

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*

GLEN F. GYGAX, \*

Complainant, \*

v. \*

Secretary, DEPARTMENT OF REVENUE \*  
and Secretary, DEPARTMENT OF \*  
EMPLOYMENT RELATIONS \*

FINAL  
DECISION  
AND  
ORDER

Respondents. \*

Case No. 90-0113-PC-ER \*

\* \* \* \* \*

A Proposed Decision and Order was issued in the above-noted case on October 20, 1994. Both parties were provided an opportunity and did submit written arguments to the full Commission. The Commission considered the parties' arguments and consulted with the hearing examiner and decided to adopt the Proposed Decision and Order as its Final Decision, except as amended below. The amendments are made for clarifications and/or to more accurately reflect record evidence.

1. Amend the second sentence of paragraph 26 of the Findings of Fact, as shown below:

"The individual names were listed alphabetically without reference to their ages or written exam scores although eligibility was determined based on the written exam scores, except as noted in paragraphs 58-61 below."

2. Amend paragraph 31 of the Findings of Fact, by deleting the last sentence.

3. Amend paragraph 34 of the Findings of Fact to correct the first line in "A-1" of Ms. Kamuiru's recorded answers for Ms. Scheuers by changing "FBI" to "FDI".

4. Amend paragraph 37 of the Findings of Fact to correct the Exhibit references relating to Ms. Miller. Specifically, change "(Exh. R1, p. 77 & 89)" to "Exh. R1, p. 81 & 93)".

5. Further amend paragraph 37 of the Findings of Fact to correct the interviewer's names under the entries related to "TOTAL SCORE" and "AVE. SCORE". Specifically, change "Murphy" to "Matthes" and "Behling" to "Kamuiru" in each entry.

6. Amend the second line of paragraph 57 of the Findings of Fact to delete an extraneous "was", as follows:

". . . particular vacancy, it was Ms. Cammer's standard practice ~~was~~ to send a . . ."

7. Amend the Discussion on page 24 of the Proposed Decision and Order, in the fifth line of the third paragraph, as follows:

". . . not exist ~~in 1994 during the period from 1994-1996~~. The data in Exh. C-8 is consistent . . . "

Mr. Gygax raised several arguments to the Commission. The major arguments not already addressed in the Proposed Decision and Order are discussed in the following paragraphs.

#### Veterans Points

Mr. Gygax noted that his claim regarding veterans points involved s. 230.16(7), Stats., not s. 230.25, Stats. (1990 texts). Those provisions, however, are related and cannot be viewed in isolation.

Section 230.16(7), Stats., provides that certain veterans who receive a passing grade on a civil service exam thereby gaining eligibility on a competitive employment register are entitled to a "preference", defined as an additional 5 points to his/her written exam score. Mr. Gygax argued that the provision is mandatory by the language of s. 230.16(7), Stats. For purposes of statutory construction, however, the legislature is presumed to be aware of related statutory provisions and, therefore, they must be interpreted in a manner which harmonizes the provisions. Mack v. Joint School District No. 3, 92 Wis. 2d 476, 489, 285 NW2d 604 (1979).

The related statutory provisions here are s. 230.25(1) & (1m), Stats., which provide the procedure for implementing the veterans "preference" points mentioned in s. 230.16(7), Stats. The procedure involves certifying the top scores without regard to veterans points and then applying veterans points to determine if the additional points result in a candidate's score equal to or greater than those already certified.

Even if Mr. Gygax were correct in his interpretation of the statutes, the ultimate findings of his case would remain the same. All veterans, regardless of sex, race/color and/or age, were granted "preference" points according to the same procedure. The Commission wishes to reiterate here that Mr. Gygax

filed a discrimination claim, not a claim that the civil service code was violated. (See discussion on pp. 29-30 of the proposed decision under the heading: "Veteran's Points/Modified Ruling".)

#### "Hearsay" Arguments

Mr. Gygax raised several arguments concerning "hearsay" evidence and at one point in his brief (p. 21) listed paragraphs 33-43 of the findings of fact as including hearsay evidence. The listing suggests he may be confused. It is not hearsay evidence, for example, for Mr. Matthes to testify that he and Ms. Kamuiru separately scored the candidates (as recited in paragraph 36 of the Findings of Fact). Rather, this is information about which Mr. Matthes has first-hand knowledge.

Other of Mr. Gygax's arguments indicate he may not realize that evidence which he agreed could be part of the record became part of the record even if it was hearsay in nature. For example, Mr. Gygax stipulated to the admission of Ms. Kamuiru's handwritten (and typed) interview notes which he could have otherwise objected to on the basis of hearsay. The notes are part of the record due to the stipulated admission.

It is true that the examiner, both at the discovery hearing and at the hearing on the merits, rejected some of Mr. Gygax's exhibits to which respondents' hearsay objection was sustained. The difference in treatment, however, was not due to examiner prejudice. Rather, it was due to the fact that respondents objected to certain hearsay evidence and such objections were sustained.

#### Newly-Offered Evidence

Mr. Gygax's written arguments to the Commission included an "Attachment H", which is discussed in his brief on p. 28. This attachment is not part of the record. Mr. Gygax indicated the attachment was part of a roster similar to the roster used for Exh. C-8 (which also is not part of the record).

Exh. C-8 indicates the information provided is from data "as of 5/13/94". The proposed decision includes a discussion about how the data is from a time period which does not support his discrimination claim. (See p. 24 of the Proposed Decision and Order.)

In an apparent attempt to correct the time-period problem discussed above, Mr. Gygax's new "Attachment H", indicates the information provided is from data "as of 12/24/91", which he says (on p. 28 of his brief) is the "oldest

one I could find". His attempt to correct the situation comes too late for consideration in this decision.

The Commission also notes that the time period in Attachment H still post-dates the hiring decisions at issue. Furthermore, while the roster contains a list of individuals employed in real estate in a specific geographic area, it fails to consider members of the qualified labor pool who are unemployed. The information is inadequate, therefore, to show the makeup of the qualified/relevant labor pool, within the meaning of s. 230.03(2)(b), Stats., and ER 43.03(2), Wis. Admin. Code.

Scheuers - par. 31 of the Findings of Fact

Mr. Gygax (on p. 21 of his brief) questioned the last sentence of paragraph 31 of the findings of fact. Specifically, he disagreed that the record supported a finding that Ms. Scheuers had previously worked as a PAT for 2 years. The examiner reviewed the hearing tapes. Mr. Gygax is correct and the required change is reflected in the amendments noted previously.


Mr. Matthes testified that Ms. Scheuers worked as a PAT for 2 years, but the examiner misunderstood the context of the statement. Mr. Matthes was referring to Ms. Scheuers' work after the hire at issue, not prior to it.

ORDER

The Commission adopts the Proposed Decision and Order as its final decision, except as amended and as the discussion is supplemented above. Accordingly, this case is dismissed.

Dated December 14, 1994.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
JUDY M. ROGERS, Commissioner

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NOTICE

**OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW  
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION**

**Petition for Rehearing.** Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)
2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

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PROPOSED  
DECISION  
AND  
ORDER

On 7/12/90, Mr. Gygax filed a charge of discrimination alleging that the Department of Revenue (DOR) failed to hire him for a number of positions due to his age, color/race and sex, in violation of the Fair Employment Act (FEA), Subch. II, Ch. 111, Stats. He filed an amendment on 8/4/92, adding military reserve membership as a claimed basis of discrimination. By this amendment he also added the Department of Employment Relations (DER) as a second respondent. Mr. Gygax withdrew the claim of military reserve membership as a basis for discrimination in a written document received by the Commission on 8/24/92, and which bears his signature next to the date of 8/22/92.

On 3/24/93, an Initial Determination was issued which found no probable cause to believe that complainant was discriminated against when he was not hired by DOR for three Property Assessment Technician 1 (PAT-1) positions in March and May of 1990. Mr. Gygax filed a timely appeal.

A prehearing conference was held on 6/18/93, at which time the parties agreed to the hearing issue as noted below:

Whether there is probable cause to believe that complainant was discriminated against on the basis of age, race/color, or sex when he was not hired by the respondent for three PAT-1 positions in March and May 1990.

At the prehearing conference of 6/18/93, the parties also agreed to hearing on 12/9-10/93. The hearing dates, however, were used to consider Mr. Gygax's motion to compel discovery. His motion was denied by ruling issued on 12/23/93.

The hearing was rescheduled for and occurred on 6/2-3/94. The hearing examiner requested briefs from the parties. The final brief was received by the Commission on 9/2/94.

At hearing, Mr. Gygax attempted to litigate the issue of veterans points based on his military reserve membership. The hearing examiner ruled that the issue of veterans points would not be heard because Mr. Gygax withdrew the allegation. Testimony and evidence relating to veteran's points was taken at hearing to establish a record for the potential of court review.

The ruling on veteran's points at hearing is modified in this decision as detailed in the discussion section.

#### FINDINGS OF FACT

1. Mr. Gygax took a written exam to compete for PAT-1 positions. The job announcement stated as follows:

[DOR]; Division of State and Local Finance; Bureau of Property Tax. This employment register is being established to fill vacancies in Eau Claire, Green Bay, Madison, Fond du Lac, La Crosse, Milwaukee and Wausau. [Geographic codes omitted.] Start at \$8.152 per hour. Perform beginning level technical work providing support services to the professional appraisal/assessment staff in the central or district property tax office. Duties involve the collection and compilation of data relating to the property appraisal/assessment functions. KNOWLEDGE REQUIRED: Basic mathematics; data collection and record keeping; reading comprehension skills; and communication skills. Apply with the Application for State Employment form ...

2. Mr. Gygax received a score of 99.17 on the written exam, without veterans points, resulting in a #1 rank.
3. Mr. Gygax's written exam score entitled him to interview in March 1990, for a PAT-1 vacancy in DOR's Division of Manufacturing (hereafter,

Manufacturing Position). Ms. Deborah Crowell also interviewed and ultimately was hired.

4. Mr. Gygax, as a result of his written exam score, also was invited to interview on 4/10/90, for two PAT-1 vacancies in DOR's Division of Equalization (hereafter, Equalization Positions). Ms. Joelleyn Scheuers and Ms. Laura Miller also interviewed and ultimately were hired.
5. The individuals hired for all three PAT-1 positions were required to be certified at the Assessment Technician level before they could pass probation. (Exh. R-H)
6. The race, date of birth, approximate age in March and May 1990, and sex of Mr. Gygax and the hired candidates are shown in the chart below.

<u>Name</u>	<u>Race</u>	<u>Date of Birth</u>	<u>Age in 3/90</u>	<u>Age in 5/90</u>	<u>Sex</u>
Gygax	White	01/13/43	47	47	Male
Crowell	White	10/03/66	23	23	Female
Scheuers	White	02/27/63	27	27	Female
Miller	White	03/14/58	32	32	Female

7. Mr. Gygax is of the same race/color as the selected candidates.

Details regarding the Manufacturing Position

8. The job duties of the PAT-1 Manufacturing Position are shown by the Position Description (PD) in the record as Exh. R-D, which is briefly summarized below.

Position Summary: This position is the entry level position responsible for technician work associated with property assessment/appraisal work performed in support of the South Unit of the Southeastern Assessment District professional property assessment/appraisal staff. At this level, the technician's responsibilities include general assistance to the professional staff in the less complex matters.

Goals and Worker Activities

<u>% Time</u>	<u>Goal</u>	<u>Description of Duties</u>
40%	A.	Assist the establishment of manufacturing values for all municipalities in an administrative area. Duties here include some routine, repetitive clerical tasks such as: logging in self-reporting penalty forms, preparing and mailing penalty notices, creating and maintaining penalty list, typing data using an on-line



- computer terminal and responding to requests for address-change or other forms. Higher level duties include assisting professional staff in reviewing self-reporting forms to identify missing information, following up to obtain the missing information, and testifying at administrative hearings.
- 30% B. Assist the professional staff with field audit activities, building data changes and appeals. Duties here include mostly routine, repetitive tasks such as: typing information from CAMPAS documents into the computer, checking documents for accuracy prior to input, correcting errors and maintaining records to coordinate computer data input from various forms from various offices. Higher level duties include reviewing form errors with professional staff.
- 20% C. General assistance to the professional staff. Duties here are mostly routine, repetitive clerical tasks such as: logging in, copying and distributing certain reports; maintaining certain files by performing filing, purging of old files and label updates; and upon request from sources outside DOR, locating requested information, copying and mailing same. Some higher level duties (as well as additional clerical duties) are possible here under the heading which says "Performs special tasks as requested by professional staff".
- 10% D. Maintain records of valuation appeal activity. Tasks here are routine and repetitive in nature and include: Filing related to appeal activities such as creating and maintaining the file, responding to requests for information by locating, copying and sending out the requested information and closing files. Also included are activities relating to the Board of Assessors and the Tax Appeals Commission such as maintaining log of information sent to the Board and Commission, as well as distributing recommendations to the Board.

9. Pursuant to DOR's request, DER provided a certification list of individuals eligible to interview for the Manufacturing Position (Exh. R-F). The individuals were placed on the certification list in alphabetical order without notations regarding their ages or written exam scores, although certification eligibility was determined based on the written exam scores. Seventeen people were included on the certification list out of which 5 were not interested and 1 failed to report for the interview, leaving 11 who were interviewed.
10. Prior to interviews, each candidate was asked to complete an "Addendum to Applicant Registration" form and to bring the form with them to the

interview. (See Exh. R-E) This form asked for a summary of the candidate's education and work experience. The purpose of the form was for use by the candidate in answering the third scored question. (See par. 12 below.) The form was not scored separately.

11. There were two interviewers; James Murphy, District Supervisor of the Milwaukee Manufacturing Section, and Robert Behling, Supervisor of Manufacturing Section in the Southeastern District located in Milwaukee.
12. The candidates were scored and ranked based on the same set of questions. (Exh. R-G) The responses were scored separately by each interviewer. The scored questions and benchmarks (meaning desired responses) are shown below, per Mr. Murphy's testimony and Exh. R-A & R-G, p. 2.

Q-1. Which of the following statements most closely reflects the way you look at a job and why?

- a. I prefer a structured work environment. That is, I like clearly defined goals and procedures. I like detailed work and order. A place for everything, and everything in it's [sic] place.
- b. I prefer a loosely structured work environment. That is, I like more generally defined goals and procedures. I prefer the broad outlook and am less inclined to be a detail person.  
Benchmark: The stronger candidates would show through work experience or specific examples, how they are relatively comfortable in a structured work environment, however also show they can be flexible in occasionally setting their own goals, etc.

Q-2. HYPOTHETICAL SITUATION - You are working on a project assigned by your supervisor [which] you must complete by the end of the week. You think you can complete it by noon on Friday, but your (sic) not sure. On Tuesday, a specialist (a person you are supposed to assist but [who] has no supervisory control over you) politely asks you to do a project for her that you estimate will take about 1/2 day. What would you do?

Benchmark: Looks for a person who clearly recognizes the primary goals the supervisor sets yet is sensitive in trying to work out a way with the specialist to be able to do both. Communication up front with the specialist is important. Keeping the supervisor informed (vs. running to him/her for answer) is a plus. Ultimately, the issue of priority of tasks may have to be resolved by the supervisor rather than conflict between the co-workers, stonewalling the co-worker or implying both tasks could be done and then not achieving both without warning the people involved.

Q-3. Now that you have read the position description, what knowledge, skills, and abilities do you have which you feel would make you a successful candidate for the position? Please relate to the information on your education and experience summary.

**Benchmark:** Looking for people who show they have education, experience or the potential to learn to work with math, computer input (vs. analysis), and routine/mundane tasks. Hoped to see clear indications the person can be the "assistant" to, or resource person for many different individuals at one time. Finally, looking for an indication that they can do the routine, defined tasks with a minimum of daily "checking" type supervision.

Q-4. Why are you interested in the PAT-1 position? Do you have a long term objective?

**Benchmark:** A poor answer would be someone who said they wanted a (cushy) job with the state. Looking for the person to show interest in the types of tasks of the property assessment series.

Q-5. From your present or previous job, tell us how your supervisor would describe you as an employee? Include both strengths and weaknesses.

**Benchmark:** The candidates were looking for honesty and how people deal with perceived strengths and weaknesses. Looking for a sincere analysis which pointed out not only the positives they thought the interviewers wanted to hear, but also some negatives with a comment on how the negatives would be overcome as the person works in the Manufacturing Position.

Q-6. Computers assist the Department in much of our work. Computer entry, file maintenance, and printing reports will be part of your duties. Give examples from your past experience that would illustrate your ability to work with computer systems. Include any typing skills.

**Benchmark:** Experience with computers would be a plus, as would a response which indicated the candidate was technically oriented. Day-to-day experience with mundane tasks and with computers was favored. The ideal response would include courses in computers and prior computer work experience. The average response would evidence typing skills. An unacceptable response would indicate no computer work experience and no typing skills.

13. The interview questions and benchmarks were related to the duties of the Manufacturing Position.

14. Mr. Murphy and Mr. Behling took notes during each candidate's interview. Their notes regarding Mr. Gygax's responses to the questions are summarized below.

Gygax Answers: As recorded by Mr. Murphy (Exh. R-I):

**A1:** "A" This position "s/b" [?should be?] more an A. This level details are more important to be accurate. Therefore organization skills, accuracy skills are more important.

**A2:** Explain to "her" situation and she/or Glen would have to work w/supervisor to see if change is appropriate or if overtime is authorized. End decision is w/supervisor. Communicate up front.

**A3:** Involved in real estate for 4 yrs (housing). Now involved in MATC in manufacturing related perspective. (Involved with extensive numbers of sales, ordering, decisions. Has done a lot of detail work and memorization. In sales was involved with public sector and w/variety of types of business. Is a team player and can adjust to problem types (such as splitting between two areas).

