

STATE OF WISCONSIN

PERSONNEL COMMISSION

AVELINO T. PONTES,
Complainant,

v.

**Secretary, DEPARTMENT OF
TRANSPORTATION,**
Respondent.

**RULING ON
COMPLAINANT'S
REQUEST TO REOPEN
HEARING**

Case No. 99-0086-PC-ER

This matter is before the Commission following the hearing examiner's issuance of a proposed decision and order pursuant to §227.46(2), Stats. Following the issuance of this proposed decision and order, complainant filed on August 8, 2001, a document which contained a "request for oral arguments." In that document he refers to two pieces of "newly discovered evidence".

I have newly discovered evidence that Mr James Lewis, a white, Caucasian male from the United States, hired into the position vacated by Pontes is at the Senior level and his annual salary is \$50, 917.968.

I have newly discovered another evidence that the Department of Health and Family Services [DOT?] is willing to activate Pontes' email account and retrieve emails exchanged between Pontes and Mr. Borth if required or asked by the Commission. This email retrieval will show that Mr. Borth admitted that Ms. Catherine Puisto did not know much, did not have good understanding of the job knowledge in the unit, and she was not going to be able to assist Pontes at all.

The Commission interprets this as a request to reopen the hearing for the presentation of additional evidence. Although this is not a request for rehearing under §227.49 Stats., because that section applies only to situations where the Commission has entered a final order, the Commission considers a similar standard to that set forth in that section when considering a request to reopen a hearing for the presentation of new evidence that is made prior to a final order, *see Conley v. DHSS, 83-0075-PC, 5/18/84.*

Section 227.49(3)(c), Stats., provides that a rehearing will be granted to take newly-discovered evidence only if the "new evidence [is] sufficiently strong to reverse or modify the

order, and could not have been previously discovered by due diligence." Complainant's request does not indicate that the evidence in question could not have been discovered earlier by the exercise of due diligence. In this regard, the Commission notes that the hearing in this matter took three days, and there was extensive prehearing discovery, which included five on-the-record motion hearings. Furthermore, there is no reason to conclude that the evidence in question would be strong enough to lead to a different result. The information about the individual who replaced complainant would be primarily related to the establishment of a prima facie case, which is not in question here. As to the emails, the degree of significance would depend on their content. However, even if they provided evidence that Ms. Puisto "did not know much", and was unable to help complainant in his job, this would not show that the reason Borth decided to terminate complainant's probation was based on complainant's race, color or national origin rather than out of concerns about complainant's ability to do his job.

Therefore, this case will be scheduled for oral argument before the Commission, but the Commission will not allow the presentation of new evidence. Complainant will have to base his arguments on evidence that was presented during the three days of hearing.

ORDER

Complainant's request for oral argument is granted, and the parties will be notified of the date and time. Complainant's request to reopen the hearing for the presentation of new evidence is denied.

Dated: August 24, 2001.

STATE PERSONNEL COMMISSION

Laurie R. McCallum
LAURIE R. MCCALLUM, Chairperson

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Judy M. Rogers
JUDY M. ROGERS, Commissioner

Anthony J. Theodore
ANTHONY J. THEODORE, Commissioner