

STATE OF WISCONSIN

PERSONNEL COMMISSION

LEE JAMES STARCK,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**

Respondent.

**FINAL DECISION
AND ORDER**

Case No. 98-0056-PC

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(d), Stats., of respondent's failure to hire appellant for the classified civil service position of Financial Specialist 1 50% at Oshkosh Correctional Institution (OCI) in April 1998. This case is now before the Commission following the issuance of a proposed decision by the hearing examiner pursuant to §230.46(2), Stats. The Commission adopts the proposed decision with some minor editing that does not affect the substance of the decision.

FINDINGS OF FACT

1. Appellant was one of three certified candidates who were interviewed for a vacant Financial Specialist 1 50% position at OCI on April 13, 1998.

2. Appellant had ranked first on the civil service exam for this classification which preceded the certification of eligible candidates for the subject position. Pursuant to §230.25(2)(a), Stats.¹, this information was not provided to the appointing authority for this position, the OCI warden.

3. A three member interview panel was appointed by Carol Carpenter, the immediate supervisor of the subject position, and a Financial Specialist 3-Supervisor. The panel consisted of Ms. Carpenter, Jim Johnson, Superintendent of Buildings and

¹ "The administrator [division of merit recruitment and selection] shall not disclose any applicant's test score . . . to the appointing authority."

Grounds, and Brian Bantleon, Supervising Officer 1. The only panelist who had any familiarity with any of the candidates prior to the interviews was Ms. Carpenter, who had interviewed appellant in connection with some previous selection processes.

4. Ms. Carpenter prepared a set of written job related interview questions and benchmarks to be used by the interview panel.

5. The panel followed the same procedure for each candidate. Each question was read and the candidate then responded to it. Each panelist made notes of each candidate's response and subsequently assigned a score to each response on the basis of the criteria set forth in the benchmarks. After assigning scores in this manner, the members of the panel compared their scores. If there had been substantial variations on the candidates' scores for a question, the panelists would have discussed their scoring to ensure that no one had overlooked or misinterpreted anything. At some point, Mr. Johnson lowered appellant's scores on several questions, which had the effect of lowering appellant's total score from 106 to 101.

6. Each candidate had been requested to and did bring to the interview a copy of his or her resume. The panelists did not consult the resumes in scoring the interviews. The scores were based solely on the panelists' evaluation of the candidates' verbal responses to the questions.

7. The panelists did not collaborate or conspire either to give appellant a low score so he would not receive the appointment, or to favor one candidate over another.

8. There is nothing in the record reflecting whether the subject position was underutilized for women.

9. Appellant's resume includes the following training and experience:

- General Laborer, Western Staffing Services, 1995-1997
- General Laborer, Outlook Graphics Corporation, 1991-1995
- Clerical Assistant, Olsten Staffing Services, 1987-1990

(This position included "various clerical, accounting, courier, and general assignments.")

- University of Wisconsin-Milwaukee
 - (This position included “daily cash reporting for 50 plus service center operations into various management reports in a timely, accurate manner utilizing Lotus 123 and dBASE software programs. . . .”) (Respondent’s Exhibit #R-103)
 - MATC-Milwaukee 1979-1987 Associate Arts degrees in: transportation and distribution management, marketing, mid-management, finance, and real estate.
 - MATC-Madison 1966-1971 Associate Arts degrees in sales and marketing and accounting.²
10. JW’s resume included the following:
- Teller, Community First Credit Union, since March 1995.
 - Bookkeeper, administrative assistant, restaurant, March 1984-March 1987.
 - Station Manager, Northwest Airlink (Appleton office), April 1987-November 1994.
 - Central Washington State College Completed 56 credits in science and business.

² This exhibit was received in the record without objection and the Commission concludes, consistent with the record, that this is the resume appellant submitted to the panel. Appellant submitted a slightly different resume with his post-hearing brief, and this can not be considered as evidence in this case because it was never offered into evidence at the hearing. However, it is noted that some of the additional information on the resume submitted with appellant’s brief is also reflected in other parts of the record—e. g., the interview questions answer sheets.