**A4:** Position description-wise; fits likes and strengths (math/property) Some thing he can grow with, gets him started and involved at ground level.

**A5:** Team player, dedicated, always there, good worker, dependable. Weakness: (not applicable to this position) not good orator/speaker crowd-wise.

**A6:** Typing 35 wpm (no error). Computer. Worked w/inventory control system in wholesaling. In real estate worked w/MLS system w/various applications (sorts on financing, eg.)

Gygax Answers: As recorded by Mr. Behling (Exh. R-I)

**A1:** A. This position is more of that type. At this level it's important that details are accurate.

**A2:** Explain supervisor's project. Send her to my supervisor to see what supervisor's decision is. Communicate problem up front.

**A3:** Involved in real estate. Residential and some business. Extensive involvement in manufacturing and business. Presently in MATC courses with manufacturing perspective. Budget & sales work. Some math. Lots of detail work. Cost marketing system. Team player. Can adjust to get job done. Steady work is a goal.

**A4:** Fits my likes & strengths. Putting numbers together. Entry level. Something I can grow with and can learn from. Good teaching position.

**A5:** Team player. Dedicated. Always at work. Dependable. Not relating to this position -- not good speaker.

**A6:** Typing - 35 wpm. No errors. Inventory Control System. MLS. Real estate data system. Various applications. Sort by property type and financing information. Micro-computer and business courses.

15. The interviewers' notes of Ms. Crowell's responses are summarized below. Blanks are shown where the examiner could not decipher the writing.

Crowell Answers: As recorded by Mr. Murphy (Exh. R-K)

**A1:** "A". structured. likes details. less chance to improvise. If you know what tasks are, you don't have problems w/co-workers or supervisors. Can see problems in advance therefore get answers.

**A2:** Talk to person asking for project. Tell them of other project. Can it wait? Discuss alternatives regarding the supervisor's project. Would check with supervisor to see if change in plan okay.

**A3:** Has BA in math. Math helps see things in logical order. Has several computer classes. Can adjust to our system. Works at McDonalds now w/different people and different personalities. Works w/multiple customers. People and technical aspect.

**A4:** Interested. Wants entry level position. Learn basics. The ins & outs. Long term goals - get \_\_\_\_\_ when people feel its necessary. Strengths lie in training others.

**A5:** Works hard, independently - does what's needed. Comes up w/own suggestions, can deal w/customers. Gets frustrated/angry when people don't do their job correctly. Good/stable/dependable.

**A6:** Had a few typing classes in H.S. (50 wpm then) Had several computer classes (programming) - on lots of systems - a couple computer languages, word processing types of program.

Crowell Answers: As recorded by Mr. Behling (Exh. R-K)

**A1:** A. Like details. No improvisation. No problems with people, supervisors when you know what to do. Don't know this. Better find out.

**A2:** Talk about supervisor's job. Do you need today? or Friday? Problem to supervisor.

**A3:** BS in math. Several computer class with hours on \_\_. 10 different bosses. Can work with different people. Deal with customers.

**A4:** Start at entry level to learn basics - so can learn and move to top. Move up promotion to position as supervisor or trainer.

**A5:** Work hard, independent. If something needs to be done does it. Can deal with customers. Gets frustrated/angry when co-workers don't do their jobs. Good stable dependable.

**A6:** Few classes typing in high school. Several computer classes, programming, computer. Good knowledge of \_\_ computer languages & word processing \_\_\_\_.

16. Mr. Murphy described at hearing what he found desirable for the Manufacturing Position in Ms. Crowell's prior training and experience. She had a math background. Her work history demonstrated an ability for the job and success in jobs which involved mundane tasks (i.e., McDonalds). She also was good at communication as shown by her experience at McDonalds where she was a supervisor and functioned as a buffer between staff and management. Mr. Murphy was concerned about one aspect of her past. Specifically, he wondered why she would remain working at McDonalds after graduating from Marquette. He asked this question of the reference at McDonalds. The person called as a reference did not know why but said he did not perceive a problem.
17. After each interview, Mr. Murphy and Mr. Behling separately scored the candidate on the six questions noted above. They compared scores and if a drastic difference existed, they went over the notes taken during the interview to ensure they each heard what the candidate said. The candidates' scores were then averaged. After all interviews were completed, the candidates were ranked by their average scores.
18. The interview scores given for Mr. Gygax and Ms. Crowell are shown below. (Exh. R-I & R-K)

<u>Q#</u>	<u>Inter-viewer</u>	<u>Gygax</u>	<u>Crowell</u>
Q1	Murphy	5	8
	Behling	6	8
Q2	Murphy	5	9
	Behling	5	8
Q3	Murphy	8	8
	Behling	8	9
Q4	Murphy	8	8
	Behling	7	9
Q5	Murphy	6	8
	Behling	6	8
Q6	Murphy	7	8
	Behling	7	8
<b>TOTAL SCORES</b>			
	Murphy	39	49
	Behling	39	50
<b>AVE. SCORES</b>			
	Murphy	6.5	8.16
	Behling	6.5	8.3

19. The answers given by Mr. Gygax and Ms. Crowell are compared below in relation to the benchmarks. The analysis does not suggest that it was likely that the scoring was influenced by a candidate's sex, age or race/color.

A-1: Mr. Gygax's response showed he understood the nature of the job but unlike Ms. Crowell's response he did not indicate he liked working in that type of environment.

A-2: Like Ms. Crowell's answer to the second question, Mr. Gygax's reply covered most of the bases; but unlike her response, he failed to say he would first try to resolve the problem without supervisory involvement.

A-3: Their response to the third question showed that each had the following different strengths as compared to the other: a) while Mr. Gygax indicated he was a team player and could adjust to situations, Ms. Crowell indicated she possessed the same qualities through actual work experience, and b) while both had classroom training in computers, Mr. Gygax indicated he also used computers in prior jobs.

A4: Mr. Gygax's response to the fourth question should have been ranked slightly higher than Ms. Crowell's response because he showed interest in the position through past education and work experience in the real estate field, as compared to Ms. Crowell who expressed interest but lacked background in real estate.

A5: Both Mr. Gygax and Ms. Crowell discussed strengths which they could bring to the position. Each self-identified one negative factor but the negative disclosed by Mr. Gygax was characterized as inapplicable to the Manufacturing Position. He offered no negatives applicable to the position.

A6: Mr. Gygax's reply to the specific work tasks included reference to both classes and work experience, whereas Ms. Crowell's reply referenced only course work. She was stronger on the second part of the question indicating a typing speed of 50 words per minute (wpm), as compared to Mr. Gygax's speed of 35 wpm.

20. The interviewers then "stepped back" and looked at the rankings to determine if the results were a good reflection of each candidate's performance. The candidate who ranked #1 by scored interview questions was moved to the bottom of the list because he/she was used to making a lot of judgement calls which the interviewers viewed as incompatible with the PAT-1 Manufacturing Position. This change improved Mr. Gygax's ranking, from #9 to #8.

21. Ms. Crowell ranked number 1 by virtue of her replies to the scored interview questions, whereas Mr. Gygax ranked 8th. (Exh. R-J)

22. The candidate's score and ranking on the written exam were not factors considered in the interview scoring or ranking process. Mr. Murphy did not want to know the written exam scores of candidates and he did not see the completed written exams, although he was familiar with the written exam questions. The first Mr. Murphy knew of Mr. Gygax's written exam score was when he received Mr. Gygax's post-interview letter dated 3/8/90, in which Mr. Gygax indicated he ranked number 1 on the written exam. (Exh. R-O)
23. Ms. Crowell received written confirmation of her selection by letter dated 3/9/90. (Exh. R-P, p. 2)
24. Mr. Gygax received written notice that he was not selected, by letter dated 3/21/90. (See Exh. R-P, p. 1)

Details regarding the Equalization Positions

25. The job duties of the Equalization Positions are described in the PD (Exh. R-T) and were clarified at hearing by Mr. Matthes.

Goals and Worker Activities

<u>% Time</u>	<u>Goal</u>	<u>Description of Duties</u>
85%	A.	Annual establishment of the equalized values for each taxation district in the state. Goals here include routine clerical tasks of maintaining sales files, posting forms for data processing input, maintaining control forms and ledgers, organizing appraisal data, assisting in data entry and assisting in handling and processing reports from local officials and taxpayers. This clerical portion of the job includes about 40% of the time processing about 20,000 real estate transfer forms each year. Involves separating a 6-part form, ensuring the data shows on each page of the form, and copying legal descriptions. Higher-level duties include drawing maps, plats and charts; as well as assisting in the preparation of standard property tax reports and performing the related math computations.
15%	B.	Improved administration of the assessment and equalization process. Includes mundane repetitive tasks such as screening incoming visitors and phone calls, providing routine information in reply to inquiries from various levels of government and the public. Some higher level duties are possible as general administrative support at the supervisor's direction.



