STATE OF WISCONSIN | CIRCUIT COURT Branch 10 | DANE COUNTY

STEVEN R. POSTLER,

Petitioner,

vs.

Case No. 95CV003178

WISCONSIN PERSONNEL COMMISSION, WISCONSIN DEPARTMENT OF TRANSPORTATION, and WISCONSIN DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents..

ORDER AFFIRMING RULINGS OF WISCONSIN PERSONNEL COMMISSION

Petitioner asks for reversal and remand of rulings by the Wisconsin Personnel Commission ("Commission") dated November 27, 1995[1], and October 16, 1995[2], on the grounds that the proceedings below were unfair and contained material errors in procedure, fact and law. Respondents contend that the rulings of the Commission should be affirmed in all respects.

BACKGROUND

Petitioner claimed before the Commission that the hiring process used by the respondent Department of Transportation ("DOT") in December of 1993 to fill a vacant

[1] This decision denied petitioner's request for rehearing.

[2] This decision adopted the hearing examiner's proposed decision and order finding that the Department of Transportation's decision not to hire appellant for the position of Motor Vehicle Supervisor 8 in January of 1994 was not illegal or an abuse of discretion (Case No 94-0016-PC) nor the result of discrimination on the basis of either sex or race (Case No. 94-0024-PC-ER).

supervisory position in the Fuel Tax Unit violated his civil service rights under §230.44(1)(d), Stats., and was illegal or an abuse of discretion (Complaint 94-0016-PC); and that DOT's decision to hire a female, minority candidate for the Supervisor 8 position was discriminatory because DOT's decision-makers were biased against petitioner as a white male candidate.

After hearing and oral argument, the Commission dismissed petitioner's complaints, finding that DOT's selection of a female, minority candidate over petitioner was based upon legitimate, non-discriminatory reasons. The Commission specifically found that, although petitioner possessed greater technical knowledge of the specific program areas than the candidate hired, the candidate who was hired possessed greater supervisory experience and that DOT legitimately placed a greater emphasis on supervisory skills in the particular hiring process in question. The Commission further found, with respect to the civil service appeal, that the fact that one of the interview panel members, who was petitioner's supervisor at the time, relied upon his perception of alleged deficiencies in petitioner's interpersonal relations with co-workers as a reason for eliminating him from consideration was not an "abuse of discretion" under §230.44(1)(d).[3] The combined complaints of petitioner were dismissed on their merits by the Commission. Petitioner maintains that his request for rehearing should have been granted, and that he should now be granted a jury trial on the issue of

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[3] Section 230.44(1)(d) provides as follows:

> **230.44 Appeal procedures. (1)** APPEALABLE ACTIONS AND STEPS. . . . [T]he following are actions appealable to the commission . . .:
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> *(d) Illegal action or abuse of discretion.* A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion . . ..

discrimination and that the court should find that DOT managers abused their discretion in hiring the minority female candidate over petitioner.

STANDARD OF REVIEW

Under §227.57(3), Stats., the standard of review for disputed issues of agency procedure, interpretations of law, determinations of fact and policy decisions within the agency's delegated discretion are separate.

Procedure and evidence. On matters of procedure and evidence, the administrative agency is granted broad discretion to issue rulings on procedure and evidence during a contested hearing. Beloit Education Association v. WERC, 73 Wis. 2d 43, 69 (1976); State ex rel. Gregersen v. Board of Review of Town of Lincoln, 5 Wis. 2d 28, 34 (1958). Rulings on admissibility of evidence are committed to the sound discretion of the agency and will not be overturned absent an abuse of discretion or an erroneous application of the law. See, City of Menomonie v. Evensen Dodge, Inc., 163 Wis.2d 226 (Ct. App. 1991); Erbstoezer v. American Casualty Co., 169 Wis. 2d 637 (Ct. App. 1992).

Findings of Fact. With respect to findings of fact made by the agency during a final hearing, the standard of review requires that findings of the agency be affirmed if they are supported by substantial evidence, e.g., such evidence as a reasonable mind might accept as adequate to support a conclusion. Muskego-Norway C.S.J.S.D. No. 9 v. WERC, 35 Wis. 2d 540, 562 (1967). The weight and credibility of the evidence are matters for the agency and not for the reviewing court to evaluate. The finding of the agency is conclusive when more than one inference can reasonably be drawn from conflicting evidence. Bucyrus-Erie

Co. v. ILHR Dept., 90 Wis.2d 408, 418 (1979); §227.57(6), Stats.

Interpretations of Law. With respect to alleged errors of law, when the law being interpreted is one that is entrusted to the specialized and expert agency charged with the interpretation and administration of that law, great weight is given to the resulting agency interpretation. Kelley Co. v. Marquardt, 172 Wis.2d 234 (1992).

DECISION

Petitioner raises seven objections in his petition for review.[4] An eighth objection -- that final arguments of the parties was not transcribed in the record certified to the court -- is raised in petitioner's brief, but not in the petition for review. Objections 1, 2, 3, 4, & 5 all deal with issues of procedure and evidence. Objection 6 attacks the support for various findings of fact. Objection 7 argues that the Commissions rulings of law were not reasonable.

Objection 1. Petitioner objects to the hearing examiner's allowing the Department to introduce hearsay evidence to show the basis for the panel interviewer's belief that petitioner had problems with interpersonal relations. Petitioner admitted during the administrative proceedings that he did not understand the basis of that ruling. See, Final Decision and Order, Item #3, Certified Record, at p. 5. However, this ruling is based upon a correct

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[4] The objections, in summary are as follows:

1) Hearsay evidence was permitted in respondent's but not in petitioner's case
2) The Commission failed to enforce the deadline for filing of witnesses and exhibits in PC §4.02, Wis. Adm. Code.
3) Petitioner's rebuttal witnesses were not permitted to testify
4) Various of Petitioner's exhibits were refused admission into the administrative record.
5) Certain findings of fact are erroneous because evidence has been excluded.
6) Certain findings of fact are not correct.
7) Certain conclusions of law are not reasonable.

application of the law: that when evidence in hearsay form is not admitted for the truth of it, but rather for another purpose (in this case the basis for the panelists belief that petitioner had interpersonal relations difficulties as a nondiscriminatory basis for selecting another candidate over petitioner), the evidence is not classified as hearsay. See, §908.01(3), Stats. Also, the Commission pointed out that the particular incidents with two women co-employees (incidents "a" and "b" in the proposed decision) were conceded by Mr. Postler. Thus, the Commission stated a ground to permit the testimony in, even if it was hearsay, because the underlying facts were conceded. This ruling is consistent with PC §5.03,[5] Wis. Adm. Code.

Petitioner also complains that he was barred by the hearing examiner from eliciting evidence as to an alleged policy or practice of DOT that all hires at that time had to be approved by the Affirmative Action Officer in the form of opinion evidence from witness Ron Kraft based solely on hearsay discussions with other supervisors. Petitioner, as a lay person, apparently does not appreciate that his use of hearsay evidence sought to establish the truth of the existence of the policy he argues would demonstrate bias against him as a white male candidate. As such, the evidence was hearsay in form and the hearing examiner was well within her discretion to exclude such testimony. Therefore, the two rulings on the use of hearsay testimony were not comparable, but are both correct.

Objection No. 2. Petitioner claims that the Commission's failure to enforce PC §4.02, requiring hearing exhibits and witness lists to be provided to the opposing party at

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[5] PC 5.03, Wis. Adm. Code, provides in part as follows:
(5) EVIDENCE. . . . Hearsay evidence may be admitted into the record at the discretion of the hearing examiner or commission and accorded such weight as the hearing examiner or commission deems warranted by the circumstances.

least three working days before the commencement of the hearing, prejudiced the proceedings as it "prohibited me from discussing my case with various law firms and ultimately making a decision on hiring an attorney to represent me at the hearing." The basis for the objection is that DOT's hearing exhibits and witness list were delivered to petitioner at about 4:00 P.M. on May 17, 1995, rather than at or before 9:00 A.M. on the same date. As petitioner states in his petition:

> I had arranged to take the afternoon off on May 17, 1995, for the sole purpose of meeting with and hiring an attorney to represent me at the hearing due to commence on Monday, May 22, 1995. Many attorneys advertise that they will meet with you the first time for free, so my plan was to take copies of my exhibits and witness list and copies of DOT's exhibits and witness list with me while I discussed my case with various law firms. . . . I decided not to go down town and visit various law firms, because I didn't want to use up my free visit without having DOT's exhibits or witness list with me to discuss. I was unable to take any time off from work to meet with attorneys on Thursday or Friday, May 18 and 19, 1995, due to my responsibilities at work and due to DOT's new sick leave monitoring policy which had recently gone into effect, so I ended up representing myself throughout the hearing which is something I had no intention of doing.

