



notified those responsible for filling this vacancy that she was interested in competing for the position.

4. At all times relevant to this matter, the examiner team leader positions in respondent's driver licensing stations were included in the Security and Public Safety bargaining unit. The agent for this unit for collective bargaining purposes is AFSCME, Council 24, Wisconsin State Employees Union, AFL-CIO and its appropriate affiliated locals (hereafter Union). The collective bargaining agreement between the State of Wisconsin and the Union governing the period from April 8, 1990, to June 30, 1991, sets forth, in Article VII, its provisions governing transfers between represented positions. An employee is eligible to transfer pursuant to the process laid out in Article VII if he or she has completed a probationary period in the same classification as that of the vacant position. Article VII, Section 3 provides further that, "In the event the vacancy is not filled by transfer, the Employer may fill the vacancy in accordance with the Wisconsin Statutes."

5. Respondent posted the vacant MVSS 7 team leader position in Waukesha for transfer pursuant to the collective bargaining agreement but there were no applicants for such transfer. As a result, respondent requested, on May 11, 1990, and received, on June 29, 1990, a list of certified promotional candidates; and, some time prior to July 13, 1990, agreed to consider appellant for the vacant team leader position in Waukesha.

6. The seven certified promotional candidates were interviewed by a panel and each asked to respond to the same set of questions. The panel ranked each candidate on the basis of their interview scores and forwarded the names of the three top-ranked candidates to Robert Tribbey, the District Manager for District 7. Mr. Tribbey checked the references of these three candidates.

7. Appellant was interviewed on July 13, 1990, by Mary Veith, supervisor of the Waukesha Driver Licensing Station; and by Mr. Tribbey. Neither Ms. Veith nor Mr. Tribbey had served on the interview panel for the certified promotional candidates. Ms. Veith and Mr. Tribbey asked appellant a set of questions. These questions were the same as or similar to certain of the interview questions asked of the certified promotional candidates. The questions asked appellant included the following:

- a. What responsibilities do you think should be carried out by the team leader versus the supervisor.

b. Developing friendships with employees can sometimes interfere with overall team efforts. Some of the employees may complain to the supervisor that they are not being treated fairly by the team leader because of these friendships. How do you plan as a team leader to deal with this if it is a problem?

c. Some employees remember you as an examiner on the Waukesha team; how do you plan to change your role now that you are a team leader?

8. As follow-up questions to these three questions, the interviewers asked appellant the following:

d. Why did Barbara Barbian (an examiner at the Waukesha station) know that you had been scheduled for an interview today?

e. Please explain why your mother had asked employees at the Waukesha station to use state resources to send a personal message to you and what steps you took when you discovered this.

f. Do you consider using state stationery, envelopes, and/or stamps for personal reasons to be like stealing?

g. Appellant was asked to describe what occurred in regard to an incident in which appellant and Barbara Barbian allegedly made comments to a co-worker regarding a procedure she had followed.

The record does not indicate what follow-up questions, if any, were asked of the certified promotional candidates.

9. The interviewers felt that appellant's answer to question a. was very good and demonstrated good technical knowledge and skills.

10. In regard to questions b. and c., appellant responded at least in part that she should be able to have friends where she worked and still do her job. The interviewers felt that appellant's answers to these questions were flippant and failed to address the concerns they had expressed to her.

11. In regard to question d., appellant testified at the hearing that she told the interviewers that she didn't know how Ms. Barbian had found out about her interview because no one was supposed to know. In her letter of appeal, appellant stated that she had told the interviewers that "I didn't know that no one was suppose to know that I was being interviewed. I told her Barb had called me over the weekend and asked if I had an interview on the 11th. I

told Barb I didn't but when I knew when mine was scheduled I would call and let her know. I don't remember exactly when I called her."

12. In regard to question e., appellant told the interviewers that she realized that it was improper to use state resources for personal reasons, she had told her mother that it was improper, and her mother had made no similar request thereafter.

