

TIMOTHY O. MATAKAS,
Appellant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**
Respondent.

DECISION
AND
ORDER

Case No. 99-0088-PC

This matter is before the Commission as an appeal from a selection decision. The parties agreed to the following statement of issue for hearing:

Whether the respondent committed an illegal act or an abuse of discretion in not appointing the appellant to the position of Supervising Officer 2 at Taycheedah Correctional Institution [in September of 1999].

After the hearing was completed, the parties filed post-hearing briefs.

FINDINGS OF FACT

1. At all times relevant to this matter, Kristine Krenke has served as the warden of Taycheedah Correctional Institution (TCI), Mary Jo Nelson has been the Human Resources Director of that institution, and James Zanon has served as the Security Director.
2. TCI houses female inmates. Sexual harassment prevention is a high priority at TCI.
3. Appellant was hired to fill a vacant Supervising Officer 2 (captain) position at TCI in August of 1996. He was one of 11 candidates considered for that vacancy and was ranked third by the interview panel. The top-ranked candidate was rejected by the appointing authority due to a poor reference from a supervisor. The second-ranked candidate was rejected because his probation as a Supervising Officer 1 (lieutenant) had been terminated approximately one year earlier.

4. Appellant was required to serve a probationary period when he was hired into the captain position at TCI in 1996.

5. Appellant's probationary employment at TCI was terminated on October 3, 1997, for failing to properly respond to sexual harassment allegations as well as for other misconduct. (See Finding of Fact 14a.) Respondent also terminated the employment of the perpetrator of the harassment and the immediate victim left state service right away. The sexual harassment incident had polarized the staff at TCI. It had created animosity and dysfunction within the facility. A significant number of the affected staff continued to be employed at TCI through August of 1999.

6. Immediately subsequent to the termination of his probationary employment as a captain, appellant worked as a sergeant at Kettle Moraine Correctional Institution (KMCI). In August of 1998, appellant successfully competed for a Supervising Officer 1 position at Columbia Correctional Institution (CCI). Warden Krenke gave appellant a positive reference for that position, indicating the appellant had great potential and that the incident at TCI in 1997 should not ruin his whole career.

7. TCI conducted interviews for a vacant Supervising Officer 2 position on August 13 and 26, 1999.

8. Appellant was one of 14 candidates who were interviewed for the vacancy.

9. There were three members of the interview panel, including Mr. Zanon. Each panelist scored every interview. Mr. Zanon added the scores of the three interviewers together to get a final score and then ranked the candidates based on their final score. Mr. Zanon erroneously added candidate RR's points (34+38+36) to total 138 rather than 108 points. As a consequence, RR was incorrectly ranked #2 rather than #5. RR was ultimately hired to fill the vacancy. The scores of all of the other candidates were correctly tallied. The correct scores for the candidates are as follows:

- | | | |
|----|------------|-----------|
| 1. | 145 points | appellant |
| 2. | 126 | RM |
| 3. | 125 | KL |
| 4. | 113 | MF |

5.	108	RR (successful candidate)
6.	107	TZ
7.	103	RB
8.	102	DF
9.	101	DR
10.	76	TB
11.	74	MM
12.	67	DZ
13.	64	MW
14.	61	RS

10. Warden Krenke reviewed the top 5 candidates with Mr. Zanon and concluded that references should be checked for the appellant and candidate RR. At least one of the other top 5 candidates was eliminated because the candidate's experience was as a fiscal clerk and TCI would have had to send that candidate through additional training. At least one other candidate was eliminated because s/he had been terminated as a supervisor in another institution.

11. There is no established policy at TCI about contacting references for candidates and a variety of persons within TCI may actually make reference contacts.

12. Staff at TCI obtained additional information regarding appellant and candidate RR. However, respondent did not check any of the references listed in appellant's materials. Respondent sought to contact the Security Director at CCI for information regarding appellant's employment there.

13. Respondent did contact at least some of RR's listed references. RR's list included his supervisors. RR's references were all very positive.

14. TCI staff did not seek to obtain copies of RR's written performance evaluations. However, Ms. Nelson obtained a copy of appellant's most recent performance evaluations (App. Exh. 14, 15 and 16) from CCI and a copy of appellant's Performance Planning and Development (PPD) evaluation for the period he had worked at TCI (App. Exh. 13).

a. The evaluation from TCI included the following language:

Captain Matakas has demonstrated an ability, in most situations, to take charge and to make reasonable decisions. He is energetic and usually

follows through on assignments. Although he did provide some creditable service to TCI, he failed to adhere to Executive Directive #7 which states in part, "Any allegation of harassment or hazing that comes to a Supervisors' attention must be investigated. All proven incidents will be met with counseling or appropriate discipline." Captain Matakas failed on two separate occasions to report a subordinate staff member's allegations of harassment by another Supervisor to his Supervisor or any member of the Administrative team.

The first complaint was received in May. The second complaint in August included that the Supervisor had "grabbed" the subordinate. Captain Matakas told the Officer she should report the incident to "proper authorities". Captain Matakas did not investigate, nor did he report the allegations.

Captain Matakas demonstrated flawed judgment that affected his credibility as a Supervisor in separate incidents of providing carry-out food to vigil staff and taking individual female Officers on tours of vacant areas on third shift. . . .

The incidents previously described have impacted Captain Matakas' credibility as a Supervisor negatively.

b. The results on appellant's 3-month promotional evaluation from CCI were "meets standards" except for expectation D3:

Expectation: "Exhibit and promote a positive and professional demeanor at all times. Address concerns, along with any recommendations, in an appropriate and timely manner to the Shift Commander, Administrative Captain, or Security Director."

