

STATE OF WISCONSIN

PERSONNEL COMMISSION

TIMOTHY LEE,
Appellant,

v.

**Secretary, DEPARTMENT OF NATURAL
RESOURCES,**
Respondent.

**FINAL DECISION
AND ORDER**

Case No. 97-0081-PC

NATURE OF CASE

This is an appeal pursuant to §230.44(1)(d), Stats., of respondent's decision not to hire appellant for a Forestry Technician 5 position.

FINDINGS OF FACT

1. Following an Achievement History Questionnaire examination, appellant Timothy Lee was notified by letter dated June 17, 1997, that he was listed as an eligible candidate for the Neillsville Forestry Technician 5 position.

2. Appellant Lee was invited to be interviewed for the position on July 3, 1997, at the Department of Natural Resources (DNR) Service Center in Black River Falls, Wisconsin.

3. On July 3, 1997, the appellant was one of four candidates interviewed at the DNR Service Center in Black River Falls.

4. The candidates were interviewed by a panel of four DNR employees: Chester Pryga, Clark (County) Land Sub Team Leader and supervisor of the subject position; Allison Beach, Black, Buffalo and Trempealeau Basin Supervisor; Don Streiff, Senior Forester and subject position team leader; and Norika Katzmark.

5. Each interview was scheduled for forty minutes, and the same set of questions was asked each candidate.

6. Also, the panelists graded the candidates' communication skills on a scale of 1-9—grades 4-6 indicated a good command of English language and grades 7-9 indicated excellent command of English language, good eye contact and effective non-verbal communication.¹

7. After all interviews were concluded, the panel discussed their rankings of the candidates. The appellant was ranked number one, but Beach, Pryga and Strieff expressed concerns with appellant's communication style and interpersonal skills.

8. Panelist Pryga was directed by Beach, his supervisor, to conduct a reference check of appellant. A good reference check report would have resulted in a recommendation by the panel to hire appellant.

9. The reference check consisted of contacting appellant's listed references, firms listed in his resume, and area DNR staff. A total of twelve people were contacted. The contacts were made in no particular order.

10. Several of the people contacted stated they did not know the appellant well enough to comment, two recommended Dan Kearney of Blue Ox Forestry and Mark Mittelstadt as persons who could give accurate evaluation and assessment.

11. There were four positive responses and four negative responses. The positive responses were: 1) The appellant had a good ability to get along with people, followed directions and was quiet; 2) Appellant had a positive attitude toward work, was very thorough and was quiet until you got to know him; 3) Appellant was a very reserved person, his work did not include public contact or awareness work; and 4) Appellant was a good student and communicator. The negative responses were: 1) Appellant did mediocre inventory and plot work, he was very quiet; 2) Appellant did not accomplish much and was not aggressive—"Tim didn't work out for us, maybe he will work out for you."; 3) Appellant left the impression that he did not like anyone, appellant under-estimated a timber appraisal by about \$50,000; and 4) Appellant had diffi-

¹ Panelist Norika Katzmark's notes (R #4) show no grade for appellant's communication skills. She was not a witness in the hearing.

culty dealing with clients and a marginal ability to get along with people. He had personality conflicts and was therefore fired.

12. After Pryga completed the reference check, he reported his findings to the interview panel. Beach and Pryga were concerned about the appellant's frequent job changes, and since the Tech 5 position required significant public contact, the panel decided not to recommend the appellant for the position and proceeded to the next ranked candidate.

13. Reference checks were made on Katherine Lentz, who was ranked second for the position. Lentz was contacted and she informed DNR that she had accepted another job.

14. After reference checks were conducted, the DNR West Central Regional Director, Scott Humrickhouse, as the appointing authority, offered the position to the candidate ranked third and recommended by the interview panel, Christopher Schmitz, and he accepted the position.

15. Prior to the job interview, none of the panelists knew any of the candidates with one exception. Panelist Streiff had met candidate Schmitz when Schmitz worked as an LTE Forester for Clark County. At the conclusion of the interviews, Strieff gave the appellant the highest ranking of the four candidates and Schmitz the third highest ranking.

CONCLUSIONS OF LAW

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

2. The appellant has the burden of proving respondent's decision not to hire him was illegal or an abuse of discretion.

3. The appellant has failed to sustain his burden.

4. Respondent's decision not to hire appellant as the Neillsville Forestry Technician 5 was neither illegal nor an abuse of discretion.

OPINION

The agreed issue for hearing was: [w]hether the decision by respondent not to select appellant for the subject Forestry Technician 5 position was illegal or an abuse of discretion.

In brief, an “illegal action” is an action forbidden by statute or administrative rule. In *Lundeen v. DOA*, 79-208-PC, 6/3/81, this Commission defined the term “abuse of discretion” as “a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.” Later, in *Harbort v. DILHR*, 81-74-PC, 4/2/82, the Commission provided further clarification of this term:

Thus the question before the Commission is not whether it agrees or disagrees with the appointing authority’s decision, in the sense of whether the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather, it is a question of whether, on the basis of the facts and evidence presented, the decision of the appointing authority may be said to have been “clearly against reason and evidence.”

Since appellant was rated by the interview panel as its number one candidate for the Forestry Technician 5 position, the issue, more narrowly defined, pertains to the subsequent actions of respondent, i.e.—the reference check and decision not to hire the appellant.² The testimony of Beach, Pryga and Streiff, the three panelists who were called as witnesses, was that each gave the appellant the highest rating because of his technical skills, but were concerned about his interpersonal skills and his ability to handle the integral public relations aspects of the position. The reference check failed to remove this uneasiness of the panelists.

The evidence presented fails to establish that respondent’s actions prompting its decision not to hire the appellant were illegal or an abuse of discretion.

² A post-hearing briefing schedule was set as agreed to by the parties, but the appellant failed to file a brief and respondent, after verifying this, declined to do so.

ORDER


The respondent's action is affirmed and this appeal is dismissed.

Dated: October 9, 1998.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rjb:970081Adec2


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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George E Meyer
Secretary, DNR
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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 appli-

cation 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