

<p>WILLIAM R. TAYLOR, JR.,</p> <p style="text-align: center;">Appellant,</p> <p>v.</p> <p>Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,</p> <p style="text-align: center;">Respondent.</p> <p>Case No. 90-0279-PC</p>
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INTERIM  
DECISION  
AND  
ORDER

This matter is before the Commission to resolve the disagreement between the parties as to the appropriate issue(s) for hearing and to rule on the appellant's motion to add the Department of Public Instruction (DPI) as a party respondent.

The appeal arises from the decision to find the appellant "not eligible" for the position of School Administration Consultant-Private Schools. The following facts appear to be undisputed:

1. At all relevant times, the appellant has been employed at the Department of Transportation.
2. The June 1, 1990, bulletin of "Servicewide Promotional and Transfer Job Opportunities" included a job announcement for School Administration Consultant - Private Schools in the Division for School Financial Resources and Management Services, Department of Public Instruction (DPI). The announcement stated in part:

**DUTIES:** Provide statewide consultation and leadership services to public and private school administrators regarding identification and evaluation of programs and the establishing of standards and guidelines for compliance with federal and state regulations for public/private schools and home-based private educational programs.... Apply with the Application for State Employment form (DER-MRS-38) and a detailed resume which highlights your qualifications for this position as it relates to the duties and knowledge requirements listed above to Virginia Maly; DPI; Personnel Office.... Resumes will be screened for relevant knowledge and/or experience and the most qualified candidates will be invited to participate further in the selection process.

3. The appellant filed an application for the vacancy.

4. The appellant was mailed a "Notice of Examination Results" which listed his final grade as "Not Eligible." The cover letter was signed by Lee Hill, Personnel Specialist, Bureau for Personnel Services, DPI, and stated, in part:

The first step in the selection process for this position was to review the application and resume of each applicant.

The applications and resumes were grouped into two groups - more qualified and less qualified - based on three criteria: (1) experience in the planning, developing and implementing of federal/state policies and procedures pertaining to public or private school operations or equivalent experience; (2) experience in the public or private sector in organizing, designing and implementation of instructional programs or equivalent experience; (3) experience in providing consultation and group facilitation with school boards, administrators, and staff or equivalent experience.

Your status as "not eligible" does not necessarily mean that your education and experience was evaluated as unacceptable; rather, it means that you were not categorized as among the more qualified with respect to the job related criteria cited above.

5. On July 19, 1990, the appellant filed a written letter of appeal with the Personnel Commission. The appeal requested the following relief: "being selected for the position." The letter set forth three grounds for appeal. The first related to the criteria used in rating the applicants, the second related to the appellant's own qualifications for the position and the third, labelled by the appellant as "The Big Picture: Good Public Policy" related to knowledge and experience which the appellant felt should have been considered when considering applicants.

6. DPI has no delegated authority pursuant to §230.05(2), Stats., to finally approve Exam Plan Checklists, the High Importance Job Content Questionnaire, or résumé screening criteria. These were only recommended by DPI and were finally approved by Kathy Knudson of DMRS.

7. Resume screening in this case was performed by Amza Vail, DPI bureau director, who formerly supervised the position at issue here.

8. The position for which the appellant applied has been filled.

9. DMRS retained full and complete responsibility to ensure that the examination was job-related, valid and approved by the administrator of DMRS, under sec. 230.16(4), Stats.

Findings of fact 6, 7 and 8 are taken from an affidavit of Lee W. Hill, filed by respondent. These facts were not contested by the appellant. Finding of fact 9 is taken from the brief of DMRS dated October 11th and was also not contested.

A prehearing conference was held in this matter on August 9, 1990. During the course of the conference the appellant requested DPI be added as a party and the Division of Merit Recruitment and Selection (DMRS) did not object. DPI subsequently objected to being added as a party and a briefing schedule was established. Also during the August 9th conference, DMRS proposed the following issue for hearing:

Whether the examination for the position of School Administration Consultant - Private Schools was conducted in accordance with §230.16(4), Stats., and s. ER-Pers. 6.05, Wis. Adm. Code.