11. The interview panel scored the candidates as follows:

| Panelist: | Carol Carpenter Financial Specialist 3- Supervisor | Brian Bantleon Supervising Officer 1 | Jim Johnson Superintendent of Buildings and Grounds | Total Score |
|------------|---|--|--|-------------|
| Applicant: | | | | |
| Appellant | 33 | 30 | 38 | 101 |
| JW | 52 | 51 | 50 | 153 |
| LG | 34 | 38 | 33 | 105 |

12. After the interviews and the panel's rankings, Ms. Loken checked the references the candidates had submitted. JW's references evaluated her very positively. Of appellant's references, two would only verify his dates of employment (March 1991-February 1995, and October 1995-December 1997, respectively). Complainant's third reference (this was his supervisor for his last employment at UWM) advised that appellant had been terminated from employment because of performance deficiencies which included these characterizations: "had shortcomings in his skills" and "wasn't able to complete tasks as assigned." (Respondent's exhibit # R119)

13. The panel's recommendation was to hire JW. The warden followed this recommendation and proceeded to hire JW.

14. Appellant was advised that he would not be hired in a letter dated April 30, 1998.

CONCLUSIONS OF LAW

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

2. Appellant has the burden of proof to establish that respondent's failure to hire him for the Financial Specialist 1-50% position was illegal or an abuse of discretion.

3. Appellant has not sustained his burden.

4. Respondent's failure to hire appellant for the subject position was not illegal or an abuse of discretion.

OPINION

This case is an appeal under §230.44(1)(d), Stats., which provides that “[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 may be appealed to the commission.” These two facets of the case—illegality and abuse of discretion—will be addressed separately, although the evidence overlaps to some extent.

ABUSE OF DISCRETION

In *Neldaughter v. DHFS*, 96-0054-PC, 2/14/97, the Commission summarized its interpretation of the term “abuse of discretion” as follows:

An “abuse of discretion” is “a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.” *Lundeen v. DOA*, 79-0208-PC, 6/3/81. As long as the exercise of discretion is not “clearly against reason and evidence,” the commission may not reverse an appointing authority's hiring decision merely because it disagrees with that decision in the sense that it would have made a different decision if it had substituted its judgment for that of the appointing authority. *Harbort v. DILHR*, 81-0074-PC, 4/2/82.

Respondent's stated rationale for its decision is not against reason and evidence. The immediate supervisor of the position developed a set of job related questions and benchmarks. The interview panel consisted of three employees, including Ms. Carpenter, the immediate supervisor. Except for Ms. Carpenter, they had no prior knowledge of the candidates. All candidates were asked exactly the same questions and evaluated solely on the basis of the benchmarks and the answers they provided. The successful candidate (JW) had a substantially better rating than either appellant or LG. The candidates were asked to provide job references, and Ms. Loker checked those references. JW's references were significantly better than appellant's. After this process, the war-

den appointed JW, the candidate the panel recommended, who had the highest interview panel evaluation and excellent references.

Appellant makes several arguments in support of his case. He contends that two of the panelists had no expertise in financial accounting matters and therefore lacked the expertise to have accurately evaluated the candidates. While it certainly would have been preferable to have had all the panelists with subject matter background, the record does not reflect that they were unable to understand the questions, the benchmarks, and the candidates' answers. The interview questions and benchmarks dealt with fairly broad concepts—e. g., describe your training and experience with the reconciliation of bank statements—rather than more technical accounting issues. Also, the candidates' scores from the Financial Specialist 3-Supervisor panelist were relatively consistent with the other two panelists. Appellant suggests that there is something suspicious about this fact: “When Mr. Johnson’s and Mr. Bantleon’s scorings fall in line with Ms. Carpenter’s professional understanding of accounting and business, you develop a credibility problem on the part of the interview process.” (Appellant’s post-hearing brief, p. 2) This argument apparently is related to appellant’s theory that the panelists colluded to lower his ratings and ranking:

Because a proper check and balance monitoring system is lacking within OSCI’s interviewing process, it lends itself to a host of *conspiratorial* [emphasis in original] possibilities. Conferencing between the panel members lends itself to score changing (point shaving). Point shaving in this case changed my score—and my score only—from 107 to 101 per Mr. Johnson. This placed me below [LG’s] runner up position score of 105. *Id.*

The correlation between the panelist’s scores could be indicative of a number of things. One is that the panelists shared the same basic understanding of the questions and the benchmarks and thus evaluated the candidates in a similar manner. Another is that for some reason the panelists colluded to give appellant the lowest score in order to prevent him from getting the job. As noted in the conclusions of law above, appellant has the burden of proof in this case, and he must establish by a preponderance of the evidence the facts needed for his claim. *See, e. g., Lawry v. DP, 79-0026-PC, 7/31/79*

("[W]ith the exception of appeals of disciplinary matters, the burden of proof as to all issues . . . is on the party seeking relief." (citation omitted)). Thus in order to prevail on this point, appellant has to establish more than that the panelists had the opportunity to have conspired against him and conceivably could have done so. He has to show by a preponderance of the evidence that this actually happened. There is little or no evidence in this case that supports appellant's theories of collusion and conspiracy. It does not follow from the fact that Mr. Johnson lowered some of his initial scores that there was, as appellant alleges, some kind of insidious "point shaving" occurring. The record (Respondent's Exhibit #R-127) establishes that appellant was the first person interviewed. This fact is consistent with a benign explanation for the changes—for example, that Mr. Johnson changed his mind about the initial scores after having been exposed to the views of the other panelists or the presentations of later candidates. In the absence of any persuasive evidence to the contrary, there is no reason to conclude that he acted improperly when he changed the scores.

Appellant also contends that he was substantially more qualified than the other candidates. In evaluating this claim it must be kept in mind that the question before the Commission is not whether the panelists' scores were correct in some absolute sense, or whether the Commission would have rated appellant higher than JW if it had been doing the scoring. Rather, the question is whether appellant has demonstrated that the ratings assigned by the panelists were without any rational basis. In the Commission's opinion, while appellant raised some questions about the ratings, he did not show an abuse of discretion in this matter.

For example, Question 1A was "describe your training and experience in . . . auditing and processing cash receipts." Appellant summarized his response as recorded by the interviewers as follows:

Relevant experience—night auditor-Pioneer/Holiday Inn room/restaurants; UW-Milwaukee-Fiscal Clerk 3—daily cash reporting for service centers, reconcile cash deposits and tapes, 1% discrepancies, resolve problems for about 50 service centers and special events, do management reports. Relevant training—7 A. A. degrees (accounting, finance, sales and marketing, distribution management, computer

courses, hospital accounting certificate). (Appellant's post-hearing brief, p. 2)

The panel gave appellant a total rating of 13 (ratings by the panelists of 4, 4, and 5 on a scale of 1-9). He contends he should have received a rating of 24 (3X8). They rated JW on this question at 21 (6, 7, and 8). It was noted on the interview question forms that she had been employed as a credit union teller in a one person branch at the Veterans Home at King. The benchmark for a score in the 7-9 range is: "Audited and processed cash receipts in a large office or has supervised the auditing and processing of cash receipts. Gives specific examples of steps taken." The candidates' scores on this question depended on how their responses at the interview related to the benchmarks. JW had more recent experience in this area than complainant. Complainant's experience as a Fiscal Clerk 3 ended in 1987. JW had worked as a Credit Union teller for three years as of the date of the interview. The Commission is not in a position to find that the panel had no rational basis for its scores on this question. This conclusion is reinforced by the fact that the panel based its score on each candidate's verbal responses to the question. Unfortunately, as noted by one of the panelists, appellant displayed a lack of focus and a tendency to ramble in response to questions. This certainly did not help his panel rating, either on this or the other questions. Another aspect of this question that also is relevant to the other questions is that the benchmarks for the most part pertain to experience and do not specifically encompass training (except to the extent training or education is implicit in a particular experiential criterion). While appellant would have put more emphasis on education, Ms. Carpenter's orientation of the criteria this way has not been shown to have been non-job related or otherwise arbitrary.

Question 1.B. involved auditing and processing invoices for payment. Appellant had no experience doing this, but cited his training and educational background. He received a score of 4 (1, 1, and 2), and asserts he should have received a score of 21 (7X3). JW gave several examples of how her work involved this activity, not only at the credit union, but also as the Northwest Airlink station manager. She received a

score of 19 (6, 6, and 7). Her answer was clearly more closely related to the benchmarks. Again, it cannot be concluded that this scoring was without a rational basis.

Question 1.C. involved reconciliation of bank statements. Complainant cited his experience doing this at a small country hospital and his work as a tax practitioner resolving bank statements for clients. He received a score of 12 (4X3), while he contends he should have been rated at 15 (5X3). JW's evaluation included her work at the credit union helping the home members at King reconcile their statements, as well as her experience as a restaurant bookkeeper. Her score was 13 (5, 5, and 3). This scoring has not been shown to have been arbitrary.

Question 1. D. involved meeting deadlines on a daily basis. Complainant referred to his work doing night audits at hotels and daily cash reporting at UWM with a 24-48 hour turnaround time and his educational credentials. He received a score of 14 (5, 5, and 4). Appellant asserts he should have received a score of 24 (8X3). JW's scoring referred to her working alone at the credit union where she had independent responsibility to get things done in a timely fashion, and the deadlines involved at her Northwest Airlink job. Her score was 17 (6, 6, and 5). Again, on this record it cannot be concluded that the panel's scoring lacked a rational basis.

Question 2 dealt with problem solving and effective communication skills. The candidates were asked to describe their experience communicating with different disciplines in a work environment. Appellant talked about working with different departments in the hotel setting, working with different departments at UWM, and the Milwaukee County circuit courts. He received a score of 15 (5, 4, and 6). He rates himself at 21 (7X3). JW mentioned working with a diverse clientele at the credit union, including some with disabilities, and the various staff with whom she worked at Northwest Airlink. She received a score of 21 (7X3). Particularly in light of appellant's tendency to lack focus in responding to questions and in the context of a question that stresses communication skills, the Commission is not prepared to conclude that the panel lacked a rational basis for their determination on this question.

