

STATE OF WISCONSIN

PERSONNEL COMMISSION

**ROBERT POOLE,**  
*Appellant,*

v.

**President, UNIVERSITY OF WISCONSIN  
SYSTEM (River Falls),**  
*Respondent.*

RULING ON MOTION  
TO DISMISS

Case No. 99-0026-PC

This case is before the Commission on respondent's motion to dismiss. Both parties have filed written arguments.

In his letter of appeal, appellant alleges, among other things, that he is a Custodian II, that he took a statewide Custodian III examination and ranked fifth, and was certified and interviewed at UW-Stevens Point (UWSP). There were two positions open at UWSP, one in Housing and one in Residential Services. He alleges that his supervisor told him that respondent wanted a woman in the Residential Services position. He also alleges that his exam score was the highest in the area in question, and that he had management experience, while the people who were hired not only had limited management experience, but also that the UWSP personnel department admitted that those candidates' scores were not high enough to have granted them interviews. He also states that he "was under the impression" that respondent should have interviewed ten people for each position, but only interviewed five.

Respondent's motion to dismiss asserts that at the prehearing conference held in this matter, appellant stated that he was not claiming he was not hired because of his gender, and also that he stated he was not claiming that he "deserved" an appointment. Respondent argues that appellant has the burden of proving that respondent's actions were either illegal or an abuse of discretion,<sup>1</sup> and that appellant is "by his own

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<sup>1</sup> This case is an appeal pursuant to §230.44(1)(d), Stats., which provides:

**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

admission not claiming that [respondent's] actions in this case were illegal," and "has offered no evidence to show that the University abused its discretion." In its earlier answer to the appeal, respondent denied that anyone made the statements appellant attributed to that office in his appeal. Respondent also had alleged that the person (Tammy Britt) hired for the position in which appellant had expressed an interest was better qualified than appellant on the basis of her experience.

In his reply to respondent's motion to dismiss, appellant confirms that he is not claiming sex discrimination in this case, but is claiming that respondent did not follow its own hiring guidelines as set forth in the employe handbook. He alleges that both jobs were filled by candidates who did not meet the requirement set forth in the employe handbook of having been in either the top ten percent or the top five of the candidates who took the exam. He asserts that at the prehearing conference he had stated that he did not know if he were the best qualified person because the respondent had pre-selected candidates for appointment.

Respondent's motion is essentially a motion to dismiss for failure to state a claim. In deciding such a motion, " the Commission must accept as true the allegations of the appeal, and all reasonable inferences that can be drawn from the allegations. An appeal cannot be dismissed 'unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations.' " *Phillips v. DHSS & DETF*, 87-0128-PC-ER (3/15/89) (quoting *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis. 2d 723, 731-32, 275 N. W. 2d 660 (1979)); *affirmed*, *Phillips v. Wis. Personnel Comm.*, 167 Wis. 2d 205, 482 N. W. 2d 121 (Ct. App. 1992)." *Sundling v. UW*, 93-0049-PC (11/23/93). Looking at the parties' allegations, there are a number of material facts in dispute, including, perhaps most significantly, whether appellant was more qualified than Ms. Britt. Also, appellant asserts that respondent failed to follow its own guidelines. This can be a factor in the decision whether there was an abuse of discretion. *See Thornton v. DNR*, 88-0089-PC

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alleged to be illegal or an abuse of discretion may be appealed to the commission.

(12/15/89). On the basis of this record, this case can not be dismissed for failure to state a claim.

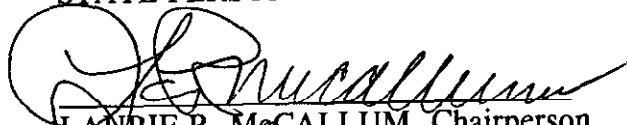
ORDER

Respondent's motion to dismiss is denied.

Dated: November 3, 1999.

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STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner