STATE OF WISCONSIN PERSONNEL COMMISSION

ADDIE E. PETTAWAY,
Appellant,

v.

Superintendent, DEPARTMENT OF PUBLIC INSTRUCTION,
Respondent.

Case No. 01-0013-PC

RULING ESTABLISHING ISSUE FOR HEARING

This matter is before the Commission because of a dispute as to the issue for hearing. The appeal arises from respondent's action of not selecting the appellant to fill a vacant position. Appellant appears *pro se*.

The following findings appear to be undisputed and are made solely for the purpose of this ruling.

FINDINGS OF FACT

1. Prior to March of 2000, when she left state service by taking disability retirement, appellant was employed by respondent as an Education Consultant.

2. In October of 2000, respondent had a vacant position for an Education Consultant, Title I: Mathematics.

3. On October 10, 2000, appellant applied for permissive reinstatement into the vacancy.

4. Respondent elected not to grant permissive reinstatement to appellant without competition, but did include appellant in the list of persons later interviewed for the position.

5. After the interviews, respondent offered the position to another applicant who declined the offer. Respondent then offered the position to a second applicant who accepted.

6. Respondent notified appellant on January 24, 2001, via telephone, that she was not selected for the vacancy.

OPINION

Appellant filed a letter of appeal with the Commission on February 20, 2001. The letter stated, in part:

> The purpose of this missive is to request an appeal. I want to appeal the decision by the Department of Public Instruction not to select me for the position of education consultant Title I: Math Education. I applied for reinstatement to that position on 10 October 2000. I was informed by Jim Walls on 24 January 2001 in a telephone call that I initiated that I was not selected for the position.

The Commission convened a prehearing conference on March 22, 2001. The prehearing conference report includes the following language:

> After a lengthy discussion regarding appellant's allegations in this matter, the hearing examiner proposed the following statement of issue:
>
> > Whether respondent abused its discretion by considering other individuals for the vacancy for the position of Consultant - Title I Mathematics, rather than simply appointing the appellant to that position without competition.
>
> After proposing this issue, the appellant made additional comments suggesting she might also be seeking to appeal certain other conduct by respondent.
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> The appellant has until April 4, 2001, to indicate if she feels the proposal does not accurately and completely describe her allegation(s) in this matter If she disagrees with the current language, she is to propose alternative/additional language and submit it by the same date. If she does not disagree with the proposal, the respondent will have until April 18, 2001, to file preliminary motions in this matter

In a submission filed on April 4, 2001, appellant sought significant changes to the March 22nd version of the issue for hearing. Respondent later responded to appellant's proposal. The appellant's proposals are set forth below in italics followed by a summary of respondent's response, in brackets. The Commission has added a numbering system for ease of reference:

Change to:
A. Whether respondent abused its discretion by not appointing appellant to the vacant position of Consultant - Title I: Math Education.

[Respondent agrees to this statement of the issue as long as it is understood that it "pertains to the interview process and qualifications of the applicants but does not include any pre-interview issues, such as the permissive reinstatement issue."]

Additional Issues
1 Did the Department of Public Instruction's Human Resources Department and John Benson arbitrary (sic) and capriciously decide not to follow the permissive reinstatement rules and process because of historical institutional racism, discrimination, bias and hostility towards the appellant during the Benson Administration?

[Respondent argues that these claims should be pursued as part of a Fair Employment Act complaint and that "[a] non-selection appeal is limited to abuse of discretion."]

2. Did the Department of Public Instruction violate the Americans with Disabilities Act because they failed to give clear instructions regarding tasks in the interview. Therefore I wasn't given the opportunity to identify the necessary accommodations needed to carry out the task of Keyboarding. I was informed that I would be required to do a writing sample when in actuality, I was expected to do a keyboarding sample which is a distinctively different task than a writing sample and requires accommodations in order for me to execute that task. I have to wear splints and require a voice-activated computer.

[Respondent argues that these claims should be pursued as part of a Fair Employment Act complaint and that "[a] non-selection appeal is limited to abuse of discretion."]

