STATE OF WISCONSIN PERSONNEL COMMISSION

JAMES A. JOHNSON, Appellant, v. Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Respondent. Case No. 94-0009-PC	INTERIM DECISION AND ORDER

A proposed decision and order was issued in the above-noted case on January 3, 1995, with both parties given an opportunity to present arguments to the full Commission. The Department of Health and Social Services (DHSS) submitted written arguments by letter dated February 3, 1995. Mr. Johnson left a telephone message for the hearing examiner on February 14, 1995, indicating he would not be filing further arguments.

The Commission considered DHSS's arguments, portions of the hearing tapes were reviewed and the hearing examiner was consulted. Based on the foregoing, the Commission determined the proposed decision required amendments for clarification and to accurately reflect the record. The full Commission also determined that the discussion of whether Mr. Johnson would have been the most qualified candidate was unnecessary and that the remedy stated in the proposed decision went beyond the act found as an abuse of discretion. Specifically, the issue for hearing was whether Mr. Johnson should have been interviewed for the MIS-2 position. Having concluded that he should have been, the appropriate remedy is to order DHSS to interview him for the next MIS-2 vacancy in the Winnebago area, the duties of which he would be qualified to perform after the customary probationary period.

Based on the foregoing, the Commission issues this decision as the decision of the full Commission.

FINDINGS OF FACT

Background

1. Mr. Johnson began working for the Department of Health and Social Services (DHSS) in October 1984, when he was hired at the Wisconsin Resource Center as an Aide 3. In November 1987, he was promoted to a supervisory position classified as an Aide 5.
2. In September 1988, Mr. Johnson moved within DHSS to the Winnebago Mental Health Institute (hereafter, Winnebago) to a position classified as a Management Information Technician 2 (MIT-2), where his supervisor was Elaine Draeger. In 9/90, he was reclassified to a MIT-3, a position which was not supervised by Ms. Draeger.
3. On 3/24/91, Mr. Johnson took a voluntary demotion within DHSS[1] at the Wisconsin Resource Center to a supervisory position classified as an Aide 5, with the working title of Psychiatric Care Supervisor. He demoted to obtain second shift work which he desired for personal reasons (day care for his children).
4. Mr. Johnson had reinstatement rights by virtue of his voluntary demotion, pursuant to s. 230.32(1)(a), Stats., as interpreted by the following sections of Ch. ER-MRS (formerly entitled "ER-Pers"), Wis. Admin. Code (WAC): A) ER-MRS 1.02(29) & (33), WAC, which define the terms "reinstatement" and "transfer"; B) ER-MRS 17.04(3), WAC, which describes voluntary demotions; and C) ER-MRS 16.035(1), WAC, which describes the nature of reinstatement rights following a voluntary demotion.
5. Mr. Johnson's reinstatement rights were for 3 years from the date of his voluntary demotion (from about 3/24/91 through 3/23/94), and provided him the opportunity to interview for positions of equal, comparable, or lower pay range to the MIT-3 position from which he demoted. He had "permissive reinstatement" rights, meaning his right to interview was dependent upon the hiring authority's agreement to do so.

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[1] Par. 3 of the Findings of Fact was amended to clarify that the voluntary demotion taken by Mr. Johnson was within DHSS.

6. In or about 8/92, Mr. Johnson returned to first shift work in an Aide 5 position. He continued working in this position at least up to the time of hearing on 9/16/94.

7. In or around 3/93, Mr. Johnson wished to return to a position in the computer field. He contacted Karla Souzek, Personnel Manager at the Wisconsin Resource Center, as well as Kathy Karkula, Personnel Manager at Winnebago, and informed them of his desired change. Ms. Karkula told Mr. Johnson to request reinstatement by writing to the personnel department at Winnebago, which he did by letter dated 4/1/93 (Exh. R-6). He requested in his letter, reinstatement to a MIT-3 position "or a position of equal or lesser pay range but in the same field".

8. Mr. Janty has been Winnebago's Management Services Director since 10/90. He received Mr. Johnson's letter requesting reinstatement, reviewed it and gave it to his secretary[2] to forward to Ms. Karkula, on 4/5/93. This is how he processed every reinstatement request.

9. Eventually all reinstatement requests go from Ms. Karkula to Margaret ("Peggy") Cox, a Personnel Assistant 3 with DHSS. She is responsible for handling all requests for reinstatement, transfer and voluntary demotions. Ms. Cox reviewed Mr. Johnson's reinstatement request to MIT-3 shortly after 4/5/93. She knew no recruiting was occurring for MIT-3 at that time. Ms. Cox's standard procedure was to keep reinstatement letters for 6 months, after which time she threw them away.[3] If a vacancy occurred within the 6 months, Ms. Cox's standard procedure would have been to inform Mr. Johnson about the vacancy, as well as to let the supervisor of the vacant position know that Mr. Johnson was interested in the position.[4]

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[2] The wording in par. 8 of the Findings of Fact was changed to reflect that Ms. Karkula was not Mr. Janty's secretary.