The Commission's ruling found that DOT was not at fault for failing to comply with PC §4.02, as the hearing examiner specifically required in a letter sent to the parties on April 14, 1995 that witness lists and exhibits must be exchanged prior to 4:30 P.M. on May 17, 1995. The commission found that any prejudice to petitioner accrued as a result of his own actions in setting an appointment with an attorney prior to the receipt deadline established in the hearing examiner's letter. The petition itself, however, suggests that petitioner did not have an appointment with any attorney; he merely intended to visit "various law firms" in one afternoon to discuss his case during a initial free consultation with each lawyer. Petitioner either naively or disingenuously maintains that he would have found a lawyer

willing to take his case by visiting various law firms on Wednesday afternoon, and that the lawyer would have appeared with him at a 3-day contested hearing commencing the following Monday morning. The petition also avers that petitioner didn't have any time to work with any attorneys on Thursday or Friday of that week because of work responsibilities and strict sick leave policies. The record herein contains no support whatsoever for the proposition that petitioner was prejudiced in any way by the seven-hour delay in providing witness lists and exhibits. Petitioner's plan to consult with various law firms during initial free consultations, with no follow up time to prepare the case is impossibly unrealistic, and could not have worked even if the exhibits and witness lists had been delivered on time. The Commission was well within its discretion and well-supported by evidence and common sense when it concluded that any prejudice to petitioner flowed from his own actions.

Objection 3. Petitioner objects that he was not permitted to call 35 rebuttal witnesses who had worked with him at various times to ask them whether he had ever made an offensive remark to them. Unfortunately, the hearing examiners ruling on this request is not reflected in the transcription of the tape recorded proceedings herein. The affidavit of Judy M. Rogers, hearing examiner, explains that human error resulted in a portion of the proceedings at this point not being recorded. See, Item #1, Record. The Rogers affidavit indicates to the best of her memory and based on her contemporaneous notes, what is missing from the tape recording. This affidavit is an appropriate device to cure the defect in the tape-recorded record. Her ruling on petitioner's request is set forth both in her affidavit and in the Commission's final decision and order dated October 17, 1995:

> Mr. Postler requested permission to present 35 rebuttal witnesses for the purpose of asking them whether they had ever heard him say an

> offensive remark. The hearing examiner denied the request mainly because she felt such testimony would not be helpful. The relevant inquiry was not whether Mr. Postler actually lacked interpersonal skills, but whether the interviewers who believe he had such problems had an explanation for their belief other than discrimination, illegality or an abuse of discretion.

The ruling -- that the proffered rebuttal testimony was not relevant -- was well within the discretion of the hearing examiner and reflects an accurate view of the law governing the conduct of administrative proceedings. There is no basis, therefore, for the court to overturn the ruling, which the Commission properly adopted in its final decision.

Objection #4. The hearing examiner excluded various exhibits offered by petitioner.[6] Because petitioner maintains that the exhibits were admissible, but were improperly excluded, he argues that the Commission made material errors of fact.

Having reviewed the record with regard to the determinations of the hearing examiner regarding the remaining exhibits petitioner argues were wrongfully excluded, I find that those exhibits were excluded on relevance and materiality grounds: that is, the exhibits were either plainly irrelevant, or are so remotely relevant as to lack probative value. Such rulings are within the discretion of the hearing examiner and are based on a correct view of the rules of the administrative hearing. Given the hearing examiner's view of the lack of probative value of these exhibits, it is clear that even if the exhibits were to be admitted, they would not affect the weight of the evidence herein or the findings of fact of the hearing examiner or the Commission.

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[6] Some of the exhibits petitioner claims were wrongfully excluded were either admitted (Exhibit C-9) or were never offered by petitioner (Exhibits C-57 through C-74, Exhibits 78, 111, and 112). No error can be assigned or evaluated for the hearing examiner to not admit exhibits which were not offered in evidence by petitioner.

The rulings complained of are inconsequential in light of the three days of evidence heard by the examiner, the 47 exhibits received into the record at the request of petitioner, and the testimony of fifteen witnesses elicited by petitioner. I therefore find no material error in the evidentiary rulings complained of and no probability that the exclusion of exhibits offered by petitioner contributed to any material errors of fact.

Objection #5. This objection presents a potpourri of complaints by petitioner: that he was surprised at the hearing; that he didn't know what discovery was; that he didn't know things were going to happen at the hearing as they did; that the absence of any attorney acting on his behalf put him at a disadvantage; and that he would add to his witness list and exhibits if he got a chance to do the hearing again.

The Commission found that petitioner failed to claim surprise at either the hearing or as part of his objections to the proposed decision and order; and further could not find that petitioner had acted with "due diligence" under §227.49(3)(c), Stats., in failing to do any pre-hearing discovery under PC §4.03, Wis. Adm. Code. Lastly, the Commission found that the issue complained about -- that petitioner wasn't prepare to deal with the fact that a person named Mary Pohlman sat in for one of the original interviewers, Martha Gertsch, in the interview of one candidate, Mr. Schuldes (a white male), who was not hired for the position -- was not central to the claims made by petitioner in this case: that Gertsch was biased against white male candidates. Although the Commission accepted Gertsch's proffered reasons for her unavailability at the Schuldes interview, petitioner argues for the inference that Gertsch's absence shows a prejudice toward or disinterest in white male candidates. This is an issue of credibility, properly resolved based on evidence in the record by the

administrative factfinders herein. There is no basis for reversal or rehearing on this record.

