

**ERIC MCCURTIS**

*Appellant,*

v.

**Secretary, DEPARTMENT OF  
CORRECTIONS**

*Respondent.*

FINAL  
DECISION  
AND ORDER

Case No. 01-0093-PC

This case involved an allegation that respondent committed an illegal act or an abuse of discretion in not appointing the appellant to the vacant position of Correctional Officer. A hearing was held on April 29, 2002, before Kelli S. Thompson, Commissioner. Commissioner Anthony Theodore was also present.

#### FINDINGS OF FACT

1. Appellant applied for the position of Correctional Officer with respondent on six separate occasions.
2. Appellant received non-selection letters from respondent on September 10, 1998, May 26, 2000, May 27, 2000, July 21 2000, July 24, 2001, and November 16, 2001. This appeal is of the latter decision.
3. The respondent conducts a three-step process for hiring Correctional Officers, which includes: passing a written test, achieving an acceptable score when interviewed, and reviewing the applicant's work history, which includes taking into account information received from former employers.
4. Included in appellant's employment application was a summary of work experience, information about previous criminal arrest and conviction record, and a list of professional references.
5. Steven O'Neil, an Officer Selections Coordinator with respondent's Bureau of Personnel and Human Resources, and Judy Brown, a Human Resource Assistant for respondent, were the coordinators for the officer selection process.

6. Marcia Reiersen, a (former) Limited Term Employee (LTE) with respondent, was responsible for reviewing appellant's application and preparing and mailing work reference information to current and previous employers.

7. Carla Lapine, a program assistant with respondent, was responsible for attempting to contact any missing work references. In the Correctional Officer 1 vacancies during the September, 2001 selection process, Ms. Lapine was responsible for the review of approximately 300 files.

8. Judy Brown signed the work reference letters that were sent to appellant's previous employers on June 26, 2001 (this was in connection with appellant's previous application), and October 15, 2001.

9. Appellant's employment application dated September 15, 2001, included Jackson Movers and Van Don Personnel as two previous employers. The appellant had not listed the two companies on prior employment application materials.

10. A work reference information sheet was sent to Jackson Movers. No information was returned.

11. A work reference information sheet was sent to Career Industries. The information sheet was returned to respondent, limiting the reply information to appellant's dates of employment and appellant's working title, and a statement indicating the employer would not rehire appellant in the position he had previously been employed. The explanation stated:

While this position may not have been a good fit, Mr. McCurtis has other experiences that I'm sure prepares him well for your Department. (Respondent's Exhibit R-102)

The statement was signed by James Ryan, Director of Fulfillment Services and dated July 3, 2001.

12. An employment sheet was sent to Taylor Home on June 26, 2001, by Ms. Brown and returned on July 17, 2001, incomplete. The returned information sheet listed appellant's date of employment as July 10, 1999, to March 7, 2001, and listed appellant's title as Youth Worker II. (Appellant's Exhibit A-15)

13. An employment sheet was not sent to Van Don Personnel, where appellant had stated on his application (Respondent's Exhibit R-109) that he had been "Director of

Operations (Racine)” from 1999-2000. The reason is that the information appellant provided on his application stated the reason for leaving was “company closed all branches,” and the person responsible for sending the sheets to employers concluded that it would be useless. Appellant had provided the name, address and phone number of someone in Texas as the reference person for this employer.

14. Respondent’s selection panel met on November 14, 2001, to fill about 50 vacancies from a pool of approximately 300 candidates.

15. Respondent’s selection panel included Mike Paschke, Judith Trampf, and Kari Houzner.

16. The selection panel reviewed individuals’ application materials, criminal background, references, and employment history and interview results.

