

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *
JERRY CHAYKOWSKI,
Appellant,
v.
Secretary, DEPARTMENT OF
DEVELOPMENT, and Administrator,
DIVISION OF MERIT RECRUITMENT
AND SELECTION,
Respondents.
Case No. 91-0136-PC
* * * * *

FINAL
DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(a), stats., of respondents' action during the examination process for the position of Administrative Officer 1-Film Office Director not to include appellant in the oral examination. Since the facts apparently are not in dispute, the parties agreed to submit this matter for decision on the basis of written arguments, and without a hearing. This decision also will address respondents' objection to the timeliness of the appeal.

FINDINGS OF FACT

1. The announcement for this classified civil service position in DOD (Department of Development) was dated May 17, 1991. The announcement included the following:

Apply with a letter of interest and resume to Department of Development; Bureau of Personnel and Employee Development (608) 266-3548; 123 West Washington Avenue; Madison, WI 53707. Application and examination materials (Training/Experience Questionnaire) will be mailed upon receipt of the letter and resume. Deadline date for receipt of completed applications and Training/Experience Questionnaires is June 7. The best qualified applicants will be invited to participate in an Oral Examination tentatively scheduled for late June.

2. Appellant, along with 166 other persons responded to this announcement by sending in a resume and letter of interest.

3. Respondents did not use the resumes and letters of interest for any purpose other than to trigger mailing applications and questionnaires to the applicants.

4. The applications and questionnaires were accompanied by a form memo dated May 20, 1991, which included the following:

The first step in the examination process for the Administrative Officer 1-Film Office Director position is completion of the Training/Experience Questionnaire. The purpose of the Questionnaire is to provide you and all other candidates, the same opportunity to describe your training and experience which are most relevant to the requirements of the position. . . . Those candidates who rank highest on the Questionnaire will be invited to participate in the second stage of the examination process, an Oral Examination, tentatively scheduled for late June.

The questionnaire included the following:

I understand the Training/Experience Questionnaire is an examination. This examination will determine my eligibility for the Oral Examination, the next step in the examination process (emphasis in original)

6. Appellant filled out and signed the questionnaire, and submitted it along with 166 other applicants.

7. As a result of the grading of the questionnaires, the 16 top applicants were chosen to participate in the oral exam. Appellant was not included in this group.

8. By a form letter dated July 12, 1991, appellant was informed that he had not scored high enough to participate in the oral exam. This letter included the following:

SUBJECT: EVALUATION OF THE TRAINING/EXPERIENCE QUESTIONNAIRES

The first step in the recruitment process for this position was to evaluate the Training/Experience Questionnaire for each of the 167 applicants. Those candidates whose training and experience matched the requirements of the position most closely are eligible to participate in the next step of the selection process, the Oral Examination.

9. Appellant filed a letter of appeal with this Commission on August 5, 1991, which included the following:

I am appealing on the grounds that my cover letter and resume, which I submitted, did not get used as criteria for the decision to invite candidates to the oral interview stage.

I have spent 18 years working in the film and video industry within the state of Wisconsin, and feel my experience was unaccounted for in the decision to invite candidates to the next step. I was told the decision was based solely on the score from the examination. I feel this is unfair.

CONCLUSIONS OF LAW

1. This appeal is properly before the Commission pursuant to §230.44(1)(a), stats.
2. This appeal was timely filed pursuant to §230.44(3), stats.
3. Respondent did not violate §230.16(5), stats., by denying appellant admission to the oral portion of the examination for the position in question.

DISCUSSION

TIMELINESS OF THE APPEAL

The time limit for filing an appeal of this nature is "30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later." §230.44(3), stats. Respondent contends that this appeal was not timely filed because the appeal was of respondent's failure to have considered appellant's resume as part of the examination process, that appellant had actual written notice from respondent in the instructions for the questionnaire and the cover letter that came with it that the resume would not be considered, and that the "effective date of the decision to exclude the letter of interest and resume could not have been any later than June 7, 1991 — the date the Questionnaire had to be at DOD."