13. In response to question f., appellant told the interviewers that she could not recall the incident and, therefore, could not respond.

14. Mr. Tribbey subsequently spoke to Linda Lewis, the District Manager for District 6, regarding appellant's work performance and qualifications.

15. The selection criteria applied to the candidates were technical qualifications, ability to lead, and the effect their hire would have on the morale of the team.

16. More than one team member at the Waukesha station had expressed to Ms. Veith and Mr. Tribbey prior to the date of the subject hiring decision their concern that, during the tenures of the previous team leader and supervisor of the Waukesha driver licensing station, morale among team members had been adversely affected by preferential treatment accorded certain team members by the team leader and/or supervisor; and that, in view of appellant's close personal friendship with Ms. Barbian, this situation could arise again if appellant were appointed to the vacant team leader position. Appellant did have a close personal friendship with Ms. Barbian. Upon assuming their respective positions, Ms. Veith and Mr. Tribbey had established as one of their goals an improvement in employee morale at the Waukesha station and anticipated that this would help solve some of the customer service problems of the station.

17. On or around July 23, 1990, Ms. Veith and Mr. Tribbey decided to recommend to David Kussow, who, as the Director of the Bureau of Field Services, had the effective hiring authority, that the vacant team leader position in Waukesha be offered to John Collard, one of the certified promotional candidates. Mr. Collard accepted the offer and was appointed to the position. Mr. Collard had been ranked as the number one candidate by the interview panel.

18. Mr. Collard was employed at the time of the hiring decision by respondent as an MVSS 6 and functioned as a driver licensing examiner at the Elkhorn driver licensing station in District 7. Mr. Collard had on occasion

been assigned on a temporary basis to the Waukesha driver licensing station to help meet workload demands.

19. Ms. Veith and Mr. Tribbey did not recommend appellant as the successful candidate because, despite their feeling that she possessed very good technical skills, they also felt that her close personal friendship with Ms. Barbian would adversely affect the morale of the Waukesha examiner team if she were selected as the team leader.

20. Ms. Veith and Mr. Tribbey recommended Mr. Collard as the successful candidate because they felt he had very good technical skills, that he had demonstrated excellent public relations skills and excellent relationships with the members of his team at the Elkhorn station, and that his selection would not have an adverse effect on the morale of the members of the Waukesha examiner team.

21. It had been respondent's practice to use a different panel and different questions to interview certified promotional candidates than to interview candidates for discretionary transfer such as appellant. Respondent followed its usual practice in regard to the instant hire.

22. Subsequent to appellant's promotion to the MVSS 7 position in District 6 but prior to her interview for the subject position, respondent established a new policy whereby those serving a probationary period would not be eligible for transfer to a team leader position. Respondent did not apply this policy to the situation under consideration here because it had not been in effect when appellant had accepted her promotion to District 6.

23. Appellant filed a timely appeal of her non-selection for the subject position with the Commission on July 30, 1990.

24. Subsequent to the filing of this appeal but prior to the end of her probationary period, appellant accepted a promotion to a team leader position at the Elkhorn Driver Licensing Station in District 7.

#### Conclusions of Law

1. The appellant has the burden to show that the Commission has subject matter jurisdiction over this appeal and that §111.93(3), Stats., does not operate to deprive the Commission of such jurisdiction.
2. The appellant has sustained this burden.
3. This matter is appropriately before the Commission pursuant to §230.44(1)(d), Stats.

4. The appellant has the burden to show that respondent's action in not selecting appellant for the subject vacant position was illegal or an abuse of discretion.

5. The appellant has failed to sustain this burden.

6. Respondent's action is not selecting appellant for the subject vacant position was not illegal or an abuse of discretion.