[3] The record contains no persuasive explanation of why Ms. Cox limited the "life" of reinstatement requests to 6 months, a period significantly shorter than the 3 years granted by s. 230.31, Stats.

[4] Ms. Cox was unaware of a memo dated 5/24/88, which discussed an intent to change DHSS' standard procedure in dealing with reinstatement requests. (Exhs. R-4 & R-5) The hearing examiner, therefore, was unpersuaded that such changes were in effect at the times relevant to Mr. Johnson's case.

DHSS Vacancy for MIS-2 Arose

10. On 5/6/93, Ms. Cox sent a memo to a newspaper in Appleton (Exh. R-14) which requested an ad run for Winnebago on Sunday, 5/9/93, to recruit candidates for Management Information Specialist 2 (MIS-2) and MIS-3 positions. Ms. Cox did not think of informing Mr. Johnson of the vacancy at this time.

11. The pay range for a MIS-2 was the same as the pay range for a MIT-3. Accordingly, Mr. Johnson's reinstatement rights potentially pertained to the vacant position. The MIS classification is similar to the MIT classification but differences exist. Basically, the MIT classification is considered technical in nature, while the MIS is considered professional with a broader scope of duties and requires a 2 or 4 year degree.

12. The advertisement in the Appleton newspaper in effect supplemented the statewide recruitment for MIS-2 and MIS-3 which had been previously announced in the Current Employment Opportunities Bulletin for 4/26/93 (Exh. R-7). The bulletin mentioned that "most jobs" were located in Madison. No reference was made in the bulletin to vacancies at Winnebago.

13. Mr. Johnson did not see the newspaper advertisement. Furthermore, it was his understanding from speaking with Ms. Karkula and Ms. Souzek that DHSS would contact him when a vacancy occurred. DHSS did not inform Mr. Johnson that a need existed for him to monitor vacancies to which his reinstatement rights could apply.

14. At some point prior to 9/21/93, Mr. Janty decided to establish an eligible pool of candidates based on statewide recruitment[5]. This was a conscious decision on his part.

15. On 9/27/93, Ms. Karkula submitted a request for a MIS-2 position at Winnebago to be funded by redeploying monies from a different position. The request was approved.

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[5] The wording in par. 14 of the Findings of Fact was changed to correctly reflect the record evidence that statewide recruitment was chosen.

16. DHSS asked the Department of Employment Relations (DER) for a certification list (hereafter, Cert List) of candidates eligible for interview by virtue of the scores they received on the test given for those who applied for the MIS-2 and MIS-3 positions advertised as noted in paragraphs 10 and 12 above. DER generated the Cert List on 11/11/93, which is in the record as the final 2 pages of Exh. R-10. Ms. Cox received the Cert List on or about 11/13/93.

17. DHSS hired a candidate off the Cert List for the MIS-2 position. The hire was confirmed by letter dated 12/21/93, with an effective date of 1/9/94.

18. Sometime after 12/28/93, Ms. Cox heard from Ms. Karkula that Mr. Johnson's reinstatement request had not been forwarded for consideration in filling the MIS-2 position. Ms. Cox checked her file and found Mr. Johnson's letter still there. She would have informed Mr. Johnson about the position if she had remembered his reinstatement request. Her omission was an oversight. She had failed to look back in her reinstatement files to determine if potential candidates existed via reinstatement rights. She did not mention Mr. Johnson to Mr. Janty as a potential reinstatement candidate to consider.

<u>Mr. Johnson Learns of the MIS-2 Vacancy on 12/28/93.</u>

19. On 12/28/93, Ms. Draeger happened to ask Mr. Johnson if he had interviewed for a Management Information Specialist 2 (MIS-2) position at Winnebago. Mr. Johnson had not known about the vacancy. He called Ms. Karkula to inquire why he had not heard of the vacancy and she referred him to Margaret ("Peggy") Cox, the personnel assistant at Winnebago who recruited for the position. Ms. Cox was gone from the office, but Mr. Johnson did speak to Mr. Janty who agreed to look into the matter. Mr. Janty consulted with Kathy Karkula.

20. The next working day, on or about 1/5/94, a second telephone conference occurred with Mr. Johnson and Mr. Janty. Mr. Janty said he had made the decision to look for outside candidates and that his decision was no reflection on Mr. Johnson. Mr. Johnson, however, took this to mean he was perceived as having some shortcoming for the position and therefore asked Mr. Janty what it was. Mr. Janty replied that he did not want to debate the issue, a statement which concluded the

conversation. Mr. Johnson then filed a timely appeal which is the subject of this decision (Exh. R-1).