3. Did the Department of Public Instruction violate any labor laws relative to reinstatement of a disabled retiree who is no longer totally disabled and is eligible for reinstatement? Reinstatement was requested when a vacancy existed in my permanent class. I obtained permanent status in class as a consultant.

[Respondent argues this relates to pre-certification conduct that is beyond the Commission's jurisdiction. Respondent suggests appellant should be required to identify the specific "labor law" that required her reinstatement.]

4. Did the Department of Public Instruction violate the permissive reinstatement law when it required appellant to compete for a vacant position in her permanent class?

[Respondent argues this relates to pre-certification conduct that is beyond the Commission's jurisdiction. Respondent also contends there is no law requiring respondent to grant permissive reinstatement situation.]

5. Did the Department of Public Instruction violate any labor laws when the appellant was not given equal consideration in the selection process? I was not required to provide references for consideration whereas it is obvious that other applicants were requested to provide references that were considered in the selection process.

[Respondent argues that unless the appellant identifies the specific "labor law" that respondent allegedly violated by not contacting references for appellant, the issue is inappropriate.]

6. Did historical differential treatment cause the respondent not to follow the rules and process of permissive reinstatement.

[Respondent argues that the proposal is too unclear to permit a response but that to the extent the issue relates to a decision prior to certification, the Commission lacks jurisdiction.]

Complainant filed supplemental materials on April 19, 2001. In those materials, complainant included a list of "Possible Reasons for Non-Selection":

- Historical bias and distortions perpetuated by former supervisors, Barb Bitters & Bill Erpenbach
- Stereotyping (math is too complex for African Americans)
- Fiscal reasons because of my seniority
- View me as a liability because of my disabilities
- Unfounded fear of legal action by me
- Vindictiveness towards me because I appear in Nathaniel Harwell's web site information about DPI in which I had no involvement in its development or dissemination
- Institutional racism
- Prejudice
- Apparent hostility towards me (i.e., did not return telephone call; would not meet with me to discuss my reinstatement; didn't support me during illness; would not let me earn money as a LTE during disability)
- Discrimination
- Holding me to higher standard (i.e., said I don't have BS in Math)
- Denying me courtesy of permissive reinstatement without competition

Respondent's jurisdictional objection

Before addressing the appellant's individual proposals, the Commission notes that respondent has raised a jurisdictional objection to any review of its decision not to reinstate the appellant before considering the other candidates:

> While the commission has jurisdiction under §230.44(1)(d)[1] to hear appeals related to non-selection, it is limited to situations after certification. The issue as stated in the conference report refers to an event that occurred prior to certification, therefore outside the scope of the commission's jurisdiction. (Respondent's arguments dated April 18, 2001)[2]

There is nothing in the materials submitted by the parties to conclusively show if the respondent's initial decision (to only consider the appellant as one of several candidates) was made before or after a list of certified candidates had been developed for the vacancy. There is no dispute that appellant first asked for reinstatement to the position in question on October 10th and was informed on January 24th, after interviews had been conducted, that she had not been selected. The record does not show when the certification list was prepared for the vacant Education Consultant position. We also don't know when respondent decided it was going to go ahead and interview the list of certified candidates rather than reinstate appellant. For purposes of addressing the respondent's jurisdictional objection, the Commission assumes that respondent's first action not to reinstate the appellant occurred *before* the certification.

The respondent's jurisdictional objection (i.e. its reliance on the particular date of the certification) fails to recognize prior decisions of the Commission explaining that

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[1] Pursuant to §230.44(1)(d):

> 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.

[2] Elsewhere in its arguments, respondent states that the Commission lacks jurisdiction under §230.44(1)(d), Stats., to review any conduct occurring *prior to the interviews* of the certified candidates. The Commission assumes the substitution of "pre-interview" for "after certification" was inadvertent.

the reference to "certification" is simply to the stage in the appointment process after which the appointing authority has the authority to make an appointment decision.

