

STATE OF WISCONSIN

PERSONNEL COMMISSION

**ELIZABETH MILLER,**  
*Appellant,*

v.

**Superintendent, DEPARTMENT OF  
PUBLIC INSTRUCTION,**  
*Respondent.*

FINAL DECISION AND  
ORDER

Case No. 00-0011-PC

#### NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(d), Stats., of a hiring decision. The issue is: "Whether respondent's decision not to select appellant for the position of IS [Information System] Program Area Liaison-Professional Senior was illegal or an abuse of discretion." Conference report dated March 20, 2000.

#### FINDINGS OF FACT

1. This case involves an appointment process for a position in the classified civil service denominated as IS Program Area Liaison-Professional.
2. The announcement for this vacancy (Respondent's Exhibit R113) describes the duties of this position as follows:

Coordinate the activities of the Center for Education Statistics (CES), provide training and technical assistance to 426 School Districts on 5 major data collections. This position monitors all data definitions to ensure uniformity and compliance to standards. Responsibilities include coordination with the agency Data, Forms and Records coordinator and other agency staff to respond to technical inquiries on Educational Statistics and interpretation using GUI front end tools on a complex Oracle database as well as develop SQL programs to generate the requested information. Initiates and leads cross agency work groups to change data collections, data definitions and processes to meet statutory requirements or federal data needs, direct and lead other staff.

3. This announcement also includes the following needed knowledges and skills:

Knowledge of structure of Oracle tables, operation of Meta data tools such as a data dictionary, GUI tools not limited to InfoMaker, Knowledge: relational data base systems such as Oracle, PC's spreadsheet, email, data base software, Windows and DOS structure and batch files. Understanding of statutory requirements and changes which affect data collection, data definitions, Well-developed skills in organization and management particularly the ability to re-engineer processes and work with others to accomplish complex projects a plus. Leadership skills in working in a collaborative team environment with strong interpersonal communications skills, effective oral and written communication skills. *Id.*

4. Appellant previously had been employed at DPI in a position entitled Coordinator of the Center for Education Statistics, and classified in the Research Analyst series from 1990 to 1995, when she was laid off,. This position's duties and responsibilities and required knowledges, skills, and abilities were somewhat similar to those aspects of the position in question. However, the position in question required more advanced technical information technology skills including software development. Appellant had experience working with software developers, but it was as a user, primarily in the role of advising the developers what needed to be accomplished. The person who ultimately was hired in this position has actually developed and written programs from beginning to the end.

5. Appellant applied and was certified for this position along with four other candidates. The candidates were interviewed and evaluated by a three member panel consisting of James Leaver, Kay Ihlenfeldt, and Chris Selk. Mr. Leaver has worked very closely with the position in question. He has been in a position which has the same classification and has very similar duties and responsibilities. Ms. Ihlenfeldt has been in a position that involved the use of the data generated by the position in question, including some of the data which had been generated under appellant's direction. Chris Selk has been the direct supervisor of the position in question and is very familiar with its duties and responsibilities.

6. These panel members used a series of job-related questions and benchmarks that had been developed to evaluate the candidates. Each candidate was asked the same questions and otherwise treated the same.

7 The panel's assessment and recommendation of the candidates is set forth in a January 12, 2000, memo from Ms. Selk and Ms. Ihlenfeldt to Kathy Knudson. (Respondent's Exhibit R 101). This memo was written by Ms. Selk. It includes the following:

Key areas addressed in the interview included:

- Technical ability
- Project leadership experience
- Communication skills
- Experience with data collection, editing and reporting (R 101, p. 1)

8. The panel's evaluation of appellant was as follows:

**Technical ability:** Liz Miller said she had no software development experience. She was trained on Infomaker prior to 1995 and could run standard reports in Infomaker at that time. She does not have experience designing or developing tables with Oracle. She defined data and elements and worked with programmers who did the Oracle development. She does have advanced experience with SAS and Excel.

**Project Leadership experience:** Five years ago here at DPI, she participated on a team that worked on two major projects, one to move software from the mainframe to the client/server and one to develop the School Performance Report. She did not lead these projects but met and worked on the projects with a team. She worked with technical staff and users.

**Communication skills:** She did support school districts 5 years ago. She supported software and developed documentation and trained users. She currently writes research papers on diabetes, tobacco and cardiovascular disease.