21. Mr. Janty confirmed that the information in the prior paragraph correctly represented the content of his second telephone conversation with Mr. Johnson. Mr. Janty's reference to "the decision" he made to recruit statewide could be interpreted in at least 2 conflicting ways. First, the words could mean that Mr. Janty made a decision not to allow Mr. Johnson to interview via reinstatement rights. Second, the words could mean that Mr. Janty made a decision to recruit statewide, but was unwilling to admit he forgot to consider expanding the group of potential candidates by, for example, agreeing to consider individuals with permissive reinstatement rights. Mr. Janty testified that he had not even considered Mr. Johnson as a candidate. His testimony was credible in light of Ms. Cox's responsibility to monitor the reinstatement requests and her credible testimony that she forgot to do so.[6]

22. DHSS would have given Mr. Johnson an opportunity to interview for the MIS-2 position pursuant to his reinstatement rights, if DHSS would have remembered that he had filed a reinstatement request.

CONCLUSIONS OF LAW[7]

1. This matter is appropriately before the Commission pursuant to s. 230.44(1)(d), Stats.
2. Appellant has the burden to show that respondent's failure to interview him for the MIS-2 position was illegal or an abuse of discretion.
3. Appellant has sustained this burden.
4. Respondent's failure to provide appellant with an opportunity to interview for the MIS-2 position was an abuse of discretion.

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[6] The wording in par. 21 of the Findings of Fact was changed to correctly reflect the record evidence that statewide recruitment was chosen.

[7] The wording was changed in the Conclusions of Law to limit the scope to the nature of the act found to be an abuse of discretion.

DISCUSSION[8]

Nature of Appeal

This is an appeal pursuant to s. 230.44(1)(d), Stats. Therefore, the standard to be applied is whether DHSS's failure to interview Mr. Johnson was "illegal or an abuse of discretion."[9] Mr. Johnson has not alleged any illegality in this regard.

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. Zebell v. DILHR, 90-0017-PC (10/4/90), Seep v. DHSS, (citation contained in footnote 5), Thornton v. DNR, 88-0089-PC (11/15/89).

Failure to Interview Mr. Johnson Constituted an Abuse of Discretion.

DHSS argues in its initial brief dated 10/14/94 (p. 8), that no conscious decision was made to exclude Mr. Johnson from the MIS-2 interviews and, therefore, an abuse of discretion could not have occurred. The crux of DHSS's argument is reflected in the following paragraph from its brief.

> This is not a case of denial of reinstatement due to abuse of sick leave as in Seep, nor a case of non-selection after consideration and interview as in Pearson or Zebell. Rather, this is a case where respondent's employee, acting neither arbitrarily nor capriciously and without consciously exercising judgment or decision-making, simply forgot about Johnson's request received seven months earlier[10]. Cox never reached the point of

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[8] Portions of the DISCUSSION section have been changed to reflect the full Commission's rationale of the Interim Decision and Order, and to address matters raised by DHSS for the first time to the full Commission.

[9] DHSS does not argue that the hearing issues are beyond the Commission's jurisdiction because they fail to involve personnel actions "after certification" relating to the "hiring process", within the meaning of s. 230.44(1)(d), Stats. Nor would such argument be supported by the Commission's prior cases. See, for example, Seep v. DHSS, 83-0032-PC, 83-0017-PC-ER (10/10/84), Seep v. State Personnel Commission, 84-CV-1920 (Racine County 6/20/85), Seep v. State Personnel Commission, 140 Wis.2d 32 (Ct. App. 1987).

[10] As Mr. Johnson noted in his post-hearing brief (p. 2), the time period between Mr. Johnson's reinstatement request and when the "oversight" occurred, could be considered as much less than the 7 months cited by DHSS. Specifically, the time period could be measured using the date of his request

> reasoning or exercising discretion. Her failure was not an act or decision, "exercised to an end or purpose not justified by, and clearly against, reason and evidence". . . . It was simply an oversight, a mistake.

The Wisconsin Supreme Court has held that the failure to exercise discretion is an abuse of discretion without distinguishing whether the nature of such failure was intentional or inadvertent. For example, in Reidinger v. Optometry Examining Board, 81 Wis. 2d 292, 260 N.W.2d 270 (1977), the Court considered the Optometry Examining Board's revocation of plaintiff's license to practice optometry in Wisconsin based on a felony conviction for federal income tax evasion. The optometrist appealed claiming the Board's action was arbitrary and capricious. The Supreme Court agreed on the grounds that the pertinent statute gave the Board discretion to revoke licenses based on felony convictions but did not mandate such action, and the Board in Reidinger failed to exercise its discretion. Reidinger, 81 Wis. 2d at 297. The Court's rationale is shown below:

> The petitioner alleges that the action of the Board is arbitrary. We agree because the Board failed to exercise its discretion. Discretion is more than a choice between alternatives without giving the rationale or reason behind the choice. In McCleary v. State, 49 Wis.2d 263, 277, 182 N.W.2d 512 (1971), this court said,
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> > "In the first place, there must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards. As we pointed out in State v. Hutnik (1968), 39 Wis.2d 754, 764, 195 N.W.2d 733, '. . . there should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.'"
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> There is nothing in the findings, conclusions or order of the Board showing that it exercised its discretion as that term has been interpreted by this Court.

(4/1/93), and the date upon which DHSS first took active recruitment steps (5/9/93); a period of about 5 weeks.

The rationale stated in Reidinger, is consistent with the Commission's prior cases. In Wing v. DILHR & DP, 80-65-PC (4/5/83) and (8/4/83 - clarified), the Commission found that an abuse of discretion occurred where Mr. Wing submitted a request to exercise his permissive reinstatement rights and such request was forwarded by the personnel office to the hiring authority for consideration in a particular vacancy, but due to problems with inter-departmental mail the hiring authority never received notice to interview him. Also see, Pearson v. UW-Madison, 84-0219-PC, Pearson v. UW System, 85-CV-5312 (Dane County 6/25/86), Pearson v. UW System, 86-1449 (unpub. Ct. App. 5/7/87).

DHSS' Failure to Notify Mr. Johnson about the MIS-2 Vacancy

DHSS argued to the full Commission that par. 13 of the proposed decision should be changed. In particular DHSS argued:

> Nothing in the record supports the contention that Ms. Karkula and Ms. Souzek had an indefinite commitment to contact Johnson when a vacancy occurred. . . . To suggest WMHI had committed themselves to determine which jobs Johnson might be interested in and contact him is without foundation.

DHSS's perception of the record is incorrect. Mr. Johnson credibly testified it was his understanding from speaking with Ms. Karkula and Ms. Souzek that submission of his reinstatement letter was all he had to do. Furthermore, his understanding was consistent with Ms. Cox's testimony that her usual practice was to keep such letters on file and to contact the employe and hiring authority when a suitable vacancy arose.

The Commission agrees with DHSS that Ch. 230, Stats., and its related rules create no obligation for the employer to monitor vacancies for an employe who has reinstatement rights. DHSS's obligation in Mr. Johnson's case arose from DHSS's statement to Mr. Johnson that it would monitor vacancies, a promise which Mr. Johnson relied upon to his detriment with the result that he missed an opportunity to interview for the MIS-2 position. In short, DHSS's obligation in Mr. Johnson's case is based upon equitable estoppel principles, not upon obligations created by statute or administrative rule. See Dept. of Revenue v. Moebius Printings Co., 89 Wis. 2d 610, 279 N.W.2d 213 (1979).

Remedy

The hearing issue agreed to by the parties is shown below:

> Whether respondent committed an illegal act or an abuse of discretion when it did not interview the appellant on a permissive reinstatement basis for the vacancy in question. If an illegal act or abuse of discretion occurred, what is the appropriate remedy?

The alleged wrongful act was DHSS's failure to provide Mr. Johnson with an interview for the MIS-2 position. The appropriate remedy tailored to the agreed-upon issue is for DHSS to provide Mr. Johnson with the opportunity to interview at the MIS-2 level within the Winnebago geographic area.[11] An order to hire Mr. Johnson for the next available vacancy goes beyond the scope of the hearing issue and the act found to be an abuse of discretion. As stated in 73A C.J.S *Public Administrative Law and Procedure* s. 223a. (1983):

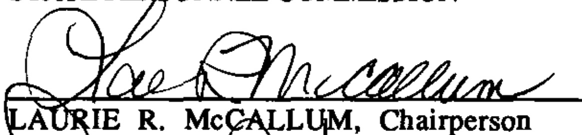
> *Refusal or failure to exercise discretion.* While the courts may compel the official to exercise his discretion where he has obviously failed or refused to do so, they do not undertake to control the administrative discretion. (Cites omitted.)

ORDER

That this matter be remanded to DHSS for action in accordance with this decision.

Dated March 3, 1995.

STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

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[11] The Commission cannot tailor a remedy to the specific MIS-2 position for which DHSS failed to interview Mr. Johnson. The record indicates the position remains filled by the person hired (Dennis Jezeski). Accordingly, the Commission lacks authority to order his removal, pursuant to s. 230.44(4)(d), Stats.

JUDY M. ROGERS, Commissioner

Parties:

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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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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. 2/3/95