26. Pursuant to DOR's request, DER provided a certification list of individuals eligible to interview for the Equalization Positions (Exh. R-U). The individual names were listed alphabetically without reference to their ages or written exam scores although eligibility was determined based on the written exam scores. Ten candidates were not interested in interviewing for the job, leaving 8 who were interviewed.
27. Prior to the interviews, each candidate was asked to complete an "Addendum to Applicant Registration" form and to bring the form with them to the interview. This form asks for information about the candidate's past formal training and work experience. The purpose of the form was as an aid to the candidate in answering the interview questions. The form was not scored separately.
28. There were two interviewers: Fred Matthes, Supervisor of DOR's Milwaukee Equalization Section and Denise Ash Kamuiru, Property Assessment Supervisor.
29. The candidates were ranked based on the same set of interview questions. The scored questions and benchmarks are shown below, per Mr. Matthes' testimony and Exh. R-V.

Q-1. As a PAT, you will be required to work with literally thousands of Real Estate Transfer Return forms. You will be mending, sorting, entering various codes, and verifying information on each form. Although the work can be tedious, accuracy is still essential due to the valuation purposes for which the information is used. Give examples from your past experiences that would illustrate your ability to deal with this type of work.  
**Benchmark:** Ideal response would include specific experience. Average response would include: if no specific experience, then transfer experience to meet needs of the job. Unacceptable would have no experience.

Q-2. Computer assist the Department in much of our work. Computer entry, file maintenance, and printing reports will be part of your duties. Give examples from your past experiences that would illustrate your ability to work with computer systems. Include any typing skills.  
**Benchmark:** Ideal response would include courses in keypunch, computer programming, owns a home computer, experience in LOTUS or other packaged programs. Prior work experience. Average response would include typing skills. Unacceptable would have no experience and no typing skills.

Q-3. Why should we hire you instead of someone else? Why do you think you are qualified for the job?

**Benchmark:** Ideal response would include examples of skills that relate to the job and mention other assets such as: 1) Good attendance, punctuality. 2) Personal attributes such as friendliness, honesty, efficiency. 3) Ability to get along with supervisors, employees and the public. 4) You think you would work harder at it than other people would. Average response: Like this type of work, are good at it (sic). Unacceptable response: No concrete examples given, only knows that he/she can do the job.

Q-4. Can you work under pressure and deadlines? Give examples from prior experiences.

**Benchmark:** Ideal response would include examples in previous jobs when it was necessary to work under such conditions. Unacceptable response: Would have no examples. This is important because statutory deadlines apply with the real estate transfer forms.

Q-5. What frustrates you the most in working with other people?

**Benchmark:** Here, the interviewers were looking for how the candidate works with other people.

30. The interview questions were related to the duties of the vacant positions.
31. Mr. Matthes described the following as Ms. Scheuers' strengths. She met anticipated responses. She had a strong background in clerical-type functions. She had been working with probation and parole and so had strong knowledge of the state's mainframe computer system which was about the same as used for the Equalization Position. She also was a strong communicator. She grasped the question, understood it and articulated an answer. Mr. Matthes felt Ms. Scheuers was not only the best candidate in these interviews, but in any PAT interview in which he has participated. She previously had worked as a PAT for 2 years.
32. Mr. Matthes described the following as Ms. Miller's strengths. She demonstrated exceptional communication skills and had the desired background performing routine tasks, such as re-stocking duties. Mr. Matthes was particularly impressed with her strong work ethic which came across in her answers to interview questions. Also, she was detail oriented. Her answers to the scored interview questions were all very

good with the exception that she did not have typing skills. Pre-existing typing skills were a consideration, but experience using the numeric pad of a computer keyboard was more critical because most of the position's input involved numbers. She did not have computer keyboard experience but she was experienced using a numeric pad on a calculator.

33. Mr. Matthes and Ms. Kamuiru took notes during each candidate's interview. Their notes regarding Mr. Gygax's responses to the scored questions are summarized below.

Gygax Answers: As recorded by Mr. Matthes (Exh. R-DD & R-EE)

A-1: Questionnaire-market research in college. Gimbels-purchasing environment. How everything fits together-purchasing authority. Real estate-sales-familiar with job and market. Deliberate but appears unsure of himself. Poor to average communicator. Talks like filling out a "blue book"-lots of filler. Helping the customer. Able to have quick information for data. Counseling-telemarketing-lots of phone contact. With Gimbels-on 2 European buying trips. Currency translation.

A-2: Yes-35 wpm. MW Kasch-IBM purchasing computers. Automated purchasing. Reviewed numbers-purchase decision. Input orders to data processing. Microcomputer course at MATC-got A on course. Lotus word processing.

A-3: Instant business background. Real estate background-broker's license. Has real estate basics, grew up on farm. Dependable, accurate. Strong math background. Likes mathematical process. Likes to see start to finish. Mental attitude good. A positive, quick to learn accurate worker, loves real estate, come back to analytical background.

A-4: Toy department at Christmas time-Gimbels. Time in order to get through season.

A-5: Stopped cold! Likes working without people. Indecision [of other workers is a problem] -decision is necessary, but others won't make it. Stands in way of getting his job done. Good team player. He did not cover how he deals with indecisive workers.

Gygax Answers: As recorded by Ms. Kamuiru Exh. R-II & R-JJ)

A-1: Compilation & tabulation of questionnaire marketing in college. Gimbels-procedures, accuracy in processing detail in area, pulls info out as needed. Knowledgeable about the total entity and foresees problems that could arise. Two European trips-exchange money and cost of shipping availability. Real estate-familiar with market-particulars of real estate and marketing situation, buyers, taxation of municipality, pricing. Sellers/buyers-list/education in making purchasing decisions, quickly decisions. Strong in these areas. US consulting-

telephone conversation, marketing. Accurate notes of info being acquired and understandable of other people.

**A-2:** Typing test: 35 wpm. MW Kascel-IBM purchasing system-weekly review and analysis of purchasing. Reading/input to data entry. Have taken microcomputer course at MATC (A) grade.

Lotus 1, 2. Word processing, a PC introduction.

**A-3:** Provide vast in business experience and real estate background. Maintain broker's license, somewhat equalization is about farm (familiar with). Demonstrated dependable, accurate, like working with numbers, like being part of analytical aspects-would have something to bring into position.

**A-4:** Yes-toy department at Christmas-enormous expansion of the number of people to be supervised-merchandise in right place at right time. Keep cool under great pressure-which he did. Real estate working fast between lister and buyer-keep everyone cool and get the job done.

**A-5:** Indecision: [Other workers] not being able to make decisions would hinder him for doing his job. Good team player.

34. The interviewers' notes of Ms. Scheuers' responses are summarized below. Blanks are shown where the examiner could not decipher the writing.

Scheuers' Answers: As recorded by Mr. Matthes (Exh. R-BB, R-CC)

**A-1:** Probation-repeated entry of formulas in data entry. Primary function-FDI files. Accuracy essential. Constant phone contact-information. Information and data file inquiry-heavy deadlines. Waitress-accuracy-timelines. Repetitious, but varied, financial screens-- 30-40 data entry.

**A-2:** No typing courses as such for speed. Have been able to use typewriter well. Much computer work-statistics on present job as well. Primary retrieval-teletype-some typing on job. Court teletype-enjoys much. PC's one course in college-basic language.

**A-3:** Best qualifications. Reading description-good basics. Likes to learn. Perfectionistic-likes numbers. 90% phone work. Emphasis pride on jobs-team players. Good communicator. Good reader. Good answer. Fast-couldn't keep up.

**A-4:** Waitress-constant pressure. Control patience-public. Desk clerk-bookkeeping. Organizer-efficiency. Computers-everyone wants info now. Two things at once.

**A-5:** Illiteracy-can't read or write. Somewhat insensitive - (I get) more frustrated with myself than with other people. Very few problems. Feels more than able to handle. Keeps own records. Sets goals-sometimes too high.

Scheuers' Answers: As recorded by Ms. Kamuiru (Exh. R-HH)

**A-1:** Program repeated entry of formula-to FBI estate board line. Done all day-must be accurate-no time to repeat. Must be done correctly. Telephone calls. Heavy time restrictions. Want to get

right abbreviations. Trained to do in certain pattern. Repetition duties. Financial services by client numbers, run number to get correct info.

**A-2:** Computer work in college-revise, study and set up plots, administration plot statistics. Typed over papers (PC). State computer. Retrieved teletype. Mainframe-type administrative messages. Supply financial screen printout. Screens interconnect. Computer system-teletype-enjoyed computers. Loved MIFS. BASIC-on-line.

**A-3:** Different types of computers and enjoy learning new things-doesn't bother. Perfection, well in math-graphics-job now about 90% phone work. Enjoys meeting people and get info. Good driver. Take pride in work, important. Good team worker. Have broad base in the areas. Good with reading comprehension.

**A-4:** Waitress-constant pressure especially at, learn to control temper. Desk clerk-explain situation. Be proficient, get info as quickly as possible to customers. Steady. \_\_\_ self up by self-prioritize work at same time as some other \_\_\_.