### Opinion

#### Motion to Dismiss for Lack of Subject Matter Jurisdiction

Respondent, on April 8, 1991, filed a Motion to Dismiss the instant appeal on the basis that the Commission's jurisdiction over this matter is superseded pursuant to the operation of §111.93(3), Stats. Appellant argues that the Commission should not entertain this Motion because it was filed subsequent to the close of the hearing in this matter. However, §PC 1.08(3), Wis. Adm. Code, specifically provides that "Any party may move at any time to dismiss a case on the ground the commission does not have subject matter jurisdiction."

Respondent argues in support of its Motion that the fact that the applicable collective bargaining agreement contains a provision on transfers invokes the application of §111.93(3), Stats.

Section 111.93(3), Stats., provides as follows, in pertinent part:

(3) . . . if a collective bargaining agreement exists between the employer and a labor organization representing employees in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes . . . related to wages, fringe benefits, hours and conditions of employment whether or not the matters contained in those statutes . . . are set forth in the collective bargaining agreement.

In Taddey v. DHSS, Case No. 86-0156-PC (6/11/87), the Commission decided that:

It is the provisions of the agreement that supersede such provisions of the statutes relating to wages, hours and conditions of employment. In order to determine which statutory provisions are superseded, one must examine the provisions of the agreement . . . (at page 7)

In Coulter v. DOC, Case No. 90-0355-PC, the Commission cited its decision in Taddey and interpreted it as follows:

In other words, it is those provisions which are actually bargained and actually stated in a collective bargaining agreement which are given superseding effect under §111.93(3), Stats.

In the instant case, the applicable collective bargaining agreement contains a provision relating to mandatory transfer rights but this provision applies only to non-probationary employees. The only language in this collective bargaining agreement governing transfers which is applicable to the transaction under consideration here is that which states: "In the event the vacancy is not filled by transfer, the Employer may fill the vacancy in accordance with the Wisconsin Statutes." Is this the type of provision which is intended to invoke the application of §111.93(3), Stats.? The Commission does not believe so. It almost seems absurd to argue that a provision in a collective bargaining agreement which specifically provides that a vacancy not filled by the exercise of a mandatory transfer right under the agreement may be filled pursuant to the process set out in the Wisconsin Statutes should operate to deprive an individual of rights of review attendant to such statutory process.

Respondent argues in this regard that:

. . . there is no doubt that the labor agreement covering the Motor Vehicle Services Specialist 7 position at issue in the present appeal and in effect at all relevant times does contain a provision on transfers. Article VII of the agreement conclusively establishes that the State of Wisconsin and Union did bargain and reach agreement on this permissive subject of bargaining. Therefore, the Taddey decision does not support retention of jurisdiction in this case.

If the issue in the instant case related to the mandatory transfer right of a non-probationary employee, then, clearly, §111.93(3), Stats., would operate to deprive the Commission of jurisdiction over this issue. That is not the case, however. The issue in this case relates to an appointing authority's exercise of its discretionary hiring authority subsequent to the exercise of its discretion to consider appellant's candidacy for the subject hire. There is no provision of the applicable collective bargaining agreement governing the exercise of such discretion on the part of the appointing authority and, as a result, no

provision of the collective bargaining agreement which would invoke the application of §111.93(3), Stats., to deprive the Commission of jurisdiction over the subject matter of this appeal.

#### Merits of the Appeal

This appeal was brought pursuant to §230.44(1)(d), Stats., and the standard to be applied, therefore, is whether the respondent's action in not selecting appellant for the subject position was illegal or an abuse of discretion.

The term "abuse of discretion" has been defined as ". . . a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." Lundeen v. DOA, Case No. 79-208-PC (6/3/81). The question before the Commission is not whether it agrees or disagrees with the appointing authority's decision, in the sense of whether the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather, it is a question of whether, on the basis of the facts and evidence presented, the decision of the appointing authority may be said to have been "clearly against reason and evidence."

Appellant argues that it was an abuse of discretion for respondent not to await the end of appellant's probationary period in District 6 before filling the team leader position in Waukesha. Respondent received the list of certified promotional candidates on June 29, 1990; appellant's probationary period was scheduled to end on August 26, 1990. Even if the record showed that respondent was aware of appellant's interest in the Waukesha team leader position on or before June 29, 1990, and the record is not clear in this regard, there was no requirement that respondent hold up its recruitment and selection process until appellant was eligible to exercise a mandatory transfer right and it certainly cannot be concluded that it was "clearly against reason and evidence" for respondent to proceed promptly to fill a vacancy in accordance with the procedure established by statute and administrative rule.

Appellant argues that an abuse of discretion is shown by the fact that appellant was not asked the same interview questions as the certified promotional candidates. However, it is important to note in this regard that the purpose of interviewing the certified promotional candidates was to generate a list of three names to be considered by Mr. Tribbey. Appellant's candidacy for the subject position was, in view of the fact that she was already



functioning as a team leader, allowed to bypass this screening process and to proceed directly to the final stage where the record shows that her candidacy was considered to be on an equal footing with that of the three remaining certified promotional candidates.

At this final stage, the record shows that three selection criteria were applied to the qualifications of the final four candidates: technical qualifications, ability to lead, and the effect their hire would have on the morale of the team. In view of the duties and responsibilities of the subject team leader position, these three criteria appear clearly job-related and "not clearly against reason and evidence." Although the appellant argues against the appropriateness of the "effect on team morale" criterion, the Commission disagrees. In view of the impact that employee morale can have on the manner in which a program operates and on the manner in which program services are delivered, it can be an important component of a recruitment and selection process particularly where, as here, previous employee morale problems had adversely affected the functioning of the program unit, had reduced the effectiveness of the team concept, and had disrupted the delivery of program services.

Appellant has failed to show that these three criteria were not uniformly applied to the final four candidates. Specifically, appellant has failed to show that the information elicited during her interview with Ms. Veith and Mr. Tribbey was not the same type of information reviewed by Mr. Tribbey in relation to his assessment of the other three finalists for the position. It should be noted in this regard that the basic questions asked appellant were the same as or similar to certain interview questions asked of the other three finalists during their interview by the panel; that appellant has failed to show that follow-up questions were not asked of these three other finalists during their interviews by the panel; and that appellant has failed to show that Mr. Tribbey did not review the responses to the panel's interview questions by the other three finalists. In addition, although Mr. Tribbey did not check appellant's references, he did discuss her work performance with her current supervisor and was aware of her performance while an examiner at the Waukesha station.

Appellant also argues that respondent's conclusion, after applying the selection criteria to the qualifications of the final four candidates, was an abuse of discretion. This argument centers on respondent's conclusion that

appellant's close personal friendship with Ms. Barbian would have an adverse effect on the morale of the team. Appellant never successfully rebuts the evidence introduced in the record by respondent that she had a close personal friendship with Ms. Barbian. This evidence took the form of testimony by Mr. Tribbey and Ms. Veith that more than one team member had told them of this friendship. Even when appellant had an opportunity, during her testimony, to explain or dispute the existence of such a friendship, she did not. In addition, the inconsistency between the statement appellant made in her letter of appeal as to her answer to the interview follow-up question relating to how Ms. Barbian came to know of her interview and her hearing testimony in this regard lend credence to the conclusion that such a close personal friendship does exist. Moreover, in view of the impact one or more close personal relationships and the resulting preferential treatment accorded one or more team members by a previous team leader had had on team morale, it was clearly not against reason and evidence for respondent to conclude that appellant's close personal friendship could also have such an impact on the team if she were selected as the team leader. Respondent did go further with the inquiry, however, and did not presume that appellant's friendship with Ms. Barbian would necessarily have such an impact and gave appellant an opportunity to allay their concern. Appellant has failed to show that her answers to the interview questions which were relevant to this concern should have been interpreted by respondent in such a way that this concern should have been laid to rest. In fact, the only evidence in this regard is that all of part of appellant's response to this concern was that she "should be able to have friends where she worked and still do her job." and Mr. Tribbey's testimony that he felt that appellant's response to this concern was "flippant." The Commission does not find that it was "clearly against reason and evidence" for respondent to conclude that appellant had a close personal friendship with Ms. Barbian and that this friendship could have an adverse impact on team morale if appellant were selected for the team leader vacancy.