The general rule in this area is that the time for filing an appeal with respect to an examination process does not begin to run until the examinee receives notice of the results of the process. Schuler v. DP, 81-12-PC (4/2/81). An examinee normally does not know if our exam question or other device will have an adverse effect on his or her interests until after he or she has received the exam score and/or ranking. For example, an examinee may be

convinced an examination question, or even an entire examination, has no relevance to the position in question, but until the examinee gets the final exam results, he or she has no way of knowing whether the questioned practice has had an adverse effect. In the instant case, appellant may have had a basis to have known his resume and letter of interest wouldn't be considered when he submitted his questionnaire, but he had no way of knowing at the time what effect this would have on his advancement to the next stage of the process (oral exam). Furthermore, from a conceptual standpoint, this appeal runs to respondent's decision that appellant could not participate in the oral exam stage of the exam process, although he is arguing that the reason this was erroneous was because of the failure to have considered the resume and letter.

WAIVER

Respondent also contends appellant waived his right to contest the refusal to consider his resume:

Upon receipt of Exhibits 2 and 3 [questionnaire and cover letter], Appellant was well aware that the letter of interest and resume would play no part in determining who would proceed to the oral examination phase of the process:

Those candidates who rank highest on the Questionnaire will be invited to participate in the second stage of the examination process, an Oral Examination, tentatively scheduled for late June. (Exhibit 2.)

Exhibit 3, p. 1, contained not only the same notice but also instructed the prospective applicant to "PLEASE READ AND SIGN THE FOLLOWING STATEMENT" which included: "This examination will determine my eligibility for the Oral Examination" Appellant signed the statement, acknowledging that he read and understood it.

The statement was clear -- its meaning unmistakable. In signing, completing and sending Exhibit 2 to DOD, Appellant agreed to abide by the rules and thereby waived any right to challenge the exclusion of the letter of interest and resume.

Respondents cites no authority for this waiver theory, and it simply does not follow from the underlying facts and circumstances that appellant waived his rights to appeal. All that signing the questionnaire evidenced was that the

appellant understood that the T&E questionnaire was an examination that would determine his eligibility to proceed to the oral examination, which was the next step of the examination process. There was nothing in the document which expressly or impliedly waived his right to challenge the examination process pursuant to §230.44(1)(a), stats. In Faust v. Ladysmith-Hawkins School Systems, 88 Wis. 2d 525, 277 N.W. 2d 303 (1979), the Supreme Court held that the waiver of a statutory right has to be clear and unambiguous. It declined to find a waiver of a teacher's rights under §118.22, stats., to notice of nonrenewal of a contract for the next school year and a private conference with the school board, even after the teacher had signed a contract which included the proviso that it was "issued and accepted by both parties with the understanding that it will not be renewed under any circumstances for the 1976-77 school year." (emphasis added) 88 Wis. 2d at 529.

FAILURE TO CONSIDER RESUME & LETTER

The primary provision in the civil service code that governs this matter is §230.16(5), stats., which provides:

(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.

Respondent first argues that §230.16(2), stats., permits the establishment of "preliminary requirements" in the exam announcement, that §230.16(5) "addresses only the examination phase itself," and that since the submission of the resume was a preliminary requirement and not part of the examination process per se: "sec. 230.16(5) . . . does not apply. Therefore, there could be no violation of that subsection in excluding a letter of interest and resume from being a determinant of selection to the oral examination." Laying to one side the question of why respondent felt it necessary to specify both a letter of interest and a resume as "a triggering device to DOD to mail out the application and examination," as respondent puts it, the vice of this argument is that it

ignores the fact that appellant is arguing that the resume and letter should have been considered as part of the exam process. The question is whether §230.16(5) was violated by failure to have considered the resume and letter. It does not follow that this question of law should be answered in the negative because, as a matter of fact, DMRS did not consider the resume and letter as part of the examination process.

Turning to the actual question of whether §230.16(5), stats., was violated by respondent's failure to have considered appellant's resume and letter, the key elements of that subsection are as follows:

[T]he 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. (emphasis added)

Appellant has not contended that respondent's evaluation of his questionnaire, in and of itself, was erroneous or otherwise improper. Rather, he argues that he "was screened out based solely on the results of the 'Questionnaire,' and that my experience, as stated in my cover letter and resume was not considered in the continuing selection process."¹ Therefore, the first question that must be addressed in the context of the controlling statutory provision, §230.16(5), stats., is whether, in connection with respondent's act of establishing a standard for proceeding to subsequent steps in the examination, due notice was given and all applicants were treated fairly.

¹ Appellant also argues that: "I feel that had my cover letter and resume been considered along with the 'Questionnaire,' I would have been invited to the Oral Examination." As respondent points out, there is nothing beyond this articulated "feeling" to support a conclusion that appellant would have been in the top 10% of the 167 applicants. However, this contention runs primarily to the question of remedy — i.e., if appellant could establish that respondent erred by not considering his resume and cover letter, whether it would be appropriate for the Commission to require that he be orally examined or that his application be reevaluated in light of his resume and cover letter.