**A-5:** Frustration-help people who can't learn to read. She tries to overcome, do more than can handle or the system can. Keeps a record of work on her own-sets daily goals.

35. The interviewers' notes of Ms. Miller show the following as her responses to the scored interview questions.

Miller Answers: As recorded by Mr. Matthes (Exh. R-FF & R-GG)

**A-1:** Alcohol and drug abuse clinic (employed at). Paper work constant. OWI-coordinator-state forms-tedious and boring. Assessed six-seven clients/day. Builder's Square-computer printout square foot numbers. Restocking labelled appropriately. KC-hundreds of same items.

**A-2:** Can type, but slow. Only experience weekend computer class-basic class. Builders Square-recall data.

**A-3:** Interest in real estate-always. New purchase of home. MATC liberal studies. Real estate urban development. Construction area. Catch on quick-detail oriented, sometimes too detailed. (Good answer)

**A-4:** Coordinating OWI systems. Court system deadlines. Extra time necessary. Alcohol counselor-criminal court cases. Other peoples' deadlines. Shipping deadlines-extra time (at) Builders Square.

**A-5:** Long pause. If they're angry and taking it out on me. Dealing with irate customers. Misdirected anger.

Miller Answers: As recorded by Ms. Kamuiru (Exh. R-KK & R-LL)

**A-1:** Certified Alcohol Specialist-assess clients daily. Coordinator of program (used to state forms). Heavy paperwork-saw 6 to 7 clients a day. Builder's Square-a lot of paper-computer and sorting and restocking products labeled property. KC production-repetition-works with the same items day in and out.

**A-2:** Typing-limited-no idea of words per minute. Only experience weekend course, Apple Macintosh at Madison. Just got involved in Builders Square.

**A-3** Interest in real estate, recently purchased a home-MATC, UW, ok general studies. Wants to get degree from MATC in real estate. Took course in wood working as a background in construction-have decided to go. Catches on quick, very detail oriented-a problem other people saw in her (detail).

**A-4:** Coordinated always under deadline. Seven counselors. Had to put in extra time. group therapy. Had more contact with criminal system. Had to be within judicial timeline. K.C. shipping deadlines to get products shipped. Builders Square, a lot of pressure to go-go-go.

**A-5:** If someone angry/and taken out on her/or coworker-misdirected or complains.

36. After each interview, the interviewers separately scored the candidate on the five scored questions noted above. When all interviews were completed, they separately scored the candidates. If a dramatic difference existed between the scores given by one interviewer than another, they went back to their notes to ensure they each heard what the candidate said. After all interviews were completed, the candidates' scores were averaged and the candidates were ranked. The interviewers then "stood back" to determine if the rankings were representative of a candidate's performance at the interview. They decided not to make changes because the rankings fit the interview performances.
37. The scores given for Mr. Gygax's interview are shown below (Exh. R1, p. 77 & 89), along with the scores given for Ms. Scheuers (Exh. R1, p. 72 & 85) and Ms. Miller (Exh. R1, p. 77 & 89).

<u>Q#</u>	<u>Inter- viewer</u>	<u>Gygax</u>	<u>Scheuers</u>	<u>Miller</u>
Q1	Matthes	9	9	7
	Kamuiru	9	8	9
Q2	Matthes	9	10	4
	Kamuiru	9	8	4
Q3	Matthes	8	8	9
	Kamuiru	8	8	8
Q4	Matthes	8	9	9
	Kamuiru	8	8	8
Q5	Matthes	5	8	6
	Kamuiru	5	8	8
TOTAL SCORE	Murphy	39	44	35
	Behling	39	40	36
AVE. SCORE	Murphy	7.8	8.8	7.0
	Behling	7.8	8.0	7.2

38. A "more than acceptable" answer included scores of 7.0 and above. An "acceptable" answer included scores from four through six. An unacceptable answer included scores of 3.0 and below.
39. The scoring of interview questions for Mr. Gygax and Ms. Scheuers are compared below. The analysis and discrepancies noted are insufficient to suggest it was likely that the scoring was influenced by a candidate's sex, age or race/color.
- A1: Ms. Scheuers indicated she had actual work experience on data entry in a position which required accuracy, as well as transfer experience. Mr. Gygax's response indicated some direct work experience in positions requiring tedious tasks and accuracy, but mostly transfer experience. According to the benchmarks, Ms. Scheuers should have scored higher than Mr. Gygax, but in fact received a slightly lower score.
- A2: Mr. Gygax's response indicated experience and training with computer systems, but not focusing on the mundane skills of data entry, etc. His typing skills (35 wpm) were better than Ms. Scheuers'. Also, he was familiar with LOTUS, whereas she was not. Based on the interviewers' notes, he should have received a higher score on this question than Ms. Scheuers but his scores were 9-9 and hers were 10-8. Her response to the first question revealed data entry work experience which probably resulted in higher-than-expected scores for this question although the interviewers did not re-record the information for question two.
- A3: The answers given by Mr. Gygax and Ms. Scheuers were both very good and appeared about equally strong.
- A4: Ms. Scheuers should have scored higher than Mr. Gygax on this question. Both candidates were able to give examples from previous jobs of working under pressure and deadlines. Ms. Scheuers, however, also discussed strategies to deal with pressure and deadlines.
- A5: Mr. Gygax's response included some positive comments, but also included a statement which reflected the opposite of what the interviewers wanted to see. Specifically, he said he liked working without other people. Ms. Scheuers' response was better.
40. The scoring of interview questions for Mr. Gygax and Ms. Miller are compared below. The analysis discrepancies noted are insufficient to suggest it was likely that the scoring was influenced by a candidate's sex, age or race/color.

- A1: Mr. Gygax's response indicated some direct work experience in positions requiring tedious tasks and accuracy, but mostly transfer experience. Ms. Miller's response had limited direct work experience in those tasks, as well as transfer experience. They should have scored about the same.
- A2: Mr. Gygax's response to this question clearly was a better match to the benchmarks than Ms. Miller's.
- A3: Mr. Gygax's background contained several good matches to the duties required of the job, as well as personal-quality assets. Ms. Miller's response showed a limited match from past training and experience to the job, and emphasized personal-quality assets. Mr. Gygax should have scored higher than Ms. Miller.
- A4: Both candidates were able to provide examples of job experiences involving pressures and deadlines. Her examples could be viewed as slightly more impressive.
- A5: Mr. Gygax's response included some positive comments, but also included a statement which reflected the opposite of what the interviewers wanted to see. Specifically, he said he liked working without other people. Miller's response was better.
41. Ms. Scheuers ranked number 1 by virtue of her replies to the scored interview questions, Mr. Gygax ranked 3rd and Ms. Miller ranked 5th. (Exh. R-S)
42. Mr. Matthes made it clear during the interview that the interviewers did not want to know any candidate's written exam score or rank. (C17, p. 8) Yet Mr. Gygax disclosed this information in his 4/17/90 letter to Mr. Matthes, which he sent to thank Mr. Matthes for the interview opportunity. (Exh. R-NN) It was reasonable for DOR to hold the disclosure against Mr. Gygax, in judging his suitability for the *Equalization Positions*.
43. DOR's decision to hire Ms. Miller was based in part on her membership in an underutilized group (females) for PAT hires, as identified in DOR's approved AA plan in effect at the time of hire.
44. Mr. Gygax was notified he was not hired for either of the *Equalization Positions* by letter dated May 31, 1990.<sup>1</sup>

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<sup>1</sup> The information regarding the no-hire letter for the *Equalization Positions* was given during the investigation of this case and apparently was uncontested.



Manufacturing Position Compared to Equalization Positions

45. Differences existed between the Manufacturing Position and the Equalization Positions. Two major differences are noted here. Typing skills were more important for the Equalization Positions than the Manufacturing Position because a separate typing position existed in Mr. Murphy's unit. The Manufacturing Position did not process real estate transfer forms.

Significance of Written Exam Scores versus Interview Exam Scores

46. The written exam is a tool used to determine which individuals are qualified generally for a civil service classification. Individuals who receive a passing grade on the written exam are considered to possess the required general qualifications and accordingly, may become eligible for certification to interview.
47. Prior to 1986, DER included the written exam scores of candidates on the certification lists. DER ended the practice in 1986, to ensure the written scores would not be given more weight than deserved in the overall hiring process and in the determination of which candidate was the most qualified for the specific job opening. The statutes were changed by 1991 Wis. Act 101, to prohibit disclosure of written exam scores on the certification list. (s. 230.25(2)(a), Stats.) As noted by James Lawrence, the Assistant to the Administrator of DER's Division of Affirmative Action, the people scoring highest on the written test are not always the most qualified for the job being filled.
48. Candidates included on a certification list are entitled to interview for the position. The hiring authority has the right and opportunity to devise an interview process to determine qualifications and suitability for a particular vacancy. In other words, the goal of the interview process is to help the hiring authority evaluate generally-qualified candidates' suitability for a particular position.

