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MARK S. FLOTTUM,
 Appellant,

v.

Acting Administrator, DIVISION
 OF MERIT RECRUITMENT AND
 SELECTION,
 Respondent.

Case No. 90-0155-PC

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FINAL
 DECISION
 AND
 ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(a), stats., of a decision to limit the competition for the examination for Vocational Rehabilitation Supervisors 2 and 3 to Department of Health and Social Services (DHSS) employees, or on an agency-wide basis, as opposed to a service-wide basis. This matter was heard on an expedited basis at the appellant's request due to the fact that the case would be rendered effectively moot if no decision were to be rendered prior to May 12, 1990, the date of the examination. The undersigned was appointed as hearing examiner with authority to render a final decision pursuant to §227.46(3)(a), stats. The issue for hearing is:

[W]hether respondent's decision to limit competition for the subject exam to DHSS employees is in violation of the civil service code (Subchapter II, Chapter 230, stats.; Ch. ER-Pers, Wis. Adm. Code). Prehearing conference report dated May 3, 1990.

FINDINGS OF FACT

1. This appeal concerns a promotional examination for Vocational Rehabilitation Supervisors 2 and 3 (VRS 2 & 3) which was announced April 6, 1990, with an examination date of May 12, 1990. Competition is limited to DHSS employees -- i.e., agency-wide.

2. Appellant was employed as a counselor in the Division of Vocational Rehabilitation (DVR) in DHSS for 14 years. In October 1989, appellant transferred to a position in Probation and Parole, Division of Corrections. Effective January 1, 1990, the Division of Corrections became a separate agency, the Department of Corrections(DOC), and appellant became a DOC employe. As a DOC employe, therefore, he was ineligible to compete in the VRS 2 and 3 examination.

3. While employed at DVR, appellant had taken and passed the VRS 2 & 3 examination with a rank of sixth on the last exam and had been offered an appointment, but declined it because of the location of the position.

4. The last VRS 2 & 3 exam, which was given on an agency-wide basis, resulted in a register of about 29 or 30 applicants. Only one or two of these were not DVR employes.

5. Respondent DMRS made the decision to limit competition for the current exam on an agency-wide basis, in consultation with DVR. The personnel specialist who was effectively responsible for this decision was Orlando Bell, of DMRS, who worked with Marian Forseth, a personnel assistant with DVR.

6. The points that were considered in reaching the decision for an agency-wide recruitment were as follows:

a) Past practice -- Past practice had been to recruit on an agency-wide basis and this had resulted in a good pool of qualified applicants from which to select.

b) Current adequacy of qualified applicants in and out of agency pool -- It was determined in consultation with Ms. Forseth that there were an adequate number of qualified candidates currently within the agency. A related point was their opinion that there would not be a significant number of qualified applicants outside the department. This opinion was based at least in part to the fact that the positions were involved in a direct service program with a very complicated state-federal funding mechanism, and it was felt that the persons hired should have a social services background that would allow them to "hit the ground running" upon appointment. It was their opinion that to proceed on a service-wide basis would result in very few

additional well-qualified candidates, but would create the likelihood of an unwieldy number of additional applicants.

c) Employee Morale --It was determined that agency-wide recruitment would be positive for employee morale within the agency by enhancing the opportunity for upward mobility.

d) Adequate balance with respect to affirmative action/equal employment opportunity considerations -- A review of past staffings revealed a good response of women and minority applicants for these positions when recruitment was on an agency-wide basis.

e) Effect of preference set forth in §ER-Pers 11.02(2)(b), Wis. Adm. Code -- The order of preference for competition (service-wide, agency-wide, employing unit-wide) set forth in this rule was considered, but it was determined that the foregoing factors outweighed the general preference for service-wide competition.

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 and must establish by a preponderance of the evidence that respondent's decision to limit competition for the VRS 2 & 3 exam to DHSS employes is in violation of the civil service code (Subchapter II, Chapter 230, stats.; Ch. ER-Pers. Wis. Adm. Code).

3. Appellant has not sustained his burden and it is concluded that respondent's decision to limit competition for the VRS 2 & 3 exam to DHSS employes is not in violation of the civil service code (Subchapter II, Chapter 230, stats.; Ch. ER-Pers, Wis. Adm. Code).

DISCUSSION

The key civil service code provisions governing the base of competition for classified civil service vacancies are as follows:

Recruitment for classified positions shall be an active continuous process conducted in a manner that assures a diverse, highly qualified group of applicants, and shall be conducted . . . on the broadest possible base consistent with sound personnel management practices and an approved affirmative action plan or program. Due consideration shall be given to the provisions of §230.19. §230.14(1), Wis. stats.

If, in the judgment of the administrator, the group of applicants best able to meet the requirements for vacancies in positions in the classified service are available within the classified service, the

vacancies shall be filled by competition limited to persons in the classified service . . . unless it is necessary to go outside the classified service to be consistent with an approved affirmative action plan or program. The administrator may also limit competition for promotion to the employes of an agency or an employing unit within an agency if the resulting group of applicants would fairly represent the proportion of members of racial and ethnic, gender or handicap groups in the relevant labor pool for the state. §230.19(2), stats.¹

Competition under this subs. may be limited and separate registers of qualified applicants under par. (a) may be established in the following order of preference:

1. Eligible persons employed within state service.
2. Eligible persons employed within an agency.
3. Eligible persons employed within an employing unit.
§ ER-Pers. 11.02(2)(b), Wis. Adm. Code.