As to the matter of "due notice," the applicable part of the examination announcement provided this notice:

Apply with a letter of interest and resume . . . application and examination materials (Training/Experience questionnaire) will be mailed upon receipt of the letter and resume. Deadline date for receipt of completed applications and Training/Experience Questionnaires is June 7. The best qualified applicants will be invited to participate in an Oral Examination. (emphasis in original)

This made it clear that a preliminary screening would be conducted to determine who would participate in the oral examination. While it does say that questionnaires will be mailed out, it does not state that the screening would be based solely on the questionnaire, or, put another way, this part of the announcement is not inconsistent with the notion that both the resume and cover letter and the questionnaire would be considered in determining the best qualified applicants who would be permitted to participate in the oral exam. However, at the next stage of the exam process, the instructions for the T&E Questionnaire and the accompanying cover letter specify that only the questionnaire would be considered in the screening for admission into the oral exam. The questionnaire instructions include this information: "I understand the Training/Experience Questionnaire is an examination. This examination will determine my eligibility for the Oral Examination, the next step in the selection process." (emphasis in original) The cover letter accompanying the questionnaire included the following:

The first step in the examination process . . . is completion of the Training/Experience Questionnaire. The purpose of the Questionnaire is to provide you and all other candidates, the same opportunity to describe your training and experience which are most relevant to the requirements of the position Those candidates who rank highest on the Questionnaire will be invited to participate in the second stage of the examination process, an Oral Examination.

This notice clearly states that the basis for the screening will be the questionnaire. It is noteworthy in this regard that while the exam announcement itself stated "[t]he best qualified applicants will be invited to participate in an Oral Examination," leaving at least some question as to what

would be considered in determining the best-qualified, the subsequent material, quoted above, is more specific. Again, the T&E Questionnaire instructions state: "[t]his examination [T&E Questionnaire] will determine my eligibility for the Oral Examination." The cover letter for the Questionnaire states: "Those candidates who rank highest on the Questionnaire will be invited to participate in the second stage of the examination process."

In conclusion, while the Commission is of the opinion that it would have been preferable not to have requested both a letter of interest and a resume if the only role all this material was to serve was to "trigger" mailing of the application and T&E Questionnaire, so as to have avoided any possible confusion as to whether the resume would be considered as part of the selection process, subsequent information provided by respondent made it more clear that advancement to the next stage (oral exam) would be based on the AHQ, and the Commission cannot conclude that due notice was not given.

With respect to the requirement set forth in §230.16(5), stats., that requires that "all applicants are fairly treated," there is no basis for a conclusion of unfair treatment. While appellant contends his resume and letter should have been considered, he does not specify how it was unfair not to have considered these items in lieu of, or in addition to, his T&E questionnaire. There is no basis on this record on which to conclude this was unfair. There certainly is nothing inherently unfair in relying on a T&E questionnaire rather than a resume and letter of interest,² and it appears that all applicants were treated the same.

The last part of §230.16(5), stats., to be addressed is the requirement that:

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.

Again, other than his assertion that respondent should have considered his resume and letter, appellant has not provided anything that would show that respondent did not use "appropriate scientific techniques and procedures in administering the selection process, in rating the results of examinations and

² The main potential for unfairness here would come from inadequate notice of what would be considered and the Commission has concluded that the notice given in this case was not inadequate.

in determining the relative ratings of the competitors," and there is nothing inherent in the process followed that would lead to such a conclusion. Therefore, the Commission also cannot conclude that respondent violated this portion of the statute.

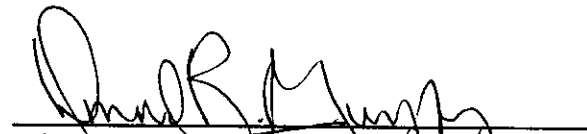
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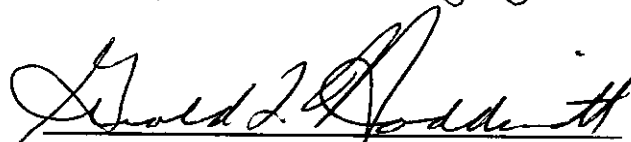
Respondent's decision not to include appellant in the group of applicants for the position in question that advanced to the oral examination is affirmed and this appeal is dismissed.

Dated: October 17, 1991 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:gdt/2


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