Veterans Points

49. Certain veterans [See, s. 230.16(7), Stats.(1990 text)] are entitled to have veterans points added to their written exam score under some

circumstances. According to civil service hiring procedures mandated by s. 230.25(1), Stats., the top 5 candidates ranked by written exam score (or top 10% if the register contains more than 50 eligible candidates) are eligible for interview automatically. The certification of the top 5 candidates is a required step prior to considering expanding the list for veterans points, according to s. 230.25(1) & (1m), Stats.

50. Certain veterans who do not rank in the top five still may qualify for an interview if the addition of "veterans points" results in a score at least as great as the fifth-ranked candidate being interviewed pursuant to s. 230.25(1), Stats. This procedure is mandated by s. 230.25(1m), Stats.
51. It is undisputed that Mr. Gygax fit within a category of veterans eligible for veterans points. However, he qualified for an interview as one of the top five candidates pursuant to s. 230.25(1), Stats. The fact that veterans points were not added to his written exam score under these circumstances was consistent with legal requirements and statutory procedures for civil service hires. The same procedure was followed for all similarly-situated candidates regardless of age, sex or color/race.

#### DOR's Affirmative Action Plan

52. DOR's affirmative action (AA) plan is in the record as Exh. R-QQ, and was in effect from 1/1/90 through 6/30/93. PAT positions were included with the category of "Real Estate Technicians/Professionals/Supervisors" (hereafter referred to as the "PAT Job Category") in DOR's AA plan. The entry-level PATs were included as part of the PAT Job Category because of the opportunity to promote to the Property Assessment Specialist (PAS) series.
53. The PAT series primarily functions as an office helper who inputs numbers, maintains flow of paper work and maintains ownership changes to property. It involves routine work without much opportunity to make judgement calls. The PAS series is primarily analytical. The positions collect information, make value judgements, work with property owners, local assessors, and others.
54. DOR's AA plan indicated that the available labor pool for the PAT Job Category was comprised of 37.81% women (Exh. QQ, p. B3). Women are identified as an "underutilized category" for the PAT Job Category,

meaning the percentage of female DOR employes in the PAT Job Category were less than 80% of the percentage of females in the available labor pool. DOR expected 10 openings to occur in the PAT Job Category during the life of its AA Plan (Exh. QQ, p. 7) and created the goal of hiring 6 females for the 10 anticipated openings.

55. DER has responsibility for determining the labor force statistics upon which each state agency's AA plan is based. Evelyn Freeman from Walker & Walker, Inc., was contracted as a consultant to devise the necessary computer software.
56. Agnes Cammer, DOR's AA Officer (AAO), was identified in DOR's AA plan as having the responsibility to "monitor and evaluate the performance of the plan on an ongoing basis". (Exh. R-QQ, p. 2) She also was given the following responsibility (Exh. R-QQ, p. 4):

Whenever a position is being filled in a classification for which the agency has an affirmative action hiring goal the AAO will send a memo to all managers and supervisors involved in the hiring process for that position informing them that they have a goal for racial/ethnic minorities, women, or both. The DOR personnel director will receive a copy of the letter.

57. Where underutilization existed under DOR's AA plan in relation to a particular vacancy, it was Ms. Cammer's standard practice was to send a memo prior to interviews to alert the hiring authority. This practice was part of Ms. Cammer's ongoing responsibilities under DOR's AA plan to monitor and evaluate plan performance. The interviewers in Mr. Gygax's case understood that the memo did not require the hiring of a female.

#### Use of Expanded Certification

58. Expanded certification for women was used to develop the certification lists for the Manufacturing Position and for the Equalization Positions due to the underutilization described in the prior section.
59. Generally, the top 5 candidates by written exam score are invited to interview. Since DOR asked for expanded certification for women, the top three scoring women (who were not already one of the top 5 candidates) also were included on the certification list as eligible for an interview, as authorized by s. 230.25(1n)(a) & (b), Stats.

60. The certification lists for the Manufacturing Position and for the Equalization Positions did not indicate which candidates were included on the list by use of expanded certification. Such disclosure is prohibited under s. 230.25(2)(a), Stats. Similarly, the same statutory section prohibits disclosure of the candidates who made the list due to added veterans points.
61. All three women hired would not have been included on the certification lists except for DOR's use of expanded certification for women.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to s. 230.45(1)(b), Stats.
2. It was Mr. Gygax's burden to show probable cause exists to believe he was not hired for three PAT-1 positions in March and May, 1990, due to his sex, race/color and/or age.
3. Mr. Gygax failed to sustain this burden.

#### DISCUSSION

##### Exh. C-8 is inadmissible.

Mr. Gygax intended to use Exh. C-8 at hearing to dispute DOR and DER's assertion that underutilization for females existed for real estate technicians and related real estate jobs. The first two pages of the exhibit contain Mr. Gygax's summary of information which he gleaned from a document entitled "Major Real Estate Company's roster of Sales Associates from Multiple Listing Service (MLS), Inc., P.O. Box 733, Milwaukee, WI 53201" (hereafter, referred to as "MLS Document"). Eleven pages from the MLS Document were attached to the exhibit. The examiner ruled at hearing that Exh. C-8, would not be admitted into the hearing record because Mr. Gygax failed to provide the entire MLS Document to enable the examiner and opposing party to verify that the conclusions drawn by Mr. Gygax in his summary pages were accurate.

Mr. Gygax attempted to cure the problem by submitting the entire MLS Document after hearing. The hearing was held on 6/2 & 3/94. He submitted 40 pages as the entire document by letter dated 6/9/94, which the Commission received on 6/13/94.

On 6/13/94, the examiner wrote to the parties stating, in relevant part, as follows:

Mr. Gygax also enclosed a "complete roster" related to exhibit C-8 for my "verification" of the "accuracy" of exhibit C-8, and "confirmation of the fact that more women are Real Estate Tech, Professional, Supervisory (sic) than men". This document is not accepted as part of the record. Exhibit C-8 was ruled inadmissible at hearing. No agreement was reached to allow the record to be supplemented post-hearing to attempt to "cure" problems with exhibit C-8.

Mr. Gygax disputed the ruling in his initial brief (p. 6). Therefore, the issue is discussed again in this decision. The reasons previously provided by the examiner at hearing and in her letter of 6/13/94, still stand as the basis for the ruling. The examiner cannot accept the exhibit after hearing without the agreement of respondents. Late submission might allow verification of the accuracy of Mr. Gygax's summary, but deprives respondents of their right to cross-examine Mr. Gygax about the exhibit and/or to present rebuttal evidence.

The examiner further notes that in any event, the statistics contained in the document do not support Mr. Gygax's claim. The statistics pertain to the time period starting on 5/19/94. Ms. Agnes Cammer, DOR's Affirmative Action Officer (from 12/76, to her retirement on 5/13/94), testified that female underutilization existed at the time of Mr. Gygax's interviews in 1990, but did not exist during the period from 1994-1996. The data in Exh. C-8 is consistent with Ms. Cammer's testimony.

DOR's decision to request expanded certification was in accord with its approved AA plan and complied with related state law.

Mr. Gygax argued that DOR's use of expanded certification discriminated against him as a male and, therefore, was illegal discrimination. It is true that DOR's use of expanded certification for women worked to Mr. Gygax's disadvantage in that all three hires involved women who gained access to the interviews under expanded certification. The Wisconsin legislature, however, has determined that favorable treatment to protected groups is legal under some circumstances; including the circumstances presented in Mr. Gygax's case.

Wisconsin statutes allow use of expanded certification for civil service hires if used in conjunction with an approved AA plan. In accord, Paul v. DHSS & DMRS, 82-156-PC & 82-PC-ER-69 (6/19/86). Section 230.25(1n), Stats.<sup>2</sup>, provides as follows:

- (a) After certifying names under subs. (1), (1g) and (1m), the administrator may engage in expanded certification by doing one or more of the following:
  - 1. Certifying up to 3 names of persons belonging to at least one of one or more specified racial or ethnic groups.
  - 2. Certifying up to 3 names of persons of a specified gender.
  - 3. Certifying up to 3 names of persons with a handicap.
- (b) The administrator may certify names under par. (a) 1 or 2 only if an agency requests expanded certification in order to comply with an approved affirmative action plan or program. The administrator may certify names under par. (a) 3 only if an agency requests expanded certification in order to hire persons with a handicap.

An approved AA plan is one which complies with the requirements of Ch. 230, Stats. Section 230.18, Stats., provides that no hiring process may discriminate (including on the basis of age, sex/color, race) "except as otherwise provided". Voluntary approved AA plans are one exception "otherwise provided".

Affirmative action is defined in s. 230.03(2), Stats., as shown below.

"Affirmative action" means specific actions in employment which are designed and taken for the purposes of all of the following:

- (a) Ensuring equal opportunities.
- (b) Eliminating a substantial disparity between the proportion of members of racial and ethnic, gender or handicap groups either in job groups within the classified civil service, or in similar functional groups in the unclassified service, and the proportion of members of racial and ethnic, gender or handicap groups in the relevant labor pool.
- (c) Eliminating present effects of past discrimination.