Result: "Needs improvement. While Lt. Matakas displays a professional demeanor toward subordinate staff, he openly displays displeasure and a negative attitude in the presence of other supervisors when decisions are other than his preference or opinion."

c. The results on appellant's 6-month promotional evaluation from CCI were "meets standards" as to all expectations. The evaluation included the following result for expectation D3: "Has improved in this area. Issues are addressed in the appropriate manner and forum."

d. The results on appellant's 9-month promotional evaluation from CCI were "meets standards" except for expectations D6 and E9:

Expectation: "Maintain confidentiality with issues that require such or as directed."

Result: "Needs improvement. Recent issues have been identified where information or supervisory discussions have been improperly shared."

Expectation: "Other."

Result: "Recent concerns have been identified in relationship to this employee leaving on a regular basis before the end of his scheduled shift. This will be monitored."

15. Ms. Nelson compiled the additional information regarding appellant and RR and provided the information to Warden Krenke.

16. TCI's practice was to not hire top-ranked candidates for supervisory positions if the candidate had previously been terminated while employed as a supervising officer, or had poor references from a supervisor.

17. Warden Krenke decided not to hire the appellant for the vacant SO2 position and to hire RR. The decision not to hire the appellant would have been the same irrespective of the qualifications of the other candidates for the vacancy.

18. Warden Krenke's decision was approved by respondent's Affirmative Action officer, by the Division of Adult Institutions, and by the Office of the Secretary.

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 Supervising Officer 2 position at Taycheedah Correctional Institution in September of 1999, 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 being processed as 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.”

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.

Appellant contends respondent acted improperly in not contacting appellant's listed references while contacting the references listed by the successful candidate, RR, and by obtaining performance evaluations for appellant but not for RR. There was no specific policy or practice of TCI in these areas. Appellant has not pointed to any requirement for an agency to conduct all of its references in the same way or that would prevent respondent from seeking additional information regarding a candidate in these circumstances. It was certainly reasonable for respondent to want to obtain information relating to the perceptions of appellant's superiors at CCI regarding his work performance there. Respondent sought to contact the security director at CCI and did obtain copies of appellant's recent performance evaluations. Respondent had obtained comparable information by speaking with the individuals serving as RR's supervisors. Respondent also chose to access appellant's final performance evaluation from his previous employment as a SO2 at TCI. RR had not been employed as a SO2 before, so

there was no comparable document available for him. Again, respondent took a very reasonable approach by accessing readily available information that shed light on appellant's candidacy for the vacant SO2 position. TCI management was not required to put on blinders with respect to appellant's past employment at TCI or CCI.

The information in the various performance evaluations showed the appellant continued to have significant problems at CCI while serving in a Supervising Officer 1 position. Testimony also established that the larger conduct resulting in the termination of appellant's probation from the SO2 position at TCI in 1997 was still divisive for staff at TCI. Management at TCI had a strong and reasonable interest in not fanning those flames of discontent.

It is undisputed that respondent incorrectly tallied the score for candidate RR. The result of that error was to rank RR as the candidate with the second highest number of interview points rather than the fifth highest. However, the relative scoring of the top 5 candidates was not the final decision here and the conclusion that RR should have been ranked #5 by the panel instead of #2 does not mean that respondent abused its discretion when it decided not to select the appellant for the vacancy.

Given the testimony of Warden Krenke to the effect that TCI was simply not going to hire appellant for a SO2 position given appellant's previous history at TCI, appellant has failed to show that absent the inaccurate ranking of RR, appellant would have been hired for the vacancy.

Warden Krenke's concerns about appellant's performance, the polarizing effect of the 1997 conduct on TCI staff and the greater level of independence at TCI compared to that experienced by appellant while employed as a SO1 at CCI, all supported her conclusion not to rehire appellant as a SO2 at TCI. Warden Krenke offered the following observations regarding the information found in the appellant's performance evaluations from both CCI and TCI:

I considered an overall perception of a continuation of a behavior that was intolerable and an attitude and a level of judgment that was intolerable at Taycheedah. And I continued to see a continuation of that kind

of lack of judgment and lack of professionalism that I would expect, and virtually demand, from a Supervising Officer 2.

Q So, basically one area on the PPD is what was causing you concern?

A No sir. It's much bigger than that. It's the issue of judgment. It's the issue of being able to make decisions. It's the issue of being able to do the right thing. It's the issue of appropriate relationships with staff. And underneath all that is the issue of trust.

Another element that is important in this matter is that respondent clearly had a history or policy of looking beyond raw interview scores and considering such things as the supervisor's opinion and whether there were any prior failures to obtain permanent status as a supervisor. These considerations were crucial in the decision by TCI to hire the appellant into a vacant SO2 position in 1996. Three years later, after complainant's probation as a SO2 had been terminated for unsatisfactory performance, TCI applied the same, very reasonable, considerations when deciding not to rehire him into a second SO2 position.

Respondent's decision not to select the appellant in 1999 was not clearly against reason or evidence.

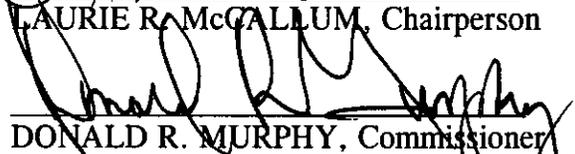
ORDER

Respondent's decision is affirmed and this matter is dismissed.

Dated: April 19, 2000 STATE PERSONNEL COMMISSION

KMS:990088Adec1


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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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