Objections #6 and #7. These objections go to the sufficiency of the record to support the Commission's finding that Postler's gender and race were not factors in DOT's decision to offer the supervisory position to a minority female candidate rather than to petitioner. The Commission's finding must be affirmed if it is supported by substantial evidence, which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Muskego-Norway C.S.J.S.d. No. 9 v. WERC, 35 Wis. 2d 540, 562 (1967); and Gateway City Transfer Co. v. Public Service Comm., 253 Wis. 397, 405-6 (1948). The weight and credibility of the evidence are matters for the agency decisionmaker, not for the reviewing court.

In its proposed decision and order, later adopted as the final decision and order, the Commission properly followed the law in determining that Postler had met his *prima facie* burden of showing that he was claiming discrimination based on protected status of race and gender; that he was qualified for the position for which he applied; and that he supported an inference of discrimination by alleging that he possessed more pertinent technical program knowledge than the candidate ultimately hired. See, Proposed Decision, Item 4, p. 12, Record.

The Commission then properly held DOT to its burden to offer a legitimate, nondiscriminatory reason for not selecting Postler for the supervisor's position. The Commission documented evidence in the record whereby DOT carried this burden of proof. DOT established that it selected the female minority candidate because she possessed a greater amount of non-technical skills directly related to ability to supervise people; and that

DOT determined prior to starting its search that supervisory skills would be given a higher priority in the selection process than technical skills, because the unit was already staffed with technically highly skilled persons. Proposed Decision, Item 4, p. 12, Record. These findings are all amply supported by substantial evidence in the record, which the Commission was entitled to believe.

At pages 12-15 of the proposed decision, the Commission observed that petitioner failed to rebut the legitimate, non-discriminatory reason offered by the DOT for its selecting the other candidate. The Commission was applying appropriate law based on substantial evidence in the record, because petitioner had the ultimate burden at hearing of persuading the Commission that his gender and/or race were determining factors in the decision by the Department not to select him for the supervisory position. See, Puetz Motor Sales, Inc. v. LIRC, 126 Wis. 2d 168 Ct. App. 1985).

With regard to petitioner's civil service appeal: that DOT's decision to hire the female minority candidate was "illegal or an abuse of discretion" under §230.44(1)(d), the Commission reaffirmed their earlier findings of no illegal discrimination. The Commission correctly analyzed the law and concluded that the strict selection criteria designed to predict successful performance on the job required under the competitive examination process described under §§230.15 and .16, Stats., apply only up to the time that the "Cert List" of qualified candidates is developed. Thereafter, the appointing authority is required only to base its selection on more flexible criteria that are "reasonably related to the responsibilities of the position" in its quest to appoint the best candidate for the position. This interpretation of law is consistent with the Commission's earlier decisions. See, e.g., Romaker v. DHSS,

86-0015-PC (9/17/86); and Ebert v. DILHR, 81-64-PC (1983). This interpretation is both reasonable and entitled to great weight by this court. Petitioner's contrary opinions about what the evidence shows or the applicable principles of law do not diminish the adequacy under the law of the Commission's rulings herein. Since the Commission based its findings on substantial evidence in the record and applied correct principles of law, their decisions must be affirmed.

Objection based on lack of transcribed arguments of the parties. The judicial review to which petitioner is entitled is based upon the evidentiary record and the rulings made by the Commission. The court has had the benefit of petitioner's objections before the Commission in its proposed and final decisions and orders. Moreover, petitioner has taken full advantage of his opportunities to make extended arguments in his petition for review and in his main and reply briefs. The arguments of the parties before the hearing examiner are not evidence and are not the basis for any findings or conclusions of the Commission. Therefore, I find no consequence or prejudice to the fact that the arguments before the hearing examiner are not contained in the transcript filed by the Commission.

CONCLUSION AND ORDER AFFIRMING RULINGS BELOW

For the reasons stated above, and based on the record herein, I find no abuse of discretion or an erroneous application of law in the Commission's rulings regarding procedures and evidence; I find that the Commission's findings of fact are supported by substantial evidence, e.g., such evidence as a reasonable mind might accept as adequate to support the conclusions of the Commission; and I find that the Commission's rulings of law

are both reasonable and entitled to weight consistent with the expertise of the Commission in administering the anti-discrimination and civil service laws of this state. The rulings of the Commission challenged by petitioner herein are therefore affirmed in their entirety.

THE FOREGOING ORDER IS THE FINAL ORDER OR JUDGMENT FOR PURPOSES OF APPEAL. NO SUBSEQUENT DOCUMENT IS CONTEMPLATED BY THE COURT.

Dated: October 9, 1996.

BY THE COURT:

Angela B. Bartell
Circuit Judge

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