

RICHARD J. OSTROWSKI,
Appellant,

v.

**Secretary, DEPARTMENT OF NATURAL
RESOURCES,**

Respondent.

**FINAL DECISION AND
ORDER**

Case No. 99-0111-PC

The Commission reviewed the proposed decision and order and adopts the same with changes noted herein which are highlighted by use of alpha footnotes. The Commission had no disagreement with the examiner's credibility findings.

A hearing was held in the above-noted matter on May 23 and 24, 2000.¹ The parties chose not to file post-hearing briefs.

The parties agreed to the following statement of the hearing issue (see Conference Report dated February 18, 2000):

Whether respondent committed an illegal act or an abuse of discretion in not appointing appellant to the vacant Park Manager 2 position at Whitefish Dunes State Park.

FINDINGS OF FACT

1. Respondent had a vacant position for the manager of Whitefish Dunes State Park, classified as a Park Manager 2.
2. The job announcement for the vacant position is not in the record. The duties of the position are reflected in the position description (PD) (Exh. R-300). The position summary in the PD states as follows:

This position supervises and administers the activities pertaining to the management and development of Whitefish Dunes State Park. Personnel

¹ Combined for hearing was this case and *Harrison v. DNR*, 99-0112-PC.

under the direct supervision includes one permanent, full time Ranger, and one permanent, nine month educator, and approximately nine LTE (limited term employment) employees.

Whitefish Dunes State Park comprises 856 acres of state owned land. The park has 6,300 feet of sand beach, 12 miles of hiking/skiing trails, and a picnic area. Whitefish offers educational programming year round.

This position also oversees the lease of the Hibbards Creek FA.

3. The goals and activities section of the PD include the following:

Time Description of Duties

30% A. Supervision of Employees²

20% B. Implementation of Administration Systems

B1 Control expenditures in accordance with established fiscal & personnel procedures to accomplish assigned objectives within budget allotments.

B2 Administer property revenue transactions in accordance with established procedures to ensure prompt remittance & minimum loss.

B3 Maintain service buildings, rolling stock, property & equipment in optimum repair & safe condition to support efficient operations & maintenance.

B4 Submit reports necessary to effectively inform the Subteam, basin, regional & Bureau staff on the status of property operations.

B5 Conduct field office procedures to support efficient property administration.

B6 Recommend future financial requirements to guide decisions in budget preparation and analysis.

B7 Delegate to appropriate staff the direction of limited term employees in office, maintenance, law enforcement &/or education fields.

B8 Purchase necessary supplies & services according to established procedures to support property operations.

20% C. Direction of Property Operations

² Goal A tasks are detailed in the PD but not repeated here.

- C1 Enforce applicable statutes & administrative codes to protect visitors and resources and minimize user conflicts.
- C2 Manage the park & its facilities to protect public health & safety.
- C3 Develop procedures for administering admission sticker sales & other fees & charges to efficiently maximize revenues & minimize user conflicts.
- C4 Devise emergency action plans to ensure prompt & proper responses to incidents affecting public health & safety.
- C5 Inspect designated use areas to ensure visitors are adequately informed of trail routes, locations, etc.
- C6 Perform direct operational tasks as required within current staffing levels to ensure they conform to established standards.
- C7 Possess & retain law enforcement credentials required to perform related duties.
- C8 Possess & retain a valid driver's license.
- C9 Assign, audit & process sticker accounts to ensure control of such accounts as well as prompt remittances.
- C10 Sell stickers to ensure visitor compliance with & awareness of respective rules & regulations.

10% D. Maintenance of Grounds and Facilities

- D1 Direct maintenance of grounds and facilities to ensure they conform to established standards and to achieve economics of time, personnel, equipment & materials.
- D2 Develop maintenance schedules & plans.
- D3 Inspect grounds & facilities.
- D4 Direct preventive maintenance to prevent damaging wear & costly repairs.
- D5 Recommend facility design & construction to promote efficient maintenance & operation.
- D6 Perform direct maintenance tasks as required within current staffing levels to ensure they conform to established levels.

5% E. Development of Recreational Facilities

- E1 Manage the construction of minor projects to efficiently develop facilities for public use.
- E2 Assist with planning major projects to ensure compatibility with property topography & to stress operations & maintenance efficiency.
- E3 Cooperate with the Regional Engineer in maintaining surveillance over contractors to ensure compliance with contract provisions.
- E4 Locate trails to effectively utilize topography, reduce maintenance costs & minimize user conflicts.

- 5% F. Implementation of Public Relations Program
 - F1 Establish & maintain a rapport with state legislators.
 - F2 Maintain contacts with local community to ensure that officials, community leaders & others are adequately informed of the status of existing & planned operations & development.
 - F3 Maintain facilities & equipment, direct the conduct of employees and respond to inquiries in such a manner as to present a favorable departmental image to the public.
 - F4 Utilize talks & meetings, written information & personal contacts to promote understanding of departmental programs.
 - F5 Develop operating procedures & recommend facility design to minimize user conflicts.