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<sup>2</sup> There is no indication in the record that the statutory and rule provisions relating to AA plans which are cited in this decision are inconsistent with the factors relied upon by the Commission in Paul v. DHSS & DMRS, Id.

The treatment of the PAT Job Category in DOR's AA plan meets the definition of "affirmative action" in s. 230.03(2)(b), Stats., of eliminating a substantial disparity between the proportion of women in the PAT Job Category in DOR as compared to the proportion of women in the relevant labor pool.

DER's Secretary is responsible for establishing AA standards, including for use in hiring applicants for state employment, pursuant to s. 230.04(9)(a), Stats. Each employing authority (state agency head) is responsible for the preparation of an AA plan which complies with the standards established by DER's Secretary as codified in Chapter ER 43, Wis. Admin. Code.

ER 43.03(2), Wis. Admin. Code, requires each state agency plan to include (in relevant part):

\* \* \*

- (2) An analysis of the agency work force to determine if there are substantial disparities between the proportion of any affirmative action groups in either a classified civil service classification, grouping of classifications or similar function group in the unclassified service, in the agency work force and the rate of that group's representation in that part of the state labor force qualified for employment in such classification, progression series or function group in the relevant labor pool.
- (3) Goals and timetables to correct disparities identified in sub. (2).
- (4) The establishment of goals and objectives for affirmative action programs designed to achieve equal opportunity, *eliminate discrimination and attain the goals and timetables identified in sub. (3)*
- (5) Description of a system and timetable for regularly monitoring the effectiveness and progress of the agency in meeting the plan objective.

The treatment of the PAT Job Category under DOR's AA plan meets the requirements of ER 43.03(2), Wis. Admin. Code. The plan includes an analysis of DOR's work force for the PAT Job Category, a comparison to the relevant labor pool and an identification of women as an underutilized group for the AA-PAT Job Category. Corrective goals were established and the timetable set was the duration of the plan.

Mr. Gygax presented various statistics which he offered as evidence that DOR's AA plan was faulty in identifying women as underutilized for the

PAT-1 positions. The statistics he presented were insufficient for the purpose offered.<sup>3</sup> As noted previously, s. 230.18, Stats., requires an analysis which compares the composition of the relevant labor pool to the composition of the employer's workforce in an identified job grouping during the time period at issue in the case. The statistics offered by Mr. Gygax were not as specific as required by statute.<sup>4</sup>

Mr. Gygax characterized the goals for hiring underutilized groups in DOR's AA plan as illegal quotas. Hiring goals without meeting the requirements discussed previously would likely be considered illegal quotas. However, the Commission is unaware of any legal authority (statutory or case law) which considers hiring goals illegal when established in accord with the requirements discussed previously.

Analytical framework for the discrimination claims.

This is a probable cause determination. In order to make a finding of probable cause, there must exist facts and circumstances strong enough in themselves to warrant a prudent person in believing that discrimination probably has been, or is being committed. PC 1.02(16), Wis. Admin. Code. In a probable cause proceeding, the evidentiary standard applied is not as rigorous as that which is required at the hearing on the merits.

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<sup>3</sup> Exh. C-1 provides statistics of all working Wisconsin citizens in 1990. The information is not tied to the composition of the relevant labor pool for the PAT Job Category. Similarly, Exh. C-2 provides 1990 statewide population statistics for females, Exh. C-3 provides 1990 statewide employment statistics by job category, Exhs. C-4, C-5 & C-6 provide national labor-force statistics by sex over several years (including 1990). Exhs. C-9, C-17 p. 41-43 provide 1990 statistics for all civil service employees as compared to the state labor force. Exh. C-17 pp. 44-45, provide 1990 statistics for civil service employees by state agency. These statistics are too general to meet the statutory requirements.

<sup>4</sup> The Commission has ruled in favor of a white male where expanded certification was used pursuant to an invalid AA plan. The Commission found the AA Plan invalid because it did not meet the statutory requirements of Ch. 230, Stats. See, for example, Paul v. DHSS & DMRS, 82-156-PC & 82-PC-ER-69 (6/19/86). Chapter 230, Stats., (then and now) required AA plans to determine whether a disparity existed between the agency's labor force as compared to the relevant labor force. The AA plan in Paul, used statewide statistics rather than the required labor force statistics to determine if underutilization existed.



Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. McDonnell-Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

Mr. Gygax claimed he was not hired for the PAT-1 positions because of his race/color, age and/or sex. In order to establish a prima facie case of discrimination he would need to establish the following elements: 1) that he is a member of a class protected under the FEA, 2) that he applied for and was qualified for an available position, and 3) that he was rejected under circumstances which give rise to an inference of unlawful discrimination.

Mr. Gygax did not establish a prima facie case of race/color discrimination because the facts do not suggest he was rejected under circumstances which give rise to an inference of unlawful discrimination. All three individuals hired for the positions were of the same race/color as Mr. Gygax. There record does not give rise to the required inference.

Mr. Gygax established a prima facie case of age discrimination. He was over 40 years old at the time of the interviews and thereby is a member of a class protected under the FEA. He applied for and was qualified for the positions as evidenced by his written exam score. Further, the candidates selected were all under 40 years old.

Mr. Gygax established a prima facie case of sex discrimination. Sex is a class protected under the FEA. He applied for and was qualified for the positions as evidenced by his written exam score. Further, the candidates selected were all females.

The burden on the claims of age and sex discrimination then shifts to DOR to articulate a nondiscriminatory reason for hiring someone other than Mr. Gygax. Each hire is discussed below separately.

The hiring of Ms. Crowell: Respondent articulated a nondiscriminatory reason for hiring Ms. Crowell. Specifically, DOR states she was the most qualified candidate for the vacant position, as shown by her interview score and resulting #1 rank.

The hiring of Ms. Scheuers: Respondent articulated a nondiscriminatory reason for hiring Ms. Scheuers. Specifically, DOR states she was better qualified than Mr. Gygax for the vacant position, as shown by her interview scores and resulting rank.

The hiring of Ms. Miller: DOR said Ms. Miller was hired because she was qualified for the vacant position and because she was a member of an underutilized group (women) identified for the PAT Job Category in DOR's AA plan.

The burden then shifts to Mr. Gygax to show that DOR's articulated reasons are really a pretext for age or sex discrimination. His arguments are addressed in the following paragraphs.

Veteran's Points/Modified Ruling

After post-hearing briefs were submitted, the examiner re-reviewed Mr. Gygax's letter which he signed on 8/22/92, and which was received by the Commission on 8/24/92. The letter states in pertinent part as shown below.

*I withdraw military reserve membership as a basis of discrimination...*

*\* \* \**

*... [T]he competitive examination score is no longer even used or known to the decision maker who determines who is hired. In my case one person (Laura Miller, hired in June, 1990) was hired with both a lower competitive examination score and also a considerably lower interview score. All positions filled from this register were filled with persons with lower competitive examination scores. Also, in my case consideration was not given to my final grad [sic] W/VP [meaning, "with veteran's points"] according to 230.16(7). ...*

Upon reflection, the examiner determines the most reasonable interpretation of Mr. Gygax's letter is that he no longer wished to have his military status considered as a separate basis of discrimination under ss. 111.321 and 111.322, Stats., but that he continued to take issue with DER's failure to give him additional veteran's points on his written exam score. Contrary to the examiner's belief at hearing, Mr. Gygax's letter does not express an intent to drop the matter entirely. A question remains as to how the matter of veteran's points fits into the legal analysis of his case.

Mr. Gygax filed a charge of discrimination under the FEA, but not an appeal under the Civil Service Code (Ch. 230, Stats.).<sup>5</sup> Nor could his charge of discrimination also be treated as an appeal because it was not timely filed. He had 300 days from his notice of rejection to file his charge of discrimination, pursuant to s. 111.39(1), Stats., a deadline he met. Appeals of the civil service code, however, must be filed within 30 days from his notice of rejection, pursuant to s. 230.44(3), Stats., a deadline he did not meet.

Potential remains for consideration of the veteran's point issue under Mr. Gygax's FEA claim. For example, it would be relevant to the discrimination claim to determine whether Mr. Gygax was given the same veteran's preference as other eligible individuals regardless of their age, sex or race/color.

The record shows DER followed the procedure mandated by statute when Mr. Gygax was not given the additional veteran's points. He was the top-ranked candidate by written exam without the additional points whereas the statutes authorize additional points only for candidates who do not rank in the top five on the certification list. (See pars. 49-51 of the Findings of Fact.) DER followed the statutory procedure for all individuals eligible for veteran's points, regardless of their age, sex or race/color.

Based on the foregoing, the existing facts and circumstances are not strong enough in themselves to warrant a prudent person in believing that discrimination probably has been, or is being committed.

DOR's AA Officer (Cammer) required the hiring authority to justify hire of individual from non-underutilized group.