**Experience with data collection, editing and reporting.** She has experience collecting data from the school districts when working here at DPI.<sup>1</sup> She discussed the editing of the data and producing reports of the data. She said that she would never assume that a data base is correct. She mentioned in discussing the editing of district data that Milwaukee

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<sup>1</sup> As noted above, appellant had been employed in a somewhat similar position from 1990-1995.

Public Schools could not report data required in the collection and that she developed “conventions” for creating/inventing data and applying it to the data base as actual data. After she had left the department, we reviewed this data and became aware of her convention to create/invent data where it didn’t exist and have discovered that the “invented” data is very inaccurate. We will not produce statistics based on these historical files with invented data because it is meaningless data. *Id.* p. 3.

9. During her interview with the panel, appellant brought up her past experience of interpolating or estimating data that local school districts (most frequently, Milwaukee Public Schools (MPS)) failed to provide. However, the panelists did not raise during the interview the issue of their concerns about this practice as summarized in the last paragraph of the evaluation in the preceding finding.

10. The foregoing evaluation represents the opinion of all three panelists. It was based on job-related criteria which the panelists were competent to evaluate, either from first-hand experience working with the data appellant had generated, or from interaction with employees who had. There was a reasonable basis for this evaluation and ranking of appellant.

11. Testimony during the hearing revealed a basis for a difference of opinion within DPI about the efficacy or utility of appellant’s handling of missing data and the way she interpolated or estimated that data in reports generated at her direction. Based on this record, there was a reasonable basis for both the positive and negative (reflected in the last paragraph of Finding #8) opinions of appellant’s practices.

12. The panel rated appellant either fifth or tied for fourth of the five candidates. The panel recommended the appointment of the candidate ranked first. That candidate was offered the position but declined, resulting in the hiring of the candidate ranked second.

#### 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 by a preponderance of the evidence that respondent's hiring decision for the IS Program Area Liaison-Professional Senior position was illegal or an abuse of discretion.

3. Appellant has not satisfied her burden.

4. Respondent's decision to hire someone other than appellant for the IS Program Area Liaison-Professional Senior position was neither illegal nor an abuse of discretion.

### OPINION

Appellant does not contend that respondent's hiring decision was illegal, so this case comes down to the question of whether it was an abuse of discretion. 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*, 79-208-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.

In this case, respondent followed a facially reasonable selection process. It developed a set of job-related criteria and benchmarks to evaluate candidates, and it asked all the candidates the same questions. The candidates were evaluated by a panel that was familiar with the requirements of the position and had the capacity to make a valid evaluation of the candidates. For example, panelist James Leaver was in a very similar position in the same classification as the position in question. Panelist Chris Selk was the direct supervisor of the position in question and was very familiar with what is involved in this position.

Appellant advances five bases in support of her case regarding abuse of discretion, which the Commission will address in the same order as has appellant.

1. The position as announced included most of the same duties previously performed by the appellant at the time she was laid off. The Department of Public Instruction was aware of this or should have been aware of this.

Appellant presented evidence that there were some similarities in the position that she held until 1995, and the position as it existed at the time of this selection process. However, there was a great deal of evidence that the position had evolved to become more technically oriented. Ms. Selk testified at length about how the position had evolved to its current classification and its emphasis on computer programming. She said the position's duties and responsibilities involved about 70% technical computer programming, and related this to the heavy emphasis on computer programming in the interview questions and benchmark answers that had been prepared. She testified that five of the eight substantive questions were programming questions because "this was what the PD was to do, was programming, computer programming." Mr. Leaver's testimony was similar. Both Ms. Selk and Mr. Leaver were in excellent positions to be familiar with this job. Mr. Russell, who provided the bulk of appellant's evidence, had not worked at DPI since 1995, when he and the appellant were laid off.

2. There was prejudice toward the applicant from the time that she applied for the position. In an abuse of discretion, information about how she performed at DPI before she was laid off in 1995 was used to rank her lowest of the applicants. However, that information was not gathered or used during the screening process in a clear abuse of discretion.

Appellant refers to the January 12, 2000, memo written by Ms. Selk regarding the panel's evaluation of the candidates (Respondent's Exhibit R 101) which includes the following:

After she [appellant] had left the department, we reviewed this data and became aware of her convention to create/invent data where it didn't exist and have discovered that the "invented" data is very inaccurate. We will not produce statistics based on these historic files with invented data because it is meaningless data.

Appellant contends that "This information was known before the screening interviews occurred; yet, there was no questioning about it during the interview . . . There were no follow-up questions, even though the appellant discussed how she dealt with the missing data." Appellant's brief, p. 2.

