STATE OF WISCONSIN | PERSONNEL COMMISSION

JAMES SUTTON,
Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS, and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,
Respondents.

Case No. 96-0155-PC

DECISION AND ORDER

A hearing was commenced on the above-noted case on April 10, 1997. Respondents moved for dismissal after the appellant put in his case in chief and such motion is now before the Commission for resolution.

FINDINGS OF FACT

1. The text of appellant's letter of appeal is shown below in relevant part, with the same emphasis as appears in the original document.

> The intent of this letter is to appeal the results of the examination for Corrections Unit Supervisor taken on 08/24/96 by James R. Sutton. I received the results of the exam on Friday 10/25/96. I feel that these results are inaccurate and do not correctly reflect my experience, knowledge and qualifications for that position.
>
> The bases for this appeal are as follows: I have taken this exam the last four times it has been offered. I have scored high enough to rank among the top ten candidates the two previous time that I wrote the exam. The questions for the last two exams were the same. To the best of my knowledge, my answers for these two exams are very similar. I made some format changes and added information that I felt was relevant to the questions. Since I am not to be penalized for wrong answers but only scored by correct bench marks, I attempted to not remove anything from my previous answers, only add information. My score for the exam taken on 6/25/95 was 83.60 with a ranking of 9th. The score for the exam taken on 8/24/96 is 75.20 with a ranking of 26th. I find it very hard to believe that my score could have dropped 8.4 points for the same questions, with the same basic answers plus positive additions. I have enclosed a copy of my test results for your comparison. If my answers were exactly the same, and I received two different scores because different people scored them, is that fair?

> I am aware that at least two of the "EXPERTS" on the "Panel of Job Experts" that scored the exams had less than six months experience as a Unit Manager. How can someone be an expert with less than six months experience as a Unit Manager. They have not even completed their one year Probationary period. . . .
>
> Because of the questions I have raised, I feel that some of the members of the scoring panel may not be qualified to score the exam. I would like to have my last two exam answers compared for similarities. I request that someone who is qualified and has experience in scoring this exam re-score my answers. If this is not appropriate, I would like to have my score from 06/24/95 used and rank me accordingly. I would also like for a standard scoring panel to be set up to score these exams in the future. This may help keep more consistent scores.

2. The parties agreed to the following statement of the issue for hearing at a prehearing conference held on February 3, 1997, as noted in the conference report dated February 5, 1997:

> Whether the Corrections Unit Supervisor examination administered by respondents on August 24, 1996, violated §§230.16(4) or (5), Stats., or ER-MRS 6.05, Wis. Adm. Code.

3. On August 24, 1996, the Division of Merit Recruitment and Selection (DMRS) conducted an examination to establish a statewide register for future vacant positions classified as Corrections Unit Supervisor (CUS). Appellant participated in the examination and was ranked #26 based on the examination results. Appellant feels his ranking is too low on this examination to entitle him to interview for future vacancies.[1]

4. One vacant position has been filled from the register in question. This was an opening in the Department of Corrections (DOC), at Columbia Correctional Institution (CCI) where appellant is currently employed. Appellant's examination rank was not high enough to entitle him to interview for the position.

5. Six individuals graded the examinations, including James Parisi who is known to appellant as they both work at CCI. Mr. Parisi began working at CCI some time within the past 10 years as a Lieutenant, was promoted to Captain, and was further promoted, via competitive examination in June 1996, to a CUS position. The CUS position occupied by Mr. Parisi is the position which functioned as his supervisor

[1] Pursuant to §230.25(1), Stats., and as a general rule, the top 5 individuals by rank (or top 10% if the register of eligibles is more than 50) are entitled to interview for a vacant position.

when he served as Lieutenant and Captain. Mr. Parisi supervised correctional officers (security staff) when he served as Lieutenant and Captain. The CUS position involved supervisory responsibility over the correctional officers, as well as over the following positions: unit manager, unit psychologist, unit social worker and working supervisors.

6. Mr. Parisi had been in the CUS position for about 3 months before he participated in grading the exams. The length of Mr. Parisi's probationary period would have been 6 months[2] and, accordingly, he had not achieved permanent status in class (pursuant to §ER-MRS 13.09, Wis. Adm. Code[3]) prior to grading the examinations.

7. The person hired for the vacant CUS position at DOC for which the appellant could not interview (as noted in ¶4 above), would be a peer of Mr. Parisi's, being at the same institution and classification level.

8. Appellant believes Mr. Parisi would have graded the exams without intentional bias to any particular individual. However, appellant contends that Mr. Parisi would not have been sufficiently familiar with the duties of the position to recognize the importance of particular answers to examination questions. Appellant did not indicate which duties of the job Mr. Parisi was unfamiliar with at the time he graded exams. Nor did appellant provide any information as to which portion of the examination was graded by Mr. Parisi. Nor did appellant cite an actual deficiency which existed due to Mr. Parisi's actual grading of anyone's exam.