By letter dated September 20, 1990, the appellant identified eleven issues relating to his appeal:

I feel that this personnel action done by DPI:

- 1) did not serve Wisconsin citizens fairly, efficiently or effectively 230.01(1)
- 2) was not based on the ability to perform the duties and responsibilities assigned to the position 230.01(2)
- 3) Showed DER had, in fact, delegated its function to DPI 230.04(1m)
- 4) although not a training program, betrays a pattern of definition and selection that avoids candidates and potential candidates with the knowledge and abilities that would best qualify them to effectively perform in the position 230.046(1)
- 5) did not rest upon actual duties performed by the incumbent in the position 230.06(1)(c) & 230.09(1)
- 6) did not involve significant change in duties or responsibilities assigned to the position 230.09(2)(c)
- 7) did not assure a diverse, highly qualified group of applicants 230.14(1)
- 8) did not measure the merit and fitness of the applicants for the position as it actually is 230.15(1)

9) did not assure that people currently working in "private education" would have any opportunity to compete in the examination process 230.16(2)

10) was not job-related 230.16(4), and

11) did not treat applicants fairly 230.16(5).

In its brief dated October 11, 1990, DMRS indicated it would agree to an amendment of its original proposed issue so that it would read:

Whether the examination for the position of School Administration Consultant--Private Schools was conducted in accordance with sec. 230.16(4) and (5), Stats., and s. ER-Pers 6.05, Wis. Adm. Code.

Motion to Add DPI as a Respondent

This appeal arises from the decision made as part of the résumé screen conducted for the vacant School Administration Consultant position, to deem the appellant as "not eligible" for further consideration in the examination process. This decision occurred prior to the certification of eligibles for the vacancy. The Commission's jurisdiction is based on §230.44(1)(a), Stats., which makes appealable a personnel decision made by DMRS or delegated to an appointing authority by DMRS. The appellant's letter of appeal, as a general matter, relates to the standards developed for the résumé screening and the way in which those standards were applied. Finding of fact 6, above, makes it clear that DMRS did not delegate its authority to adopt résumé screening criteria to DPI. However, the record is somewhat less clear as to whether DMRS delegated the authority to DPI to apply those criteria to individual applications that had been received. Finding of fact 7 indicates that Amza Vail, a DPI bureau director, actually performed the résumé screening. However, in its brief of October 11th, DMRS stated that "DMRS retained full and complete responsibility to ensure that the examination was job-related, valid and approved by the administrator of DMRS, under sec. 230.16(4), Stats." Pursuant to that subsection and subsection (5):

(4) All examinations, including minimum training and experience requirements, for positions in the classified service shall be job-related in compliance with appropriate validation standards and shall be subject to the approval of the administra-

tor. All relevant experience, whether paid or unpaid, shall satisfy experience requirements.

(5) In the interest of sound personnel management, consideration of applicants and service to agencies, the administrator may set a standard for proceeding to subsequent steps in an examination, provided that all applicants are fairly treated and due notice has been given. The standard may be at or above the passing point set by the administrator for any portion of the examination. The administrator shall utilize appropriate scientific techniques and procedures in administering the selection process, in rating the results of examinations and in determining the relative ratings of the competitors.

In addition, §230.05(2)(b), Stats., provides:

The administrator is prohibited from delegating any of his or her final responsibility for the monitoring and oversight of the merit recruitment and selection program under this subchapter.