- 5% G. Management of Lands
 - G1 Suppress wild fires to protect people & the resource.
 - G2 Ensure that boundaries are posted to inform the public of the limits of state land.
 - G3 Cooperate with other functions to maintain optimum availability of recreational resources.

- 3% H. Roles in Standing Teams
 - H1 Attends or send representative to all NEWROCKFISHPOT Subteam meetings. Appoint representative or attend all functional team meetings.
 - H2. Attend Regional Management Team meetings, or send representative when unable to attend.

- 2% I. Training and continued education³

4. Interviews were held on October 12 and 13, 1999. Respondent interviewed 11 candidates for the position (Exh. R-303). The top three candidates after interviews were Mr D. Kent Harrison, Mr. Ostrowski and Ms. Niah Venable (Exh. R-309). Respondent hired Ms. Venable to fill the position.

5. Mr. Harrison and Ms. Venable were on the certification list as eligible for interview as transfer candidates. Mr Ostrowski was on the certification list based on his performance on a competitive examination. Mr. Harrison was employed as the Assistant Park Superintendent at Potawatomi State Park in Sturgeon Bay (a position he has held since March

1986). He viewed the vacant position as more desirable in terms of prestige and career development because he would be in charge of the park rather than an assistant.

6. The interview panel included Bruce Chevis, Charles Fernandez and Jean Romback-Bartels. Mr. Chevis had more than 27 years of experience with DNR in the parks and in the forestry programs, including 21 years as the manager of North Kettle Moraine State Forest. Ms. Romback-Bartels was the Park Manager at Potowatomi State Park and would serve as the first-line supervisor of the person hired. Mr. Fernandez was a State of Wisconsin employee in the Department of Horticulture (in a position funded by the Department of Agriculture, Trade & Consumer Protection). Ms. Romback-Bartels asked Mr. Fernandez to participate on the interview panel because he was Hispanic and she was under the mistaken notion that Ms. Venable also was Hispanic. Ms. Romback-Bartels and her supervisor, Arnie Lindauer, had the authority to make the final selection decision.

7 The following chart shows the interview scores of the top 3 candidates based on the interviews (taken from Exh. R-309) as well as the results of the written exercise. All interviewers ranked Mr. Harrison as the #1 candidate for the position. The panel reached a consensus that Mr. Harrison was the most qualified candidate for the job.

<u>Candidate</u>	<u>Chevis</u>	<u>Fernandez</u>	<u>Romback-Bartels</u>	<u>Written Exercise</u>
Harrison	58	69	69	9.5
Ostrowski	52	63	60	8
Venable	51	59	66	7

8. Seven pre-prepared questions were asked of every candidate at the interview.⁴ Each candidate was asked at the end of the interview whether they had anything to add. Right after the interview, each candidate was given 20 minutes to write a response to a hypothetical letter of complaint. Question 2 had no benchmarks for the interviewers to use in assigning points to a candidate's answer. Question 1 (parts a and b) listed one benchmark apiece. Ques-

³ Goal I tasks are detailed in the PD but are not repeated here.

⁴ There were six numbered questions but question one had two parts bringing the total to seven.

tions 4 through 7 had more extensive benchmarks. Even where benchmarks existed, the interviewers were not given guidance on how to use the benchmarks to arrive at a numerical score.

9. Question 1a asked candidates to describe their educational background (5 point maximum). The scores for question 1a are shown below for the top 3 candidates.

Q1a - Education

	Chevis	Fernandez	R-Bartels	Total
Harrison	5	4	5	14
Ostrowski	5	5	4	14
Venable	3	4	4	11

The only benchmark for this question was law enforcement school yet all interviewers also awarded points for pertinent education, which may have been reasonable, but the fact remains that pertinent education was not a benchmark. Considering both law enforcement school and pertinent education, the scores for Mr. Harrison were reasonable from all scorers. All panelists should have rated Mr. Ostrowski higher than Ms. Venable because their formal education was roughly comparable yet he had law enforcement training and she did not. Ms. Rombach-Bartels testified at hearing that with the benefit of hindsight she should have given Ms. Venable a "3" instead of a "4."^A

10. Question 1b asked candidates to describe their work experience (5 point maximum). The scores for question 1b are shown below for the top 3 candidates.