The reinstatement[3] decision (i.e. the decision not to reinstate) is addressed by the Commission's ruling in *Lundeen v. DOA*, 79-208-PC, 6/3/81. In that case, the appellant had retired in 1977, when he reached the then mandatory retirement age of 65. After the mandatory retirement age was changed in 1978 to 70, appellant requested reinstatement to his former position of Superintendent of Buildings and Grounds 3. Respondent denied the request by letter in January of 1979. In April of 1979, respondent announced a Superintendent of Buildings and Grounds 3 vacancy. Appellant was not informed of the vacancy, did not apply and another individual was appointed. The decision reads, in part:

> The respondent also argues in his post-hearing brief that there "has been no personnel action after certification relating to the hiring process in the classified service. "
>
> The appellant requested and was eligible for reinstatement. The respondent elected not to reinstate him to a vacant position. This failure to re-

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[3] Pursuant to §230.31(1), Stats.

> Any person who has held a position and obtained permanent status in a class under the civil service law and rules and who has separated from the service without any delinquency or misconduct on his or her part but owing to reasons of economy or otherwise shall be granted the following considerations:
> (a) For a 5-year period from the date of separation, the person shall be eligible for reinstatement in a position having a comparable or lower pay rate or range for which such person is qualified.

The term "reinstatement" is defined in §ER-MRS 1.02(29), Wis. Adm. Code, as follows, in part:

> "Reinstatement" means the act of permissive re-appointment without competition of an employee or former employee under s. 230.31, 230.33, 230.34 or 230.40(3), Stats., to a position:
> (a) In the same class in which the person was previously employed

In contrast, the term "restoration" is defined in §ER-MRS 1.02(30), Wis. Adm. Code, as follows, in part:

> "Restoration" means the act of mandatory re-appointment without competition of an employee or former employee under s. 230.31, 230.32, 230.33 or 230.34, Stats., to a position:
> (a) In the same class in which the person was previously employed.

> instate was equivalent to a denial of reinstatement or appointment occurring after certification when the actual appointment was made.

Similarly, in *Wing v. DER*, 84-0084-PC, 4/3/85, the Commission reviewed a decision not to select the appellant from among a list of persons seeking transfer, reinstatement and demotion to a vacant position, even though no examination had been given to fill the position and no list of eligible candidates had been certified:

> Even though no certification actually occurred with respect to the [Budget and Management Analyst] position, the point of obtaining a group of eligible applicants was passed. This was done by having the appointing authority select an applicant from among *all* of those who sought to transfer, reinstate or demote into the position. This procedure took the BMA appointment process past the point of certification and into the realm of the exercise of selection discretion by the appointing authority.
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> The apparent intent of §230.44(1)(d), Stats., is to permit, *inter alia*, appeals of appointment decisions. Those decisions are made in all instances by the appointing authority. There are no apparent policy reasons for interpreting §230.44(1)(d), Stats., to permit appeals of appointment decisions *only* when actual certification by the administrator preceded the selection decision. An interpretation of the phrase "personnel action after certification" to exclude appointment decisions that were not preceded by a particular certification would result in an illogical distinction within one category of personnel selection decisions. An employee seeking reinstatement, voluntary demotion, or transfer into a position could appeal an alleged abuse of discretion in the appointment decision if the appointing authority's consideration of eligibles included those certified as a result of competition, but could not appeal if there was no such certification because the appointing authority had requested only the names of those interested in transfer, reinstatement or voluntary demotion, pursuant to §ER-Pers 12.02(3), Wis. Adm. Code:
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> > The administrator may submit the names of persons interested in transfer, reinstatement or voluntary demotion along with a certification or, at the request of the appointing authority, in lieu of a certification.
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> The Commission is convinced that no such distinction was intended and that the legislature utilized the phrase "after certification" to refer to a certain segment of the appointment process.

In *Seep v. Pers. Comm.*, 140 Wis.2d 32 (1987), the Court of Appeals upheld the Commission's decision under §230.44(1)(d), Stats., rejecting a decision by the Department of Health and Social Services (DHSS) to deny reinstatement to Ms. Seep because of a history of sick leave abuse. Ms. Seep had been employed at DHSS's Southern Wisconsin Center for the Developmentally Disabled for 20 years until her retirement in January of 1982. At that time, she was told that she could be reinstated if she applied within 3 years. One year later, she sought reinstatement but her request was denied. The Commission concluded that DHSS's decision not to reinstate Ms. Seep was an abuse of discretion under §230.44(1)(d), Stats., and rejected it.