Based on this record, it can not be concluded that respondent acted unreasonably in the process it followed and the hiring decision it made. As a past DPI employee, appellant inevitably left impressions with other employees concerning her performance and competence based on the work she had done. Some of these employees had negative opinions about her practice of estimating or interpolating missing data. It is inherently reasonable for an employer to rely on its understanding of a prior employee's past performance when considering rehiring that employee. Appellant does not contend that the respondent should not have entertained such considerations, but rather that respondent should have given her an opportunity to rebut critical opinions when it interviewed her. However, in this case the respondent followed a reasonable process by relying on the opinions of people who had a basis to have been well informed about appellant's work. For example, Ms. Zach had been employed in the position in question prior to the selection process at issue and was under Ms. Selk's direct supervision, and it was reasonable for respondent to have relied on her (Ms. Zach's) opinion, which was developed in part by having worked with the data appellant generated during her tenure at DPI. *See, e. g., Holley v. Docom*, 98-0016-PC, 1/13/99 (not abuse of discretion for appointing authority to rely on opinions of two of its employees as to the applicant's work quality while employed as elevator operator in private sector); *Romaker v. DHSS*, 86-0015-PC, 9/17/86 (not abuse of discretion for appointing authority to rely on personal knowledge about applicant's performance while employed in minimum security institutions, and his discussion of applicant's work performance with applicant's supervisors in that setting); *Puls v. DHSS*, 90-0172-PC, 5/1/92 (not abuse of discretion for appointing authority to rely on information about applicant obtained from apparently reliable sources without conducting independent investigation to determine the accuracy and completeness of that information).

3. The ranking of the 5 candidates was described differently by the three interview panelists who ranked the candidates. This confusion was an abuse of discretion in how the ranking was developed.

The only question before the Commission is whether “respondent’s decision not to select appellant for the position . was illegal or an abuse of discretion.” Conference report dated March 20, 2000. This decision was not affected by any confusion that may have been present as to whether appellant’s rank was fifth or tied for fourth.

4. The hiring decision was based on rankings of the applicants. These rankings should have been based on facts gathered through the screening process. Rather, in an abuse of discretion, gossip and hearsay was used in the hiring decision.

The record does not reflect that respondent relied on gossip and hearsay. The negative information about appellant’s work performance came from people within the agency who had first-hand experience with complainant’s work product.<sup>2</sup>

5. The criteria used in developing the ranking for Ms. Miller was not based on information provided in the interview process, nor from information she provided in her resume and letter of interest. Rather, in an abuse of discretion, her credentials were ignored which irretrievably lowered her final ranking used in the hiring decision.

*Complainant presents a number of arguments that she has better credentials than the persons ranked first and second, who got job offers. She cites the facts that she was the only one with a college degree (BA English), that she has had significant training in many types of software used in state agencies, and specifically that she had training in both beginning and advanced SAS, and that she had experience in a professional classification. She contends that her “education, training and experience were purposefully minimized to rank her lowest of the five candidates for the position which is a clear abuse of discretion.”* The record does not reflect that respondent minimized

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<sup>2</sup> It would not necessarily be an abuse of discretion for the employer to rely on hearsay in such a situation. That would depend on the degree of reliability that could be attributed to the information.

complainant's qualifications, either deliberately or otherwise. Respondent reached the conclusion that programming was a very significant part of the position as it existed at the time of the hiring decision. For example, Ms. Selk testified as follows:

The position description has over 50% does technical computer programming—actually, one could argue 70% because it's referenced in some of the other tasks. And so the questions . . . of eight that were specific to the job, six had to do with programming. One is sort of what kind of machines do you work on or what you're familiar with regarding operating systems. But five were programming questions because it was considered important enough, because that was what the position was to do was programming, computer programming.

Clearly there was a difference of opinion between the respondent and the appellant regarding how important it was to the successful performance of this position to have technical programming skills, including the fact that complainant did not have the ability to "sit down at the computer" to develop programming, as she admitted. This difference of opinion does not rise to the level of an abuse of discretion. The criteria and benchmarks were developed on the basis of on an analysis of the position by people who had a good basis for familiarity with the job. On this record, the respondent had a reasonable basis for stressing technical programming skills and not placing a great deal of weight on such things as formal education.

ORDER

This appeal is dismissed.

Dated: February 8, 2001.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

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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