Question 3 concerned data entry experience and/or training with CRT's and computers. Appellant mentioned "[t]wo years of experience at UWM using Lotus 123 and dBase3+, data entry, developed and improved/modified programming with the MIS to make it user friendly," his training with various applications, and his use of a home PC. He received a score of 15 (6, 4, and 5), while he asserts he should have received 18(6X3). JW had a score of 19 (6, 6, and 7). She mentioned home computing and working with the systems at the airline and at the credit union, including involvement in the state system in the latter position. Both applicants' scores were in the mid-range benchmark bracket (4-6), except JW had one score (7) in the next higher bracket. The benchmarks for this bracket involve experience with specific applications ("FMS or WISMART, WITS and database programs") which are not further identified or explained on this record. Since JW's stated experience is not inconsistent with some experience with these applications, and appellant did not provide specific examples of work with these applications, there is an insufficient basis for an inference that the panel scores did not have a rational basis.

Question 4 addressed the need to act as a back-up to other positions in the business office which requires a variety of knowledge and the ability to step in at a moment's notice, sometimes at the expense of the employe's normal deadlines. The applicants were asked to describe their own experience with handling a variety of job duties and explain how they would handle the extra duties in such situations. Appellant answered that as a night auditor in a hotel he had been called on to fill in as a housekeeper and in a security role, and that at UWM he was interrupted to do other tasks. He explained how he managed his work under these circumstances. He received a score of 14 (4, 4, and 6). He asserts he should have had 18 (6X3). JW explained how she dealt with a variety of different priorities at the credit union and at Northwest airlink. She received a score of 21 (7X3). The benchmark for this question for a score in the upper bracket (7-9) was "Gives specific examples of handling a variety of job duties. Answer shows good organizational skills. Learns quickly and likes challenge. Schedules work

to avoid waiting until last day to complete.” Once again, the record is not inconsistent with the panel having made at least a rational decision in scoring this question.

The final element in the interview process was a communication skills rating based on a composite of all the applicants’ responses. Appellant scored 14 (5, 5, and 4), while he asserts he should have gotten 18 (6X3). JW’s score was 22 (8, 7, and 7). As has already been discussed, appellant’s verbal communications unfortunately tended to be diffuse and hard to understand. Even taking into account appellant’s apparent unfamiliarity with the hearing process, the Commission concludes from this and other evidence of record that the panel had a rational basis for their conclusion regarding his communication skills.

ILLEGAL ACTION

With regard to illegality, while appellant in effect contends he was discriminated against on the basis of race (white) and sex (male), there was no WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Stats.) issue noticed for hearing in this case,³ and the Commission, accordingly, can not decide it. Even if these issues were properly before the Commission, appellant could not prevail.

There is absolutely no evidence of race discrimination. Unless the successful candidate is a member of a different race than appellant, appellant would not have established even a prima facie case of race discrimination.⁴ The record does not reveal the race of the successful candidate. There is no other evidence which creates an inference of race discrimination. There is no indication that respondent is underutilized for minorities for this job classification, so there is no reason to infer that respondent preferred not to hire a white applicant like appellant because of affirmative action considerations. Appellant contends he is better qualified than the successful candidate. Even

³ The prehearing conference report dated July 10, 1998, reflects that “appellant clarified that he was not raising a claim of Fair Employment Act discrimination in the instant appeal.”

⁴ See, e. g., *Puetz Motor Sales v. LIRC*, 126 Wis. 2d 168, 172, 376 N. W. 2d 372 (Ct. App. 1985).

if this were true, there would be no reason under the circumstances of this case to infer appellant was not hired because of his race.

With respect to sex discrimination, appellant has established a prima facie case because the successful candidate is female. Respondent has articulated a legitimate, nondiscriminatory rationale for its decision based on its evaluation of the applicants' qualifications. At this point, appellant must establish that this rationale was a pretext for sex discrimination.⁵ Appellant contends that he was better qualified than JW. The interviewers based their rating of the candidates on their responses at the oral interviews. As discussed above, appellant did not establish that respondent abused its discretion in deciding whom to hire for the subject position. For similar reasons, the Commission also concludes appellant did not establish that respondent's articulated rationale for its decision was a pretext for sex discrimination.

ORDER


Respondent's action of hiring JW rather than appellant for the subject position is affirmed and this appeal is dismissed.

Dated: April 21, 1999.

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STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

⁵ *Id.*

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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