17. Appellant was not selected for one of the 50 vacant Correctional Officer 1 positions because

a) One of his employment references (Jackson Movers) did not provide any information on the reference form (Respondent’s Exhibit R-103) respondent sent it.

b) Respondent looked at his application files for his earlier applications and found a negative reference from Career Industries, Inc. (Respondent’s Exhibit R-102), which stated that it would not rehire appellant “at this position,” and otherwise did not answer the questions asked except dates of employment and job title.

c) Respondent compared appellant’s current and prior applications, and ascertained that there was information that was provided on some applications and not others.

d) There were a number of candidates who had positive, complete references.<sup>1</sup>

18. Respondent’s policy with regard to incomplete or unreturned references was to make phone calls to facilitate getting information as time allowed. Due to the large number of applicants, this could not be done in all cases. This was not done in appellant’s case because respondent did not have enough time. Respondent’s policy re-

sulted in some applicants getting respondent's help in this regard, and others not, but all applicants were treated alike in the sense they were all subjected to the potential uncertainties of this process.

19. A letter, dated November 16, 2001, notified appellant that he had not been selected for the position(s) of Correctional Officer I.

20. At a prehearing conference held in connection with an earlier appeal of an earlier non-selection for the same type of jobs, the DOC representative (paralegal Terri Rees), in answer to appellant's question as to why he had not been hired, said it was due to negative employer references. She advised him to use other references that would be positive.

#### CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to 230.44(1)(d), Stats.
2. Appellant has the burden to establish that the personnel action by which he was not appointed to the vacant position of Correctional Officer constituted an illegal act or an abuse of discretion.
3. Appellant has failed to sustain his burden.

#### OPINION

The parties stipulated 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 vacant position of Correctional Officer. Conference Report dated January 25, 2002.

This matter is being reviewed pursuant to the Commission's authority under §230.44(1)(d), Stats., which provides:

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.

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<sup>1</sup> The record does not reflect the other qualifications of those hired such as education, type of experience, etc., that would permit a comparison of appellant and those applicants in those areas.

Appellant testified during the hearing that he was not alleging respondent committed an illegal act when they did not hire him for a vacant position of Correctional Officer 1. Therefore, the question which remains is whether the respondent properly exercised its 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; See also, *Starck v. DOC*, 98-0056-PC, 4/21/99.

An agency acts outside the scope of a proper exercise of, or abuses its discretion, when it bases a discretionary decision on an erroneous view of the law relating to the transaction in question. *Hartung v. Hartung*, 102 Wis. 2d 58, 66 306 N.W. 2d 16 1981. "And where the record shows that the agency looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable tribunal could reach, and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree." *Id*

A related principle is that if an agency considers a factor it should not have considered, or fails to consider all the factors it should have considered, this can amount to an abuse of discretion. See *Motor Veh. Mfrs. Assn. v. State Fam. Mut.*, 463 U.S. 29, 43 77 L.Ed. 2d 443, 458, 103 S. Ct. 2856 (1983).

In the present case, appellant is alleging respondent failed to hire him for the position of Correctional Officer 1, for which he felt he was qualified. In addition, appellant is alleging respondent did not follow department hiring procedures because respondent did not contact all of the employers he provided.

Respondent stated the reasons appellant was not selected as a successful candidate for the position of Correctional Officer 1 was because the interview panel determined his references were not complete, one reference, Career Industries, was considered negative,

and there was missing information that was provided on some of his earlier applications, but not others.

Respondent sent out employment information sheets to a number of appellant's employment references, requesting completion of ten questions. One information sheet, dated October 15, 2001, and signed by Judy Brown, was sent to Jackson Movers. The returned document showed that none of the ten questions were completed. On that same date, Ms. Brown signed an employment information sheet, which was then sent to Genesis Behavioral Services. The information sheet was returned with the questions completed. The information provided was favorable towards appellant. An employment sheet was also sent to Taylor Home and returned incomplete. The returned form listed only appellant's date of employment as July 10, 1999, to March 7, 2001, and appellant's title as Youth Worker II.

During a previous application process for the Correctional Officer 1 position, Ms. Brown had sent an employment information sheet to Career Industries, Inc., dated June 26, 2001. The employment sheet (Respondent's Exhibit R-103) was returned incomplete, limiting its responses to appellant's dates of employment and title and a statement indicating the employer would not rehire appellant in his previous position, with a follow-up explanation that stated:

While this position may not have been a good fit, Mr. McCurtis has other experiences that I'm sure prepares him well for your Department.

This statement was signed by James Ryan, Director of Fulfillment Services and date July 7, 2001.

On appellant's correctional officer application supplement, he listed Van Don Personnel as a prior place of employment and listed Vanessa Mills as the contact person, with a Houston, Texas, address and phone number. The reason listed for leaving was the company had closed all branches. Respondent asserted they were unable to locate any additional information to indicate whether Van Don had been contacted. Mr. O' Neill testified he believed the employment information sheet for Van Don was prepared but not sent, because of appellant's written explanation on his application that the company had closed all branches. In the September 2001, application process appellant provided addi-

tional professional references but these were not considered in keeping with respondent's policy to only consider non-employment references in circumstances where, due to circumstances such as the applicant having recently graduated or left military service, the applicant had no significant employment record, and the fact that appellant did not fit into this category as he had an employment record that started in 1989.

The Commission has held it is not an abuse of discretion to rely upon employment references in making a hiring decision. (*Skaife v. DHSS*, 91-0133-PC, 12/3/91), even if it results in the rejection of the top-ranked candidate from the interview (*Lee v. DNR*, 97-0081-PC, 10/9/98).

Respondent's stated rationale for its decision not to hire appellant is not against reason and evidence. The selection panel reviewed between 200-300 applicants over a 2 to 3 day period. Included in this selection process, was appellant's application materials, as well as his references. Appellant's references were considered incomplete by the selection panel. Michael Paschke, a Staff Development Program Director and a member of the selection panel, testified appellant was considered but not selected for the position because of his lack of references as well as one reference considered to be negative by the panel. He also considered that appellant had not provided consistent information on his applications, and had included certain employment in some applications but not others. He testified, from the perspective of a previously employed correctional officer, the ability to document oral reports and provide complete and accurate information, not just the information the officer thought was important, was important. Respondent had a rational basis for this conclusion.

Mr. O'Neil testified that an individual's application materials could be kept up to seven years. Therefore, the interview panel had access to the applicant's previously supplied employment references, such as the one provided by Career Industries, from his June, 2001, application. It was not unreasonable to consider all of appellant's application materials.

As a result, the Commission concludes that it was not against reason and evidence for respondent to decide that appellant's employment references were not favorable, and did not support his appointment to the position. While it may have been beneficial for

appellant if respondent had attempted to contact Van Don Personnel, respondent's rationale that the contact was not made because the appellant had explained all the branches were closed, is at least reasonable, although an argument can be made that respondent should not have equated the closure of all branches with having ceased all operations, and should have contacted the contact in Houston listed on the application.

It is true respondent could have sought additional information by contacting persons listed as job references for more specific information about appellant before the decision was made not to select him for the position of Correctional Officer 1. However, the "abuse of discretion" standard does not require respondent to do more than it did. Respondent's position is that they contacted previous employers regarding missing information to the extent time permitted, but with about 300 applicants to screen they could not do this in all cases. There is no indication in the record that the manner in which this was done was based on improper considerations, or otherwise would constitute an abuse of discretion. Even if the Commission had determined such a process was unreasonable, there is no showing this would have had an affect on appellant's application.

The Commission concludes that respondent's decision does not constitute an abuse of discretion.




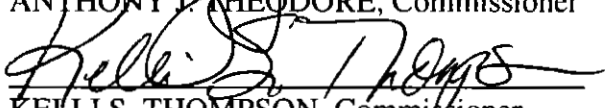
ORDER

The decision of respondent not to select appellant for the position of Correctional Officer 1 is affirmed and this appeal is dismissed.

Dated: Sept. 26, 2002.

STATE PERSONNEL COMMISSION

AJT/KST: 010093Cdec1.1

  
ANTHONY J. THEODORE, Commissioner  
  
KELLI S. THOMPSON, Commissioner

Parties:

Eric McCurtis  
1024 Main St. #304  
Racine, WI 53403

Jon Litscher, Secretary  
P O Box 7925  
Madison, WI 53707-7925

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