9. The appellant was informed that the statistical reliability of the 1996 examination was extremely high to an unusual degree. He recognized that a statistically high test reliability generally would be considered as adverse to the allegations raised in his appeal. However, he speculated that the high reliability was unusual because Mr. Parisi was insufficiently experienced to recognize important distinctions given in test answers. The appellant did not provide any example to support his speculation.

10. The appellant did not disclose the names of any witnesses or provide copies of any exhibits prior to the exchange deadline of 4:30 p.m., on April 7, 1997.

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[2] The appellant did not provide the exact duration of Mr. Parisi's probationary period but noted that the minimum duration would have been 6 months and the maximum 12 months. This ruling adopts the minimum duration based on appellant's failure to establish a longer duration.

[3] The copy of the code submitted by appellant reflects the outdated referencing prefix of "ER-Pers", which was changed to "ER-MRS", effective October 1994.

The deadline was noted in the conference report dated February 5, 1997,[4] again in the enclosure to the conference report, and again in the hearing examiner's letters to the parties dated February 28, 1997 and March 13, 1997. The only documents offered (late) by the appellant were copies of DMRS' administrative code chapters relating to probationary periods and promotions. (Exh. A-101)

11. The appellant conducted some discovery by letter dated March 13, 1997, which, as noted in the hearing examiner's letters of March 13, 1997 and April 7, 1997, was served too late to afford respondents with 30 days to respond. He conducted the discovery late even though the 30-day response time was specifically noted in the enclosure sent to appellant with the conference report dated February 5, 1997.[5]

12. The appellant attempted to use respondents' exhibit 103 while he testified, but respondents objected on the bases that appellant had not filed it as an exhibit and respondents did not plan to use it. The examiner sustained the objection.

13. After respondents moved for dismissal at hearing, the examiner provided appellant with an opportunity to present an offer of proof to explain the evidence he

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[4] The conference report contained the following information regarding the requirement to exchange exhibits and witness lists prior to hearing (emphasis appears in the original document):

> The parties are reminded that pursuant to §PC 4.02 and PC 6.02(2), Wis. Adm. Code, copies of exhibits and names of witnesses must be exchanged at least 3 working days before the day established for hearing, or will be subject to exclusion. **This means the information must be exchanged at or before 4:30 p.m. on Monday, April 7, 1997.** A timely exchange occurs if the Commission and opposing party each receive said information by the stated deadline.

[5] The enclosure included the following information regarding discovery, exchange requirements and order of proceeding at hearing:

> Discovery: Commission rules provide at §PC 4.03, Wis. Adm. Code, that parties have the right to conduct prehearing discovery in the same manner as is done in judicial proceedings under Ch. 804, Wis. Stats. This means, for example, that the respondent agency could take your deposition . . . or could send you questions (interrogatories) to be answered in writing. Discovery must be conducted well in advance of hearing to allow the opposing party a period of 30 days to reply.
>
> You also have the right to conduct discovery to, for example, obtain copies of positions descriptions . . . Parties, of course, are free to voluntarily exchange such information without filing formal discovery . . . requests.
>
> At the Hearing: . . . In most appeals before the Commission, the burden of proof is on the appellant (with the notable exceptions of discharges and other disciplinary actions against permanent unrepresented employes). Having the burden of proof means you will put on your witnesses before the agency puts on its witnesses. It is up to you to establish to a reasonable certainty, by a preponderance of the evidence, the facts necessary for your case. . . .

could have provided if he had been allowed to refer to respondents' exhibits. The exhibits which respondents timely exchanged are noted below.

Exhibit Number	Description
R-101	• Ch. 192-Examination Security of the Merit Employment Procedures Manual.
R-102	• Job Expert Certificates for Anne Felton, Michael Baenen, Kent Demers, James Parisi, Karl Brekke and Alieu Fofana.
R-103	• List of panel experts including name, title, location, and date of hire.
R-104	• 8/30/96 letter to Verhagen from Conley regarding raters for CUS examination.
R-105	• Resutls of appellant's 8/24/96 exam.
R-106	• CUS Register for 8/24/96 exam.

14. The only additional fact which appellant would have offered if he would have been allowed to refer to respondents' exhibits is that a second grader, Alieu Fofana, was similar to Mr. Parisi in that she had been in a CSU position only for 3 months before she participated in grading the examinations. Ms. Fofana previously had worked as a unit social worker at a DOC correctional institution.

CONCLUSIONS OF LAW

1. Appellant's burden of proof at hearing was to prove by a preponderance of the evidence that the examination administered by respondents on August 24, 1996, violated §§230.16(4) or (5), Stats., or §ER-MRS 6.05, Wis. Adm. Code.