The administrator, in determining the most appropriate base of recruitment for classified civil service positions, shall consider such factors as: affirmative action; agency goals; staff development patterns; availability of qualified applicants in the service, agency or the employing unit, and effect on employe morale or turnover; designated promotional patterns in the classification series; availability of trained people in the labor market, including the number who have completed or are completing training for the type and level of positions; value of bringing new personnel with different backgrounds into the service; current pay; employe benefits and hiring practices for the types of positions; the interests of other agencies which may use the eligible lists; and efficiency in conducting recruitment programs and examinations. § ER-Pers. 6.01, Wis. Adm. Code.

Section 230.14(1), Stats., provides that recruitment shall be on the "broadest possible base consistent with sound personnel management practices." (Emphasis added) and subject to the provisions of §230.19, Stats. Section 230.19 provides that if the best-qualified applicants are available within the classified service, competition shall be on a promotional basis unless it is necessary to go outside for affirmative action purposes. That is, this is an exception or limitation to the provision in §230.14(1) that recruitment be on the "broadest possible base." The second sentence in

¹ The last sentence of this subsection was added by 1989 Wis. Act 31, effective August 8, 1989.

§230.19(1), which was added by 1989 Wis. Act 31, explicitly states that recruitment can also be limited to agency or employing unit employees so long as the resultant candidate pool is representative in terms of "racial and ethnic, gender or handicap groups in the relevant labor pool for the state."

Read together §§230.14(1) and 230.19(2), as amended, make it clear that the general preference of the civil service code is for the broadest possible base of recruitment to fill vacancies, consistent with "sound personnel management practices," and except that promotional competition is favored where the best-qualified candidates are available within the service and it is not necessary to go outside the classified service for affirmative action purposes. The amendment to §230.19(2) makes it clear that competition can also be limited to agency-wide or employing unit-wide recruitment so long as the makeup of the resultant applicant pool is representative of the state labor pool. Appellant argues that this amendment simply addresses AA/EEO concerns -- i.e., that it permits limiting recruitment to the agency or employing unit level if necessary for AA/EEO purposes. However, the way this sentence is worded ("The administrator may also limit competition for promotion to the employees of an agency or an employing unit if the resulting group of applicants would fairly represent the proportion of members of racial and ethnic, gender or handicap groups...") the administrator is not restricted to limiting competition to the agency or employing unit level where it is necessary to do so for affirmative action reasons. The representativeness of the resultant pool is simply a condition which must be present to limit competition in this manner, but the limitation can be imposed for other reasons.

The administrative code rules quoted above provide additional direction with regard to the effectuation of the more or less general principles set forth in the statutes. Section ER-Pers. 11.02(2)(b), which establishes an order of preference for service-wide, agency-wide, and employing unit-wide competition, reflects the general direction provided by §230.14(1), Stats., that recruitment is to be on the broadest possible basis. Section ER-Pers. 6.01, which sets forth an extensive list of factors to be considered in the determination of the appropriate recruitment base, is a detailed exposition of the kinds of "sound personnel management practices" referred to in §230.14(1) that qualify the general preference for the broadest possible recruitment base, and, inferentially, the preference for service-wide over agency-wide recruitment in promotional situations.

The record in this case reflects that in deciding to limit competition to DHSS employees, respondent considered many of the factors set forth in § ER-Pers. 6.01, within the context of the general provision of § ER-Pers. 11.02(2)(b) regarding order of preference. Respondent had an adequate basis for limiting this exam to an agency-wide recruitment base. Probably the key factor is that past experience showed that the overwhelming majority of people who passed the exam came from within DVR. There is nothing on this record to contradict in a meaningful way the opinion of respondent's personnel people that to have made the exam service-wide would have netted only a few more qualified applicants while probably substantially increasing the number of examinees. Appellant argued that Probation and Parole should contain a good source of qualified candidates. However, this contention is inconsistent with the fact that these employees did not appear on the register when the exam previously had been given on an agency-wide basis and probation and parole was in

DHSS. On this record, it appears that respondent probably could have had a good case for limiting competition to DVR, which has provided the great majority of qualified candidates in the past, but respondent went to agency-wide recruitment for affirmative action reasons and to broaden the pool somewhat consistent with § ER-Pers. 11.02(2)(b).

Appellant also relied on some of the statutory language concerning the legislative intent underlying the civil service code -- e.g., §230.01(2) -- and the liberal construction language contained in §230.02. However, the general principles set forth in §230.01(2) can not override specific statutory provisions which explicitly give the administrator the right to restrict the base of competition on an agency-wide basis.

In conclusion, it is unfortunate that appellant is unable to compete in this exam. He is obviously qualified, as he has demonstrated in the past when competing as a DVR employe, and except for the creation of a separate DOC he would be eligible to compete in this exam. However, particularly in light of the fact that the register for these positions has been filled almost exclusively by DVR employes in the past, respondent's decision to restrict competition on an agency-wide basis cannot be found to violate the civil service code.

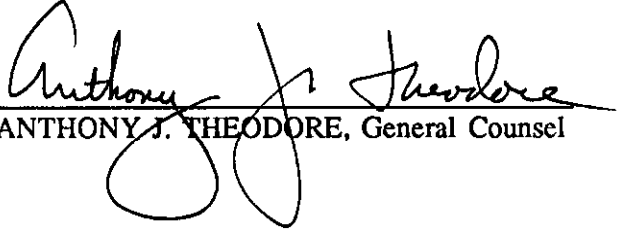
During the course of this proceeding there was some informal discussion concerning the possibility of integrating appellant into the new register. While this did not appear feasible at that time, respondent is urged, in light of appellant's seemingly unique situation, to carefully examine this option, possibly in connection with the reactivation of the previous register.

ORDER

Respondent's decision to limit competition for the subject exam to DHSS employees is affirmed and this appeal is dismissed.

Dated: May 10, 1990

STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, General Counsel

AJT:gdt

Parties

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