In the present case, the facts recited by respondent show that it first decided not to reinstate appellant to the vacant Education Consultant position without considering other candidates, and that it subsequently considered appellant along with other candidates who had been certified as eligible for the vacancy, but decided to hire someone other than the appellant for the position.

While the respondent may have actually made two decisions at two different times in this matter, the net effect of its conduct was to not select the appellant for the vacancy even though respondent had the discretion, at either point in the process, to so employ her. Consistent with its previous rulings, the Commission's authority under §230.44(1)(d), Stats., extends to the action not to reinstate the appellant without considering additional candidates. The fact that this action occurred before the names of other candidates had been certified is irrelevant. Section 230.44(1)(d) encompasses decisions by an appointing authority not to hire someone to fill a vacant position. That is precisely what respondent did when it rejected appellant's reinstatement request in October of 2000 and decided merely to consider her along with an as yet undetermined list of additional candidates.

Therefore, the Commission rejects the respondent's jurisdictional objection to Commission review of that portion of its non-selection decision made prior to certification of additional candidates, i.e. the failure to reinstate the appellant before considering additional candidates.

Issue for hearing

The Commission has a responsibility to provide notice to the parties of all contested case hearings. Pursuant to §227.44(2), Stats:

> The notice shall include:
> (a) A statement of the time, place, and nature of the hearing, including whether the case is a class 1, 2 or 3 proceeding.
> (b) A statement of the legal authority and jurisdiction under which the hearing is to be held
> (c) A short and plain statement of the matters asserted. If the matters cannot be stated with specificity at the time the notice is served, the notice may be limited to a statement of the issues involved.

In a case filed under §230.44(1)(d), Stats., the hearing issue is typically phrased simply in terms of whether the respondent's decision not to hire the appellant for the vacancy in question was "illegal or an abuse of discretion." *Miller v. DPI*, 00-0011-PC, 2/8/01; *Harrison v. DNR*, 99-0112-PC, 8/28/00.

In appellant's first proposal for an additional issue, she contends that respondent's actions were taken "because of historical institutional racism, discrimination, bias and hostility towards the appellant." Appellant's April 19th submission identifies historical bias, racial stereotyping, institutional racism, prejudice and discrimination as possible reasons for respondent's action. Appellant also contends that respondent failed to reasonably accommodate her disability during the selection process. One question raised by this appeal is whether such allegations are properly considered as part of an appeal under §230.44(1)(d), Stats., rather than in the context of a complaint of discrimination filed under the Wisconsin Fair Employment Act.

Within Wisconsin's civil service code, found in subch. II, ch. 230, Stats., is §230.18, which provides:

> No question in any form of application or in any examination may be so framed as to elicit information concerning the partisan political or religious opinions or affiliations of any applicant nor may any inquiry be made concerning such opinions or affiliations and all disclosures thereof shall be discountenanced except that the administrator may evaluate the competence and impartiality of applicants for positions such as clinical

> chaplain in a state institutional program. No discriminations may be exercised in the recruitment, application, examination or hiring process against or in favor of any person because of the person's political or religious opinions or affiliations or because of age, sex, disability, race, color, sexual orientation, national origin or ancestry except as otherwise provided.

This language descends from 1905 Wis. Act 363, which created a civil service structure for the State. Pursuant to §26 of that law:

> No question in any form of application or in any examination shall be so framed as to elicit information concerning the political or religious opinions or affiliations of any applicant, nor shall any inquiry be made concerning such opinions or affiliations and all disclosures thereof shall be discountenanced. No discriminations shall be exercised, threatened, or promised, by any person in the civil service against or in favor of any applicant, eligible, or employee in the classified service because of his political or religious opinions or affiliations.