2. The evidence presented by appellant was insufficient to shift the burden of persuasion to respondents.

OPINION

Respondents' motion to dismiss was raised at the close of appellant's case. The motion, in effect, requests the Commission to issue a judgment against the appellant on the grounds that he has failed to present sufficient evidence to shift the burden of persuasion to respondents. Wisconsin courts have provided the following statement of the analysis to be used in determining such motions:

> A motion challenging the sufficiency of the evidence as a matter of law should not be granted "unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." (Citations omitted.) When deciding a motion to dismiss at the close of the plaintiff's case, the trial court should consider "only the proof which [has] been offered by the plaintiff at the time it rested its case." *First Nat. Bank v. Sheriff of Milwaukee County*, 34 Wis. 2d 535, 541, 149 N.W.2d 548 (1967).

Beacon Bowl v. Wis. Elec. Power Co., 176 Wis. 2d 740, 788, 501 N.W.2d 788 (S. Ct. 6/9/93)

The Commission first considers the law applicable to the issue raised in this appeal in order to have a framework against which the sufficiency of appellant's evidence may be determined. The text of the controlling statutes and administrative rule related to civil service examinations are shown below:

> **230.16(4), Stats.**: All examinations, including minimum training and experience requirements, for positions in the classified service shall be job-related in compliance with appropriate validation standards and shall be subject to the approval of the administrator. All relevant experience, whether paid or unpaid, shall satisfy experience requirements.
>
> **230.16(5), Stats.**: 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.
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> **ER-MRS 6.05, Wis. Adm. Code**: Examinations. (1) The administrator shall establish criteria for evaluating applicant qualifications and shall require the same or equivalent examination for all applicants competing for eligibility on a register except [exception is inapplicable here].
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> (2) Examinations may include any technique or techniques which the administrator deems appropriate to evaluate applicants.
>
> (3) All examinations shall be:
>
> (a) Based on information from job analysis, position analysis or other equivalent information documenting actual job tasks to be performed or skills and knowledges required to perform job tasks, or both;
>
> (b) Developed in such a manner as to establish the relationship between skills and knowledges required for successful performance on

> the test and skills and knowledges required for successful performance on the job;
>
> (c) Supported by data documenting that the skills and knowledges required for successful performance on the test are related to skills and knowledges which differentiate among levels of job performance if the examination results are to be used as a basis for ranking candidates;
>
> (d) Sufficiently reliable to comply with appropriate standards for test validation; and
>
> (e) Objectively rated or scored.

The appellant does not dispute that the examination content was job-related, within the meaning of §230.16(4), Stats. (and as noted in §§ER-MRS 6.05(1), (2) (3)(a), (b) and (c), Wis. Admin. Code) as shown by his agreement with the results of the 1995 examination and his statement that the same examination was used in 1996. Nor does appellant dispute the standard established for proceeding to subsequent steps under §230.16(5), Stats.

Appellant first argued that the 1996 examination results were unreliable because one of the graders, Mr. Parisi, had been in a CUS position for only three months prior to the time he participated in grading the examination.[6] The appellant does not dispute that Mr. Parisi would have been qualified to grade the examinations if he had served in his CUS position for 6 months, thereby passing probation and attaining permanent status in class. Appellant cited no authority to support a proposition that a grader must have attained permanent status in class before being considered as qualified to grade an examination. Nor is the Commission aware of any authority to support such a proposition.

Appellant contends that a grader with less than 6 months in a CUS position would be unfamiliar with all aspects of the position and, accordingly, would be unable to evaluate answers to a CUS examination. Even if it were true that Mr. Parisi was familiar with only a portion of his CUS job responsibilities, the appellant failed to articulate what matters were unknown to Mr. Parisi and how such lack of knowledge could or did impact on his ability to objectively grade the examination. The stated suspicion without any supporting evidence is insufficient to shift the burden of persuasion to respondents.

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[6] The Commission also determined that the analysis would be the same here even if the hearing examiner's ruling barring appellant's use of respondents' exhibits was erroneous. Specifically, the Commission's conclusions here would be the same even if Ms. Fofana's background were as stated by the appellant at hearing.

Appellant argued that the 1996 test results were unreliable because he received a higher ranking on the same examination in 1995. An inference cannot be drawn from this fact to support his argument that the 1996 test was unreliable because the two tests involved different applicant pools and different graders, the reliability analysis on the 1996 test was statistically acceptable, and there was no evidence that the results of the 1996 examination were affected by any grader's intentional bias or other form of inconsistency.

Based on the foregoing, the Commission concludes that the evidence presented by appellant, as well as the reasonable inferences to be drawn from such evidence, was insufficient to shift the burden of persuasion to respondents.

ORDER

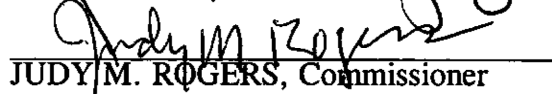
That respondents' motion is granted and this case is dismissed.

Dated: June 4, 1997.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner



JUDY M. ROGERS, Commissioner

JMR
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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