Mr. Gygax attempted to show pretext by suggesting DOR pre-selected the women hired. His evidence of preselection relates to Ms. Cammer's standard practice of sending an AA letter to staff involved with the interviews . (See Exh. C17, p. 14, for example.) Her standard letter includes the following language:

If after conducting your interviews and hiring deliberations your decision is to select an individual who is not a target group member for this vacancy, you must contact me at 608/266-7061

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<sup>5</sup> See Wilterdink v. DOR, 85-0072-PC (2/6/86), for an example of a civil service appeal (rather than a discrimination complaint) of a PAT hiring process.

before you make a job offer to discuss your justification for not making an affirmative action hire. [Emphasis appears in the original.]

Ms. Cammer's memo is part of DOR's system for regularly monitoring the effectiveness of its AA plan objectives. (See pars. 56 & 57 in the Findings of Fact.) The interviewers understood there was no requirement to hire women, only a requirement to explain why a women was not recommended for hire. Further, the record indicates Ms. Cammer approved the hire of non-targeted groups in other hires where justified for example, by the interviewers' opinion that another person was the best candidate for a particular vacancy. Under these circumstances, Mr. Gygax failed to show facts and circumstances strong enough in themselves to warrant a prudent person in believing that discrimination probably has been, or is being committed.

DOR did not consider written exam scores.

Mr. Gygax felt the results of the written exam scores should have been taken into account in DOR's hiring decision. He contended that such failure constituted a violation of s. 230.15(1) & (3), Stats., the text of which is shown below.

(1) Appointments to, and promotions in the classified service, shall be made only according to merit and fitness, which shall be ascertained so far as practicable by competitive examination for appointments made under sub. (1m).

\* \* \*

(3) No person shall be appointed, transferred, removed, reinstated, restored, promoted or reduced in the classified service in any manner or by any means, except as provided in this subchapter.

The written exam is one measure of "merit and fitness", within the meaning of s. 230.15(1), Stats. However, the interview process also is a measure of merit and fitness, as noted in pars. 46-48 of the Findings of Fact.

Sections 230.15(1) & (3), Stats., do not require the appointment of the candidate with the highest written test score. Thompson v. DMRS & DNR, Case No. 87-0204-PC (4/28/89), citing State ex rel. Buell v. Frear, 146 Wis. 291, 131 N.W. 832 (1911), for the proposition that the statute intends reasonable

discretion to be exercised by the appointing authority in deciding which of the certified candidates to hire.

Nor does the language of s. 230.15(1) & (3), Stats., require the written exam score to be a factor considered in the post-certification hiring process. Thompson v. DMRS & DNR, Id., p. 5-6 of Proposed Decision and Order which was adopted in the Final Decision and Order.

Furthermore, DOR did not consider the written exam score of any candidate. Respondents treated all certified candidates the same in this fashion, regardless of the candidate's age, sex or color/race. Under these circumstances, the facts and circumstances are not strong enough in themselves to warrant a prudent person in believing that discrimination probably has been, or is being committed.

#### The Interview Questions

Mr. Gygax attempted to show pretext by his allegation that the interview questions were so subjective that the results cannot be credited. The Commission disagrees.

An objective question has one correct answer, such as in a true/false test or a math question. A purely subjective question has no one correct answer; rather, the correct answer is determined by the listening individual's feelings and ideas. An example of a purely subjective question would be to ask someone whether blue or pink is the prettier color.

It is true that the interview questions were subjective to some extent. However, benchmarks were developed as the "correct answer" for grading purposes. The establishment and use of the benchmarks substantially limited subjectivity in the grading process.

Furthermore, the interview questions and benchmarks were related to the duties of the vacant positions and were developed prior to the interviews when specifics of each candidate's background were unknown to DOR. The record does not give rise to an inference that the interview questions/benchmarks were designed to give preferential treatment to women, candidates under 40 years of age, or candidates of a specific color/race.

For the foregoing reasons, the facts and circumstances are not strong enough in themselves to warrant a prudent person in believing that discrimination probably has been, or is being committed.

PAT-1s must meet certification standards under s. 73.09(2), Stats., as a condition of passing probation.

Mr. Gygax felt the certification requirement for PAT-1s supported his contention that he was the best qualified candidate for the Equalization and Manufacturing Positions. He may be correct that an individual with a professional real estate background would have an advantage in meeting certification requirements as compared to individuals lacking the same background. On the other hand, there is no record evidence to indicate that PAT-1 incumbents without a real estate background historically fail the certification standards.

Mr. Gygax and others may feel it would have been wiser for DOR to emphasize a real estate background rather than repetitive, mundane tasks. However, it was within DOR's managerial role to decide what factors would be most valuable in response to interview questions, and such decision should not be overturned lightly.

DOR chose to structure the interview questions to emphasize repetitive, mundane tasks. The decision was reasonable considering the job duties of the PAT-1 entry level positions. Furthermore, DOR's interview questions and related benchmarks were developed prior to the interviews at a time when the interviewers did not know Mr. Gygax's background in real estate. Under these circumstances, even at the lower probable cause evidentiary standard, the record does not support an inference that DOR's decision to emphasize mundane, repetitive tasks was made because of Mr. Gygax's or of any other candidate's age, sex, or color/race.

Mr. Gygax's Qualifications as compared to those of Ms. Crowell and Ms. Scheuers.

Mr. Gygax felt more qualified for the Manufacturing and Equalization Positions than either Ms. Crowell or Ms. Scheuers. His opinion is based upon his background in real estate which Ms. Crowell and Ms. Scheuers lacked.

The benchmarks show DOR did not value professional real estate experience as highly as experience performing mundane, repetitive tasks;

regardless of the candidate's age, sex or color/race. Furthermore, DOR's emphasis was reasonable for these entry-level jobs which required performance of mundane, repetitive tasks. Accordingly, the facts and circumstances are not strong enough in themselves to warrant a prudent person in believing that discrimination probably has been, or is being committed.

Mr. Gygax's qualifications as compared to those of Ms. Miller.

Overall, Mr. Gygax's answers to the interview questions were a better match to the benchmarks than answers provided by Ms. Miller. However, Mr. Gygax's act of disclosing his written exam score was reasonably considered as a factor against him. (See par. 42 of the Findings of Fact.)

The record shows Mr. Matthes felt strongly that the disclosure of Mr. Gygax's written exam score was inappropriate. The record does not support a conclusion even at the lower probable cause standard, that Mr. Matthes would have felt differently if Mr. Gygax had been a woman, under 40, or of a different race/color.<sup>6</sup>

The interview process demonstrated that Ms. Miller was qualified for the Equalization Positions. Her lack of typing skills as a weakness was offset to a degree by her experience using a numeric pad on a calculator. As compared to Mr. Gygax, Ms. Miller lost 5 points per interviewer due to her lack of typing skills; yet she still achieved a "more than acceptable" overall score.

The Commission has rejected the argument that discrimination occurs in every case where a member of an underutilized group identified in an approved AA plan is hired even though she/he had a post-interview rank lower than other candidates who are not a member of the underutilized group. Byrne v. DOT & DMRS, 92-0672-PC & 92-0152-PC-ER (9/8/93), aff'd Byrne v. State Personnel Commission, Case No. 93-CV-003874 (Cir. Ct. Dane Co. 8/15/94).

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<sup>6</sup> Mr. Gygax pointed to omissions on Ms. Miller's Addendum to Applicant Registration form as evidence that Ms. Miller failed to follow directions too. The omission on the form, however, was not of the same nature or significance as Mr. Gygax's disclosure of his written exam score after being told such disclosure would be inappropriate. The potential impact of Ms. Miller's omission was slight as compared to the potential impact of Mr. Gygax's disclosure which could be viewed as tainting the interview process by introducing information which was not considered for every candidate.

The Byrne court noted as follows:

The commission did not contravene the law which provides that, although absolute racial preferences may be unlawful, race may be considered as one factor among others in making employment decisions, at least where a bona fide affirmative action plan is involved. University of California Regents v. Bakke, 438 U.S. 265 (1978); Steelworkers v. Weber, 443 U.S. 193 (1979). [Footnote omitted.]

It is generally true (as Mr. Gygax argues) that the FEA prohibits consideration of a candidate's sex as a reason for making a hiring decision. The narrow exception noted in Byrne applies here. No violation of the FEA occurred when Ms. Miller was a member of a group identified in an approved AA Plan as an underutilized group for the PAT Job Category, where DOR clearly showed she was qualified for the job and where the interview process otherwise was free of discrimination. In accord, Paul v. DHSS & DMRS, Id., and Kesterson v. DILHR & DMRS, 85-0081-PC & 85-0105-PC-ER (12/29/86). In short, the facts and circumstances are not strong enough in themselves to warrant a prudent person in believing that discrimination probably has been, or is being committed.

ORDER

This case is dismissed.

Dated \_\_\_\_\_, 1994.

STATE PERSONNEL COMMISSION

\_\_\_\_\_  
LAURIE R. McCALLUM, Chairperson

\_\_\_\_\_  
DONALD R. MURPHY, Commissioner

\_\_\_\_\_  
JUDY M. ROGERS, Commissioner

cc: G. Gygax  
D. Goldsworthy