Appellant has also failed to show that, in applying the selection criteria to Mr. Collard's candidacy, it was "clearly against reason and evidence" for respondent to conclude that he was a better candidate for the team leader vacancy. There is no evidence in the record from which to conclude that the reasons for selecting Mr. Collard as the successful candidate did not comport

with the information available to respondent at the time of his hire, i.e., there is no evidence in the record from which it is possible to conclude that Mr. Collard did not have very good technical skills, that he had not demonstrated excellent public relations skills and excellent relationships with members of his team at the Elkhorn station, or that his selection was likely to have an adverse effect on the morale of the members of the Waukesha examiner team. In addition, appellant failed to show in the record that her technical skills were superior to Mr. Collard's, that her public relations skills were superior to Mr. Collard's, that her leadership skills were superior to Mr. Collard's, that her ability to get along with team members was superior to Mr. Collard's, and/or that the impact of her leadership on the morale of the Waukesha team would be superior to Mr. Collard's. Appellant has failed to show an abuse of discretion in this regard.

Appellant also seems to imply in her arguments that, since she was qualified for the position as a result of performing satisfactorily in a similar position, she should have been appointed to the subject vacancy. There is no question that appellant was qualified for the team leader position and respondent has not argued that she wasn't qualified. However, this is not a situation where appellant was entitled to the team leader position as a result of a mandatory transfer right. She was allowed to compete for the position on an equal footing with the certified promotional candidates who are also presumed to be qualified for the position as a result of their certification. In addition, respondent did not question her technical qualifications for the team leader vacancy but other more individual factors related to the characteristics of this particular station and this particular team. Appellant has failed to show an abuse of discretion in this regard.

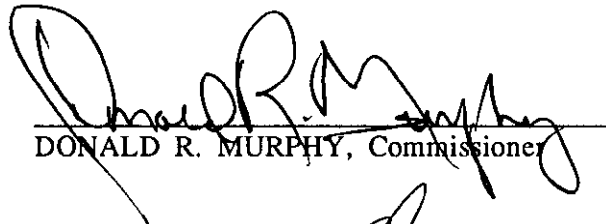
Appellant's other arguments are very puzzling. Appellant argues that the final authority for a hire rests with the Department of Employment Relations (DER); that this hire is tainted by the fact that DER did not approve the hiring criteria applied by respondent; and that respondent's selection process did not accord with the requirements of §230.15, Stats. First of all, the final authority for hiring decisions rests with the appointing authority, not DER. Here, the appointing authority is respondent DOT. There is no authority for appellant's argument that the hiring criteria applied by the appointing authority must be approved by DER and such a conclusion is inconsistent with the discretionary authority accorded the appointing authority to make final

hiring decisions. Finally, §230.15, Stats., applies to the pre-certification examination process administered by DER. In this case, and in order to invoke the jurisdiction of the Commission pursuant to §230.44(1)(d), Stats., the Commission is reviewing the post-certification action taken by respondent in reaching a hiring decision. Appellant has failed to show any illegality in regard to the subject hire.

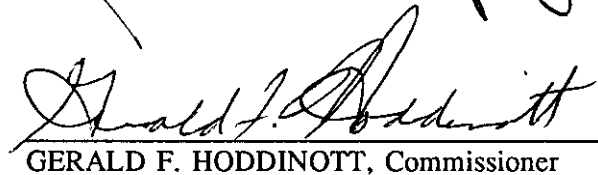
Order

Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction is denied. Respondent's action in not selecting appellant for the subject vacancy is affirmed and this appeal is dismissed.

Dated: June 12, 1991 STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Commissioner

LRM:lrn:dah

  
GERALD F. HODDINOTT, Commissioner

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