STATE OF WISCONSIN PERSONNEL COMMISSION

ERIC M. SEITTER, Appellant, v. Secretary, DEPARTMENT OF TRANSPORTATION, and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION, Respondents. Case No. 94-0021-PC	DECISION AND ORDER

The Commission, having reviewed the Proposed Decision and Order and the parties' objections and arguments in regard thereto, and after having consulted with the hearing examiner, adopts the Proposed Decision and Order as its final resolution of the matter with the following modifications:

I. The issue stated in the Nature of the Case section should be modified to state as follows:

> Whether the action taken by respondent DMRS on or after November 30, 1993, in regard to the subject certification violated §230.25(2)(b), Stats., or was an abuse of discretion.

II. The reference to "Ms. Schunke" in Finding of Fact 16 should be modified to refer to "Mr. Schunke."

III. The reference to "Jerry Pippen" in Findings of Fact 11 and 12 should be modified to refer to "Jerry Pippin."

IV. The reference to "January 6, 1993," in Finding of Fact 16 should be modified to refer to "January 6, 1994."

V. The last sentence in Finding of Fact 16 should be modified to state as follows:

Mr. Schunke was appointed to the subject position on or around January 31, 1994.

VI. The following should be added as Finding of Fact 19:

19. Part of Ms. Schwab's responsibilities during the relevant time period was to grant extensions to the 60-day requirement. When the certification at issue here was re-opened on November 22, 1993, Ms. Schwab concluded that it would be very difficult, if not impossible, for DOT to make another appointment on or before November 30, 1993; that DOT needed additional time to make an appointment; and that this extension should be for 60 days since DOT was basically starting over with a new certification even though using some existing names. Ms. Schwab later concluded that this 60 days should be measured from December 3, 1993, because the problem with the certification list was not resolved until that date. Ms. Schwab regarded her actions in this regard as an implicit extension of time for DOT to make the appointment.

VII. The final sentence of the first full paragraph on page 6 is deleted and the following substituted:

Appellant also argues that DMRS abused its discretion because it never considered the 60-day provision and failed, as a result, to exercise any discretion at all in this regard. However, even though her thought process may not have been verbalized or reduced to writing (and §230.25(2)(b), Stats., does not require it to be), the record indicates that Ms. Schwab did go through a reasoning process which resulted in her conclusion that DOT would need an additional 60 days beyond December 3, 1993, to make an appointment. The record shows that Ms. Schwab concluded, based on DOT's representation that it desired to request additional names and her knowledge of the time that it takes to notify newly certified candidates and conduct interviews, that it would very difficult, if not impossible, to complete this process before November 30, 1993; that she considered that a vacancy had been created which required a new appointment and that a reasonable period of time to complete this was 60 days, i.e., the period of time designated for effecting an appointment in §230.25(2)(b), Stats.,; and, in view of the fact that the problems with the re-certification were not finally solved until December 3, 1993, that the 60-day period should be measured from this date. Appellant has failed to show that any of the facts or factors Ms. Schwab considered were inconsistent with the information available to Ms. Schwab at the time, or that the conclusion Ms. Schwab reached in considering these facts and factors was an unreasonable one. The record does not show therefore that Ms. Schwab failed to exercise discretion, or that the conclusion Ms. Schwab reached in this regard was an abuse of discretion, i.e.,

clearly contrary to reason and evidence. Harbort v. DILHR, Case No. 81-74-PC (4/2/82). The Commission concludes that the goal, as well as the letter, of §230.25(2)(b), Stats., were met, and that DMRS did not abuse its discretion in regard to application of the 60-day requirement.

Dated: March 9, 1995

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

LRM:lrm

STATE OF WISCONSIN PERSONNEL COMMISSION

ERIC M. SEITTER, Appellant, v. Secretary, DEPARTMENT OF TRANSPORTATION, and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION, Respondents. Case No. 94-0021-PC	PROPOSED DECISION AND ORDER

Nature of the Case

This is an appeal of a hiring decision as well as certain aspects of the related certification process. The two issues to which the parties agreed were separated for hearing purposes. The instant decision addresses only the following issue:

> Whether the certification issued for the subject Engineering Technician 1 position was contrary to Section 230.25, Stats., or Ch. ER-Pers 12, Wis. Adm. Code.

A hearing on this issue was held on November 10, 1994, before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the briefing schedule was completed on January 5, 1995.

Findings of Fact

1. On October 1, 1993, respondent Department of Transportation (DOT) initiated a request for a list of certified candidates for a vacant Engineering-Transportation-Technician 1 position in District 4. This list was obtained by DOT on October 1, 1993, through the computerized Employment Relations Certification System (ERCS).

2. DOT contacted each of the candidates on this list to determine their interest and availability for the position. Of the 23 candidates, fifteen (15)

failed to respond, and one (1) indicated that he was not interested in the position. The remaining seven (7) candidates were interviewed.

3. Carl Schunke was one of the candidates on the certification list who was interviewed for the position. Mr. Schunke, in completing the application materials for the Engineering-Transportation-Technician 1 examination, had completed a Veterans Preference Supplement form. On this form, Mr. Schunke had indicated that he was entitled to veterans preference points and, as a result, 10 points were added to his examination score. Without these additional 10 points, Mr. Schunke would not have been certified to DOT on October 1, 1993, for the subject position.

4. Respondent DOT appointed Mr. Schunke to the subject position effective November 15, 1993.

5. Some time between November 15 and November 19, 1993, respondent DOT determined that Mr. Schunke had not been entitled to veterans preference points, and communicated this by phone to Jean Fillner, Certification Specialist with DMRS, on or around November 19, 1993. DOT advised Ms. Fillner that Doris Ziegler of DOT would be sending a writing to DMRS requesting that veterans preference points be removed from Mr. Schunke's score. Ms. Fillner communicated this information to Deb Schwab, Director of Applicant Services for DMRS.

6. Mr. Schunke was removed from the subject position by respondent DOT some time between November 19 and 22, 1993.

7. On or around November 22, 1993, Ms. Schwab discussed the invalid certification and appointment of Mr. Schunke with Jesus Garza, Policy Advisor to the Administrator of DMRS. The purpose of this discussion was to determine the procedure to be followed in filling the subject position. Mr. Garza and Ms. Schwab agreed that the certification, which had been closed upon the appointment of Mr. Schunke, should be re-opened. The certification was re-opened by DMRS on November 22, 1993, and this was communicated to DOT.

8. In a handwritten memo to Ms. Fillner dated November 22, 1993, Ms. Schwab indicated that Mr. Garza had approved the re-opening of the certification, and that she had changed the data in the ERCS system so that it no longer reflected that Mr. Schunke had been selected for the position.

9. On November 22, 1993, through the ERCS system, DOT requested and received the names of additional certified candidates to replace those on the original (October 1, 1993) certification list who had failed to respond or who

had not indicated an interest in the position. Of these eleven (11) replacement candidates, three (3) failed to respond; four (4) were not interested; and four (4), including appellant, were interviewed.

10. On December 1, 1993, DOT obtained through ERCS the names of additional replacement candidates. Of these two (2) replacement candidates, one (1) failed to respond, and one (1) was interviewed.

11. In a written memo dated November 30, 1993, to Jerry Pippen of the Department of Employment Relations (DER), Doris Ziegler of the DOT stated as follows, in pertinent part:

> The purpose of this memo is to bring to your attention a discrepancy in eligibility for veterans preference points for Carl Schunke who is on an Engineering Technician Trans 1 register for the Department of Transportation.
>
> Mr. Schunke does not appear to be eligible for veterans preference points. . . .
>
> We have removed Carl Schunke, . . . , from his position and request he be removed as a selected candidate on the certification.
>
> We are interested in re-doing the certification as Mr. Schunke is ranked #25 in the state and we had 7 not interested candidates under the basic certification and are therefore entitled to additional names.

12. In a handwritten note to Ms. Schwab dated December 1, 1993, Mr. Pippen suggested that the veterans preference points be removed from Mr. Schunke's score on all employment registers on which his name appeared; that Mr. Schunke's name be restored to the Engineering-Transportation-Technician 1 register at his original rank; and that DOT be provided additional names to the extent they were entitled to them.

13. On December 3, 1993, Ms. Schwab removed, through the ERCS system, the veterans preference points from Mr. Schunke's score on all employment registers on which his name appeared, including the Engineering-Transportation-Technician 1 register; and removed his name from the certification list for the subject position.

14. On December 9, 1993, DOT obtained through ERCS the names of additional replacement candidates. Of these four (4) replacement candidates, two (2) failed to respond, and two (2) were not interested.

15. On December 17, 1993, DOT obtained through ERCS the names of additional replacement candidates. Both of these two (2) replacement candidates indicated they were not interested.

16. On January 6, 1993, DOT obtained through ERCS the names of additional replacement candidates. Of these two (2) replacement candidates, one (1) indicated no interest and the other one (1) was interviewed and selected. The candidate selected was Mr. Schunke. Ms. Schunke was appointed to the subject position effective January 31, 1994.

17. An appointing authority is entitled to request names of replacement candidates until it obtains a full roster of interested candidates. The full roster for the filling of the subject position consisted of 24 candidates.

18. Respondent DMRS did not apply the 60-day requirement of §230.25(2)(b), Stats., in a rigid manner and routinely granted extensions, either implicitly or explicitly, if it appeared the appointing authority was being reasonably diligent in filling the position.

Conclusions of Law

1. This matter is properly before the Commission pursuant to §§230.44(1)(a) and (d), Stats.

2. The appellant has the burden to show that the subject certification was illegal or an abuse of discretion.

3. The appellant has failed to sustain this burden.

Opinion

Section 230.25(2)(b), Stats., states as follows:

> (b) Unless otherwise provided in this subchapter or the rules of the administrator, appointments shall be made by appointing authorities to all positions in the classified service from among those certified to them in accordance with this section. Appointments shall be made within 60 days after the date of certification unless an exception is made by the administrator. If an appointing authority does not make an appointment within 60 days after certification, he or she shall immediately report in writing to the administrator the reasons therefor. If the administrator determines that the failure to make an appointment is not justified under the merit system, the administrator shall issue an order directing that an appointment be made.

It appears as though appellant's primary contention here is that the date of certification was October 1, 1993; the re-opening of the certification on November 22, 1993, did not create a new certification from which to measure the 60 days; the 60-day period was never extended by the Administrator of DMRS; and, as a result, the certifications of replacement candidates after November 30, 1993, and the second appointment of Mr. Schunke, which occurred outside the 60-day period, should be voided.

The basic problem with appellant's contention is that no authority is cited for the conclusion that voiding the certifications and the hire would be the proper result even if it were concluded that they occurred outside the statutory time period. A reading of § 230.25(2)(b), Stats., reveals that the primary purpose of this subsection is to assure that an appointment is effected after certification. Even a rigid application of the 60-day rule by DMRS would not lead, under the language of this subsection, to the voiding of certifications or the voiding of tardy appointments but instead to an order by the Administrator of DMRS that an appointment be made. Even if the Commission were to conclude that DOT or the Administrator of DMRS failed to carry out certain of their responsibilities in accordance with this subsection, it would be incongruous for the PC to order that this failure should result in the voiding of certifications or the voiding of tardy appointments. In addition, the obvious intent of this subsection in investing the Administrator of DMRS with this appointment monitoring function is to assure that he is aware of and involved in the process when an appointment has not been effected within the 60-day period. In the instant case, DMRS was aware of the invalid original appointment of Mr. Schunke and the efforts by DOT to fill the position after his removal. Even if it were concluded that the replacement certifications and the second appointment of Mr. Schunke occurred outside the statutory 60-day period, the extent of the awareness and involvement of DMRS in this process leads to a conclusion that the administrator of DMRS acceded to the procedure that was being followed by DOT in filling the position and, by this accession, implicitly extended the statutory time period.

Appellant points to the alleged failure to DOT to request an extension and to justify the request in writing as a further violation of §230.25(2)(b), Stats. However, Ms. Ziegler of DOT did write a memo to DMRS (See Finding of Fact 11, above) explaining the problem with the original appointment of Mr. Schunke and indicating that DOT was requesting that the certification be re-opened and

that DOT intended to obtain the names of replacement candidates. The purpose of this memo appears to be to memorialize previous telephone communications between DMRS and DOT. Both the date of this memo, i.e., November 30, 1993, and the intention stated in the memo to request additional names, indicates that a request for the extension of the original 60-day period or, alternatively, a request for the commencement of a new 60-day period, is necessarily implicit in the memo, and the Commission concludes from this that the reporting requirements of §230.25(2)(b), Stats., were met. As above, even if it were concluded that these reporting requirements were not met, it would not serve the intent of §230.25(2)(b), to void the certifications or the appointment which occurred outside the 60-day period.

Appellant also argues that DMRS abused its discretion when it did not order DOT to make an appointment on or before November 30, 1993, from the group of interested candidates certified on or before that date. First, such an order would have been inconsistent with the implicit grant of additional time described above. In addition, approaching this question from a practical perspective, the statutory provision under consideration here sets forth 60 days as a generally reasonable period of time to make an appointment to a vacant position. The original appointment of Mr. Schunke was made within the 60-day period. Once Mr. Schunke was removed from the position, DOT had another vacancy to fill. Although it may have been possible to do so on or before November 30, 1993, it would be contrary to the underpinnings of the merit recruitment and selection system to require an employer with a vacancy to forego the opportunity to have a full slate of certified candidates from which to choose and to rush to make an appointment within a few days. The obvious purpose of §230.25(2)(b), Stats., is to provide a mechanism for assuring that an employer does not unreasonably delay the appointment process and that the Administrator of DMRS becomes involved if a question of such a delay presents itself. Here, DOT was careful to involve DMRS in the process once Mr. Schunke's invalid certification came to DOT's attention, and DMRS at no time concluded that there had been an unreasonable delay in filling the position. The Commission concludes that the goal, as well as the letter, of §230.25(2)(b), Stats. were met.

Appellant is not arguing here that the certification of any candidate (other than the original certification of Mr. Schunke) was invalid for any reason other than that related to the application of the 60-day requirement.

The Commission concludes based on the above that appellant has failed to show that the certifications and the appointment which occurred after November 30, 1993, were illegal or an abuse of discretion.

ORDER

The action of respondent is affirmed.

Dated:______________________, 1995 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:lrm

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

Parties:

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