by examining and certifying a nonresident (Mr. Drummond). In order to bring this under the coverage of §230.43(1)(a), it would have to be concluded that by so doing, respondent willfully defeated, deceived or obstructed appellant "in respect of the rights of examination or registration under this subchapter." Obviously, respondent took no action per se against appellant's rights to be examined or placed on the register. Allowing Mr. Drummond to participate in the selection process resulted in the adverse effect on appellant of having been ranked tenth on the exam register rather than ninth, as he presumably would have been if Mr. Drummond had not been allowed to compete.[8] This frames the question of whether respondent's violation of §230.16(2), which caused the appellant (as well as all others who ranked behind Mr. Drummond) to have a lower rank on the exam register than he otherwise would have had, falls within the ambit of this subsection.

The Commission is unaware of any precedent for this interpretation of §230.43(1)(a). Based on the plain language of this subsection, it appears that it is meant to cover intentional action against a particular individual or individuals, rather than a violation of the civil service code that has the effect of inuring to the detriment of some of the examinees. The statute addresses wilful action which "defeats, deceives or obstructs any person in respect of the rights of examination or registration under this subchapter." (emphasis added) This language is consistent with an active, purposeful intent to interfere unlawfully with individual rights under the civil service code, either by helping or hindering particular persons, rather than an intent to criminalize any violation of the civil service code that results in adverse effects on a group of examinee's chances for success in a competitive selection process.

A second reason for not granting appellant this remedy is that even if appellant's rank had improved from tenth to ninth as a result of considering

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[8] As will be discussed below, this had no effect on appellant's actual opportunity for certification for this position.

Mr. Drummond disqualified for competition, appellant would not have been in line to have been certified at that point. Appellant argues that it is possible that if Mr. Drummond had not been certified, other candidates ahead of appellant on the register might have dropped out of consideration for one reason or another, and he ultimately might have been certified and selected. However, a make - whole remedy cannot be based on such a speculative edifice. Compare Zebell v. DILHR, 90-0017-PC (10/4/90) (where appellant showed that absent manipulation of the hiring process, he would have been the successful candidate, he established his entitlement to the remedy of an appointment to the next available vacancy), Parson v. UW-Madison, 84-0219-PC (9/16/85), affirmed other grounds by Dane Co. Circuit Court No. 85CV5312 (6/25/86), and Court of Appeals, No. 86-1449 (2/5/87) (where appellant showed that he was the best-qualified candidate and was denied the appointment because of the appointing authority's manipulation of the hiring process to prevent him from being hired, he was entitled to an appointment to the next available vacancy).

On the basis of this record, the only remedy to which appellant is entitled is a cease and desist order. On remand, respondent is to cease and desist from a similar violation of the civil service code with respect to any future examinations and certifications in which appellant may participate.

ORDER

Respondent's actions of admitting Mr. Drummond to the exam for the Administrative Officer 2 - Supervisor (Safety Director) vacancy and including him in the certification for appointment to said position are rejected. All other material aspects of respondent's handling of the examination and certification for this position are affirmed. This matter is remanded to respondent for action in accordance with this decision.

Dated:_____, 1995 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

AJT:bjn

_____
DONALD R. MURPHY, Commissioner

_____
JUDY M. ROGERS, Commissioner

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