Pursuant to 1971 Wis. Act 270, §41, this language was amended to reference other forms of discrimination:

> No question in any form of application or in any examination shall be so framed as to elicit information concerning the partisan political or religious opinions or affiliations of any applicant nor shall any inquiry be made concerning such opinions or affiliations and all disclosures thereof shall be discountenanced except that the director may evaluate the competence an impartiality of applicants for positions such as clinical chaplain in a state institutional program. No discriminations shall be exercised in the recruitment, application, examination or hiring process against or in favor of any person because of his political or religious opinions or affiliations *or because of his age, sex, handicap, race, color, national origin or ancestry except as otherwise provided.* (Emphasis added.)

The same law revised the civil service laws so that state employees could appeal "personnel decisions made by appointing authorities when such decisions are alleged to be illegal or an abuse of discretion." 1971 Wis. Act 270, §11, Sec. 11, creating §16.03(4)(a), Stats. Those appeals were taken to the Director of the Bureau of Personnel in the Department of Administration, and "actions and decisions of the director"

could, in turn, be appealed to the Personnel Board. 1971 Wis. Act 270, §13, creating §16.05(1)(f), Stats.

In 1978, the legislature again made substantial changes to the civil service structure. The Personnel Commission was created by 1977 Wis. Act 196, (referred to here as the "Stevens-Offner Act") effective February 16, 1978. The Commission was given the responsibility of hearing appeals of a personnel action "related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion." 1977 Wis. Act 196, §121, creating §230.44(1)(d), Stats. However, the same legislation also granted the Personnel Commission responsibility, effective February 16, 1978, to review complaints of discrimination filed under the Wisconsin Fair Employment Act.

The Wisconsin Fair Employment Act (WFEA) had been created by 1945 Wis. Act 490. Initially, the responsibility to administer the law and to receive and investigate complaints charging employment discrimination based on race, creed, color, national origin or ancestry was conferred on the Industrial Commission. Subsequent amendments prohibited discrimination based on age,[4] sex,[5] handicap[6] and arrest/conviction record[7] and extended the reach of the Fair Employment Act to licensing agencies.[8] Immediately prior to the implementation of the Stevens-Offner Act, the WFEA was administered by the Department of Industry, Labor and Human Relations, which processed complaints of employment discrimination filed against private employers as well as those complaints filed against the State of Wisconsin as an employer. Once the Stevens-Offner Act went into effect, the Personnel Commission took on the responsibility of processing WFEA complaints filed against the State of Wisconsin as an employer

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[4] 1959 Wis. Act 149.
[5] 1961 Wis. Act 529.
[6] 1965 Wis. Act 230.
[7] 1977 Wis. Act 125.
[8] 1967 Wis. Act 234.

Even though the Commission has previously issued at least one decision in an appeal under §230.44(1)(d), Stats., that addresses a claim of discrimination,[9] the language and legislative history of §230.18 and the WFEA support the conclusion that the Personnel Commission must process claims of discrimination arising from a civil service selection process (including discrimination based on age, sex, disability, race, color, sexual orientation, national origin or ancestry) pursuant to the WFEA complaint procedure rather than as an appeal under §230.44(1)(d).

The legislative history shows that these two jurisdictional routes developed separately. The Commission's authority to review "illegal or abuse of discretion" allegations regarding the hiring process arose from a civil service law that existed before the enactment of the WFEA. The Commission attained jurisdiction over both procedures simultaneously, from different predecessor agencies, when the Commission was created pursuant to the Stevens-Offner Act. However, the WFEA establishes a very specific procedure for processing allegations of discrimination involving employment with the State of Wisconsin. The procedure described in §111.39, Stats., and in Ch. PC 2, Wis. Adm. Code, provides for an investigation[10] of the alleged discrimination as well as for conciliation efforts. The WFEA has a much longer filing period[11] and provides for more extensive remedial authority.[12]

The Commission will supply the appellant with a complaint form so that she may pursue any claims of discrimination she may have relating to the personnel action in question in the context of a charge under the WFEA.

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[9] In *Jacobson v. DILHR*, 79-28-PC, 4/10/81, the Commission addressed claims of sex discrimination as well as retaliation for having filed prior complaints of discrimination.

[10] Pursuant to §230.45(1m), Stats., a complainant may waive the investigation and proceed to a hearing on the complaint.