Because the résumé screen process, including the adoption of the criteria and the application of those criteria to individual applicants, was part of the examination for the subject position and DMRS did not delegate its responsibility for the examination, DPI cannot be considered a necessary party to a review of that examination unless DPI is a necessary party to any relief which might be awarded to the appellant. The only requested relief identified by the appellant is that he be "selected for the position." DPI contends that if the appellant were to prevail as to the merits of his appeal, the Commission would have no authority to have him placed in the position because the vacancy has been filled. The Commission has previously declined to drop an agency as a party to a proceeding where the petitioner has contended he should be employed by that agency as a remedy to the action. In Prill v. DETF & DHSS, 85-0001-PC-ER, 1/23/89, reconsideration denied, 1/30/89, the complaint arose from a decision relating to retirement benefits. The complainant's former employing agency was retained as a party in addition to the Department of Employee Trust Funds even though the complainant had conceded that his former employing agency had not discriminated against him where the complainant contended he should be reinstated to his former position as the remedy upon a finding of discrimination. In denying the petition to reconsider filed by DHSS, the Commission offered the following analysis:

Inclusion of DHSS in the matter is supported by the decision in U.S. v. Pabst Brewing Co., 183 F. Supp. 220 (E.D. Wis., 1960). There, two defendants were retained as parties pending determination of the relief to be granted, even though the plaintiff conceded that they had been charged with no offense, where the plaintiff contended that they were proper parties for the purposes of relief. The court ruled that their argument that "no conceivable remedy could ... be granted against them" was premature: "[T]he question of whether any effective relief can be granted against the movants must await the determination of the substantive issues."

For the same reasons, DPI will be added as a respondent in the present matter.

Issue for Hearing

DMRS has most recently proposed the following issue for hearing:

Whether the examination for the position of School Administration Consultant--Private Schools was conducted in accordance with sec. 230.16(4) and (5), Stats., and s. ER-Pers 6.05, Wis. Adm. Code.

Each of the appellant's 11 allegations/issues is discussed below.

1. [I feel that this personnel action done by DPI<sup>1</sup>] did not serve Wisconsin citizens fairly, efficiently or effectively 230.01(1)
2. [I feel that this personnel action done by DPI] was not based on the ability to perform the duties and responsibilities assigned to the position 230.01(2)
4. [I feel that this personnel action done by DPI] although not a training program, betrays a pattern of definition and selection that avoids candidates and potential candidates with the knowledge and abilities that would best qualify them to effectively perform in the position 230.046(1)

The statutory references in all three of these allegations are to statements of policy. Statutory statements of policy are not enforceable as such and merely serve as an aid to interpretation of the other statutory provisions. The appellant may wish to cite this language in support of a specific interpretation of other provisions in ch. 230, Stats., but the language of §230.01(1) and (2) and

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<sup>1</sup>While the appellant has phrased his allegations in terms of actions taken by DPI, the Commission has concluded that DMRS has sole legal responsibility for designing and applying the resume screen examination. The appellant's allegations will be interpreted as if he had referred to DMRS rather than to DPI.

230.046(1), Stats., does not itself serve as a basis for an appeal to the Commission.

3. [I feel that this personnel action done by DPI] Showed DER had, in fact, delegated its function to DPI 230.04(1m)

Section 230.04(1m), Stats., sets forth the powers and duties of the secretary of the Department of Employment Relations, which, for purposes of ch. 230, Stats., and specifically §230.44(1), Stats., is a separate entity from the administrator of DMRS. The appellant's reference to the secretary of DER is immaterial to his allegations regarding the examination process here.

5. [I feel that this personnel action done by DPI] did not rest upon actual duties performed by the incumbent in the position 230.06(1)(c) & 230.09(1)

Section 230.06(1)(c), Stats., requires an appointing authority to provide DER with "current information relative to the assignment of duties" to classified positions in the appointing authority's agency. Section 230.09(1), Stats., requires DER to, among other things, establish position classifications for all positions in the classified service.

The Commission interprets the appellant's statement as a contention that the respondents failed to properly take into consideration the actual duties of the subject position in developing the résumé screen criteria. That contention is included within the issue proposed by DMRS.

6. [I feel that this personnel action done by DPI] did not involve significant change in duties or responsibilities assigned to the position 230.09(2)(c)

Section 230.09(2)(c), Stats., requires an appointing authority to give written notice to DER and the employee involved where a change in the assignment of duties due to anticipated changes in either program or organization "may affect the classification of a position." Here, the appellant's contention is that there was no significant change in the duties or responsibilities assigned to the position. The cited statute clearly does not require any action on the part of either DER or the appointing authority where there has been no significant change in duties. In addition, there is no apparent connection between the appellant's contention and the examination for the School Ad-

ministration Consultant position. Under these circumstances, the issue for hearing should not make specific reference to this contention.

7. [I feel that this personnel action done by DPI] did not assure a diverse, highly qualified group of applicants 230.14(1)

9. [I feel that this personnel action done by DPI] did not assure that people currently working in "private education" would have any opportunity to compete in the examination process 230.16(2)

Section 230.14(1), Stats., requires that recruitment for a position in the classified service be "conducted in a manner that assures a diverse, highly qualified group of applicants." Section 230.16(2), Stats., requires that examinations be open to all applicants who are state residents and "who have fulfilled the preliminary requirements stated in the examination announcement."

The appellant's contentions relate to the scope of recruitment for the vacancy rather than to the appropriateness of the examination for that vacancy. The facts set out above establish that DMRS recruited servicewide for the School Administration Consultant vacancy. The appellant was qualified to apply because of his status as an employe of the Department of Transportation. DMRS argues that the appellant lacks standing to contest the decision because he was not "adversely affected" by the decision to limit competition to current classified employes. The Commission concludes that the appellant was not injured in fact by the scope of recruitment decision and, therefore, lacks standing as to that topic. Larson v. DHSS, 86-0152-PC-ER, 7/8/87.

8. [I feel that this personnel action done by DPI] did not measure the merit and fitness of the applicants for the position as it actually is 230.15(1)

Section 230.15(1), Stats., requires appointments in the classified service be made "only according to merit and fitness, which shall be ascertained so far as practicable by competitive examination." DRMS offered the following argument regarding this issue:

Since DMRS and DPI did administer a competitive examination for this position, this part of the statutes does not appear to be in issue. Further, this part of the statutes does not impose an absolute requirement that a "competitive examination" always be given. Rather, it requires that "merit and fitness" be determined by a



competitive examination " so far as practicable". Again this section does not appear to apply to Mr. Taylor's claims.

The appellant's contention is effectively included within the more specific language of §230.16(4), Stats., which requires all examinations to be "job-related in compliance with appropriate validation standards." The language of §230.15(1), Stats., is more general and simply requires that a competitive examination be given "so far as practicable" without establishing any standards for the content or application of the examination. There is no question that an examination was used for the the School Administration Consultant vacancy. Appellant's arguments regarding the content of the examination are properly addressed by reference to §230.16(4) and (5), Stats.

10. [I feel that this personnel action done by DPI] was not job-related 230.16(4), and

11. [I feel that this personnel action done by DPI] did not treat applicants fairly 230.16(5).

The respondent has effectively stipulated that these two contentions are appropriate parts of the statement of issue for this matter.

ORDER


The appellant's motion to add the Department of Public Instruction as a party in this matter is granted. In the future, this matter will be referred to as Taylor v. DMRS & DPI.

The issue for hearing shall be as follows:

Whether the examination for the position of School Administration Consultant--Private Schools was conducted in accordance with sec. 230.16(4) and (5), Stats., and s. ER-Pers 6.05, Wis. Adm. Code.

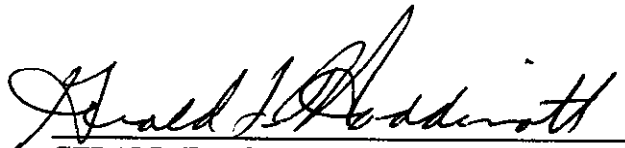
The hearing is scheduled for December 13 and 14, 1990, commencing at 9:00 a.m., in the Commission's offices at 121 East Wilson Street in Madison, Wisconsin. The hearing will be a class 3 proceeding with jurisdiction pursuant to §230.44(1)(a), Stats.

Dated: November 1, 1990 STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson

KMS:kms

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner