STATE OF WISCONSIN PERSONNEL COMMISSION

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WISCONSIN PROFESSIONAL EMPLOYEES COUNCIL,

Appellant,

v.

Administrator, DIVISION OF MERIT RECRUITMENT & SELECTION,

Respondent.

Case No. 95-0107-PC

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RULING ON APPELLANT'S PETITION FOR REHEARING

A hearing was held on October 19 and 20, 1995, resulting in a proposed decision and order mailed to the parties on January 25, 1996. The parties submitted written arguments which were considered prior to the Commission mailing its final decision and order on April 5, 1996. The appellant, Wisconsin Professional Employees Council (WPEC), filed a petition for rehearing on April 17, 1996, which is the subject of the present ruling.

DISCUSSION

Petitions for rehearing are governed by s. 227.49, Stats., which provides as shown below:

> (3) Rehearing will be granted only on the basis of:
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> (a) Some material error of law.
> (b) Some material error of fact.
> (c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

WPEC claims entitlement to rehearing based upon a material error of law and/or a material error of fact.

ALLEGED MATERIAL ERROR OF LAW

WPEC's allegation in this regard repeats its argument raised for the first time in oral argument before the Commission claiming that respondent, Division of Merit Recruitment and Selection (DMRS), had the burden of proof.

The issue was addressed in the Commission's final decision and order. WPEC, however, states in its petition for rehearing (p. 4) that the Commission in its final decision fails to "explain why it finds the McFarren fact situation relevant to the present case, other than to offer a conclusory statement that flies in the face of the language of s. 230.30, Wis. Stats.".

The McFarren court established 5 factors to consider in determining which party has the burden of proof. The Commission in its final decision discussed only the exceptions factor because that was the only factor WPEC argued. An analysis of the entire five factors follows to place the prior discussion of the exceptions factor in perspective.

Five Factor Analysis to Determine Burden of Proof

The Wisconsin Supreme Court in State v. McFarren, 62 Wis.2d 492, 215 N.W.2d 459 (1974), considered which party had the burden of proof on a particular matter. The Court established the following five factors to consider based upon a discussion in McCormick, *Evidence* (2d ed.), s. 337. McFarren, pp. 499-505: 1) the customary common law rule that the moving party has the burden of proof, including not only the burden of going forward but also the burden of persuasion; 2) special policy considerations, if any; 3) whether access to relevant facts are peculiarly available to a party; 4) fairness based on analyses of: 4a) proof of exceptions, and 4b) proof of negatives; and 5) judicial estimate of probabilities which would place the burden of proof with the party alleging that an unlikely set of facts exists.

The Commission notes that the five factors stated above do not have equal weight. Rather, the first factor establishes which party has the burden of proof under customary common law rules and the four remaining factors are considered to determine whether special considerations exist to justify shifting the burden of proof to the opposing party. See, for example, State v. McFarren, 62 Wis.2d 492, 215 N.W.2d 459 (1974), where the state had the burden of proof under the first factor and consideration of the remaining factors did not justify shifting the burden to McFarren; State v. Hanson, 98 Wis.2d 80, 295 N.W.2d 209 (Ct. App. 1980), where Hanson had the burden under the first factor, but consideration of the remaining factors justified shifting the burden to the state; State v. Bleck, 114 Wis.2d 454, 338 N.W.2d 492 (1983) and State v. Buelow, 122 Wis.2d 465, 363 N.W.2d 255 (Ct. App. 1984), where the State

had the burden of proof under the first factor and analysis of the remaining factors did not justify shifting the burden to the opposing party; State v. Big John, 146 Wis.2d 741, 432 N.W.2d 576 (1988), where Big John had the burden of proof under the first factor and analysis of the remaining factors did not justify shifting the burden to the opposing party; and Rivera v. Eisenberg, 95 Wis.2d 384, 290 N.W.2d 539 (Ct. App. 1980), where tenants had the burden of proof under the first factor but the burden was shifted to the landlord due to the landlord's peculiar access to evidence and due to policy considerations.

WPEC - facts and statute involved

WPEC filed an appeal under s. 230.44 (1)(a), Stats., of a personnel decision made by the DMRS Administrator. In particular, WPEC contests the correctness of the Administrator's decision under s. 230.30, Stats., to establish eight new employing units at the Office of the Commissioner of Banking (OCB), as opposed to treating the entire OCB agency as one employing unit. The statutory text is shown below.

> **Employing units; establishment and revision.** Each agency shall constitute an employing unit for purposes of personnel transactions, except where appropriate functional, organizational or geographic breakdowns exist within the agency. These breakdowns may constitute a separate employing unit for one or more types of personnel transactions under an overall employing unit plan if requested by the appointing authority of that agency and approved by the administrator. If the administrator determines, after conferring with the appointing authority of the employing agency, that an employing unit is or has become inappropriate to carry out sound personnel management practices due to factors including, but not limited to, the size or isolated location of portions of the employing unit, the administrator may revise the employing unit structure of the agency to effect the remedy required.

WPEC as the party who wishes to change the current employing unit structure of OCB, is the party with the burden of proof under the first factor noted in McFarren; and should remain the party with the burden of proof unless analysis of the remaining four factors justifies shifting the burden to DMRS.

As to the second factor, neither party has advanced special policy considerations which would justify shifting the burden of proof -- nor is the

Commission aware of any. Regarding the third factor, DMRS certainly is in the best position to access relevant information but not to such degree as would justify shifting the burden of proof to DMRS, a conclusion with which WPEC apparently agrees because WPEC did not argue that this factor would justify shifting the burden of proof to DMRS.

In order for WPEC to prevail, the record must show that the DMRS Administrator failed to follow the statute when establishing 8 employing units at OCB. The frequency of such occurrence is the required consideration under the fifth factor. Such frequency has not been estimated by the parties. The Commission, however, notes that the current appeal is the first known challenge to the statute which tends to suggest that such event occurs infrequently and, as a result, the burden of proof should remain with WPEC.

The Commission now turns to analysis of the exceptions factor. This is the factor which WPEC felt applied to shift the burden of proof to DMRS. WPEC's arguments are based on the first sentence of the statute, shown below.

> Each agency shall constitute an employing unit for purposes of personnel transactions, except where appropriate functional, organizational or geographic breakdowns exist within the agency. . . .

WPEC contends that because the word "except" appears in the statute the burden of proof should shift to DMRS. The Commission disagrees.

The interpretive approach suggested by WPEC takes into account the form, or wording of the statute; but fails to undertake the more difficult task of determining the overall intent of the language. As noted by the McFarren court, a draftman's use of the word "except" may represent merely a casual choice of words and, accordingly, deserves further scrutiny. The McFarren court said:

> "In allocating the burdens, courts consistently attempt to distinguish between the constituent elements of a promise or of a statutory command, which must be proved by the party who relies on the contract or statute, and matters of exception, which must be proved by his adversary. Often the result of this approach is an arbitrary allocation of the burdens, as the statutory language may be due to a mere casual choice of form by the draftsman. . . ."

> McFarren, 62 Wis.2d 501, citing from McCormick, *Evidence* (2d ed.), s. 337. (Emphasis added.)

Further scrutiny is required to determine whether the statute involves a true exception, rather than an integral part of the described activity. The following two examples of this further inquiry were given by the McFarren court.

> " . . . one who relies on an exception to a general rule or statute has the burden of proving that the case falls within the exception, unless the nonexistence of the exception is made a condition of the application of the rule."
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> McFarren, 62 Wis.2d 502, citing from 31A, C.J.S, *Evidence*, s. 104. (Emphasis added.)
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> ". . . It has been stated . . . that the preceding rule [regarding the exceptions factor] cannot be mechanically applied, and the real question is whether the exception is so incorporated with the clause defining the offense that it becomes in fact a part of the description, and such question cannot be determined by the mere position of the exception in the text."
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> McFarren, 62 Wis.2d 502, citing from 22A, C.J.S, *Criminal Law*, s. 572. (Emphasis added.)

Further scrutiny of the language of s. 230.30, Stats., lead the Commission to characterize the "except" clause is an integral part of the powers conferred to the DMRS Administrator, rather than a true exception which would have the potential to shift the burden of proof to DMRS. The integral nature of the "exceptions clause" is the similarity the Commission saw between the statute involved here and the statute involved in McFarren. Such similarity was discussed in the Commission's final decision.

The language of s. 230.30, Stats., provides a framework which the DMRS Administrator must use in establishing employing units and such framework includes consideration of the factors mentioned in the statute such as "functional, organizational or geographic breakdowns". This interpretation parallels the wording of the final sentence in the statute, as shown below, in pertinent part:

> . . . If the administrator determines . . . that an employing unit is or has become inappropriate to carry out sound personnel management practices due to factors including, but not limited to, the size or isolated location of portions of the employing unit, the administrator may revise the employing unit structure of the agency to effect the remedy required.

The drafter could have used a similar style for the first sentence, as suggested below:

> The administrator shall give preference to designating an entire agency as the employing unit for purposes of personnel transactions, but must further consider whether it would be more appropriate to designate portions of an agency as the employing unit by considering the existence of appropriate function, organizational or geographic breakdowns within the agency.

Even if WPEC were correct in its contention that a true exception exists in s. 230.30, Stats., the Commission would not find such factor sufficient in the context of an analysis of all five factors to shift the burden of proof to DMRS. In conclusion, an analysis of the 5 factors enunciated in McFarren, lead the Commission to conclude that WPEC properly had the burden of proof at hearing.

ALLEGED MATERIAL ERRORS OF FACT

The alleged errors in findings 3 and 4 of the proposed decision and order (ultimately incorporated into the final decision and order), were raised previously by WPEC in arguments to the full Commission. Each concern is discussed below.

Finding of Fact 3

Appellant contends that the record does not support the finding that 95% of bank examinations in a district were carried out by examiners assigned to that district. The only specific percentage recited in the record was provided by examiner Thomas Shively who testified that, prior to November of 1994, 95% of the examinations he conducted were of banks within his assigned district, i.e., Milwaukee. Although appellant contends that Mr. Shively also testified that examiners assigned to other districts spent considerably more

time examining banks outside of their district, such testimony would be accorded little weight in view of the failure of the record to reveal the basis for Mr. Shively's knowledge of what the specific experience in the other districts had been. Moreover, such testimony would also be limited by the fact that it provided no quantification of the term "considerable." Ann Smith, a central office review examiner testified that it was not unusual for an examiner to be assigned outside his or her district. Again, there was no evidence in the record quantifying what Ms. Smith meant by the term "unusual." In addition, this testimony is not necessarily inconsistent with the finding under consideration here. Michael Mach, Administrator of OCB's Division of Supervision and Regulation, testified that generally, prior to September of 1994, assignment of an examiner outside of his or her district would primarily result from needs such as those associated with a large examination or the need for special expertise; and, after September of 1994, the primary reason was to keep all examiners busy. Finally, and most importantly, the record shows that it was the practice to assign examiners to banks within their districts and it was the exception to this practice to assign them outside their districts. It was this showing that the Commission relied upon in drawing its conclusion here.

Finding of Fact 4

Appellant contends that there is not evidence in the record to support the Commission's finding that the experience and expertise gained by an examiner in one district was not identical to that gained in another district. However, Thomas Shively, appellant's own witness, testified on direct examination that all banks differ as to methods of operating, management practices, banking philosophy, reasons for making changes, and other factors; and that it takes time for an examiner to learn these things about a particular bank, it is useful for examiners to know these things about banks they are assigned to examine, and historical perspective is lost when examiners unfamiliar with a particular bank are assigned to examine it. James Huff, the Deputy Commissioner of Banking, testified that each district had different needs and a different mix of banks. Jesus Garza of DMRS testified that, in his meetings with OCB management, concerns were raised about not being able to limit promotions to examiner staff within a particular district

and about not being able to require a probationary period for examiners transferred or reinstated from positions outside a particular district. If examiners in different districts were indeed interchangeable as appellant has argued, there would have been no reason for such concerns on the part of OCB management.

There is sufficient evidence in the record to support these findings of fact.

ORDER

WPEC's petition for rehearing is denied.

Dated May 14, 1996.

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

JMR/LRM

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