[11] The WFEA filing period is 300 days rather than the 30 days for an appeal under §230.44(1)(d).

[12] Under the WFEA, the Commission may "order such action by the respondent as will effectuate the purpose of this subchapter, with or without back pay." §111.39(4)(c), Stats. The Commission's authority to award relief for a successful appeal under §230.44(1)(d), Stats., is limited by §230.44(4)(d), Stats., and does not include back pay. *Seep v. Pers. Comm*, 140 Wis. 2d 32 (Ct. App., 1987).

The Commission's enforcement authority under §230.44(1)(d), is limited to provisions of Wisconsin's civil service laws, including related administrative rules. For example, the Commission has no authority to hold that respondent's conduct in the present matter violated federal law.[13] In *Balele v. DILHR et al.*, 95-0063-PC-ER, 10/16/95, the Commission rejected a proposed issue for hearing that was phrased in terms of whether the respondents had "engaged in racketeering activities with respect to the decision in 1995 not to select the complainant" to fill a specific vacancy. The Commission specifically addressed the question of whether such an allegation fit within the scope of §230.44(1)(d), Stats:

> This provision permits the Commission to review decisions to select a candidate for a vacant civil service position, if the appellant/unsuccessful candidate alleges the decision was illegal or an abuse of discretion. While the statute does not otherwise describe what is intended by the word "illegal," it is reasonable to interpret the word to refer to an action taken that is contrary to the civil service statutes (subch. II, ch. 230, Stats.) or the administrative rules promulgated thereunder Nothing within those sources prohibit[s] "racketeering" which is defined in §946.82(4), Stats. Allegations of criminal activity must be prosecuted in court, rather than before an administrative forum. If complainant [were] able to pursue his "racketeering" claim in the present case, the Commission would be operating in an area that is reserved to the courts. "[A]n administrative agency has only those powers which are expressly conferred or which are fairly implied from the four corners of the statute under which it operates." *State (DOA) v. ILHR Dept.*, 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977).

In her second proposal for an "additional issue," appellant alleges the respondent violated the Americans with Disabilities Act during the course of the interview. The federal Equal Employment Opportunities Commission is vested with the responsibility for enforcing the provisions of the Americans with Disabilities Act (ADA), 42

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[13] In *Holubowicz v. DOC*, 90-0048, 0079-PC-ER, 8/22/90, the Commission refused to consider an argument that the respondent's conduct violated the Fair Labor Standards Act and stated that the complainant's concerns would have to be raised with the "appropriate regulatory agency."

U.S.C. §§12101 *et seq.* The Personnel Commission lacks jurisdiction to enforce the ADA so appellant is not eligible to pursue this claim as part of her appeal.[14]

Appellant's third proposal for another issue asks whether respondent's conduct violated "any labor laws" without further specification. In her fourth proposal, appellant refers to violation of "the permissive reinstatement law." Appellant's fifth proposed "additional issue" refers to the respondent's alleged failure to check references for the appellant. Appellant proposal suggests this conduct violated a "labor law" without specification. The appellant's final proposal refers to "historical differential treatment" and "rules and process of permissive reinstatement" without any clarification.

As already noted, the Commission's enforcement authority under §230.44(1)(d), is limited to provisions of Wisconsin's civil service laws, including related administrative rules. A general statement of issue referencing illegal conduct is broad enough to encompass an alleged violation of a statutory provision found in subch. II of ch. 230, Stats., or a related provision in the Wisconsin Administrative Code.

[14] The appellant could decide to raise a disability discrimination claim as part of a discrimination complaint form filed with the Personnel Commission under the WFEA, not the ADA.

ORDER

The Commission establishes the following issue for hearing:

Whether respondent's failure to hire the appellant for the position of Education Consultant, Title I: Mathematics, was illegal or an abuse of discretion.

This issue encompasses appellant's allegations 1) relating to respondent's action of requiring appellant to compete for the position 2) that other applicants were requested to provide references while appellant was not; and 3) relating to the decision to hire someone other than appellant from the group of candidates for the positions.

Dated: September 23, 2001 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

ANTHONY J. THEODORE, Commissioner