Q1b - Experience

	Chevis	Fernandez	R-Bartels	Total
Harrison	5	5	5	15
Ostrowski	5	5	4	14
Venable	0	4	4	8

Supervisory experience was the *only* benchmark for this question. Mr. Chevis gave Ms. Venable zero points on this question noting on his scoring sheet that she lacked supervisory experience. His approach to scoring may have been reasonable, but he applied it inconsistently

^A The text of this paragraph was changed to clarify the nature of the error Ms. Rombach-Bartels made in scoring Mr. Ostrowski's and Ms. Venable's answers.

and to Mr Ostrowski's benefit. Like Ms. Venable, Mr. Ostrowski also lacked supervisory experience but had leadwork experience. Accordingly, Mr. Chevis should have given Mr. Ostrowski the same score as he gave Ms. Venable; a zero. Mr. Chevis testified that he knew Mr. Harrison and Mr. Ostrowski, that Mr Ostrowski's answers were brief and not as in-depth as Mr Harrison's and that Mr. Chevis tended to "fill in the missing information" from what he knew about the background of these two candidates. Ms. Romback-Bartels and Mr Fernandez gave points to candidates who had no supervisory experience. Ms. Romback-Bartels' equal scores for Ostrowski and Venable are suspect because Ms. Venable had less pertinent experience than Mr. Ostrowski. For example, Mr Ostrowski told interviewers he had 23 years of experience with DNR and Ms. Venable had less than 3 years of experience with DNR. Furthermore, Ms. Venable's work experience prior to working for DNR was not as impressive as Mr Ostrowski's work record at DNR. Ms. Romback-Bartels testified that she would not change these scores even with the benefit of hindsight but she did not explain why. If Ms. Romback-Bartels felt that Ms. Venable earned a score of 4, then Mr Ostrowski's score should have been a 5.^B

11. Question 2 asked candidates to describe their experience with "partnerships, friends groups, etc." (10 point maximum). The scores for question 2 are shown below for the top 3 candidates.

Q2 - Experience w/partnerships, etc.

	Chevis	Fernandez	R-Bartels	Total
Harrison	5	10	9	24
Ostrowski	5	7	7	19
Venable	3	7	8	18

The scores for Mr. Harrison were reasonable from all scorers. Mr. Chevis consistently used a lower total point system than did Mr. Fernandez and Ms. Romback-Bartels. Ms. Romback-Bartels gave Mr. Ostrowski one less point on this question than she gave Ms. Venable. Both had relevant experience. Ms. Venable discussed working with several groups whereas Mr

^B The text of this paragraph was changed to clarify the basis for concluding that Mr. Ostrowski should have received five less points from Mr. Chevis, and one additional point from Ms. Romback-Bartels.

Ostrowski noted working with only one group. Under these circumstances, the one-point difference from Rombach-Bartels was reasonable.

12. Question 3 asked candidates to describe the role of the subteam, basin, region and bureau with respect to a property manager (15 point maximum). The benchmarks were detailed. The scores for question 3 are shown below for the top 3 candidates.

Q3 - Roles Defined

	Chevis	Fernandez	R-Bartels	Total
Harrison	12	14	14	40
Ostrowski	8	10	10	28
Venable	15	12	12	39

The point spread between Mr. Ostrowski and the other top candidates was significant here. The scoring on this question was reasonable. All interviewers gave Ms. Venable a higher score than Mr. Ostrowski. Ms. Venable's preparation for the interview enabled her to answer this question well.

13. Question 4 asked candidates to explain the goals and strategies of respondent's strategic plan (15 point maximum). Detailed benchmarks were provided. The scores for question 4 are shown below for the top 3 candidates.

Q4 - Strategic Plan

	Chevis	Fernandez	R-Bartels	Total
Harrison	15	15	15	45
Ostrowski	10	12	12	34
Venable	12	12	12	36

The scores on this question were reasonable. Mr. Fernandez and Ms. Rombach-Bartels' scores for Mr. Ostrowski (12 points each) were higher than the score given by Mr. Chevis (10 points). Mr. Chevis admitted that he gave Mr. Ostrowski the advantage by "filling in the blanks" for his responses to interview questions. The fact that Mr. Chevis' score for Mr. Ostrowski on this question was lower than the scores given by the other interviewers supports the conclusion that all scores were reasonable.^c

^c The text of this paragraph was changed to clarify the point made.

14. Question 5 asked candidates to explain integration (10 point maximum). Detailed benchmarks were provided. The scores for question 5 are shown below for the top 3 candidates.

Q5 - Integration

	Chevis	Fernandez	R-Bartels	Total
Harrison	4	7	7	18
Ostrowski	4	9	8	21
Venable	8	9	10	27

The scores for this question were reasonable. Mr. Chevis, who tended to “fill in the blanks” for Mr. Harrison and Mr Ostrowski, gave Ms. Venable twice the score (8) as he did for Mr. Harrison and Mr Ostrowski (4’s). The scores given by Ms. Rombach-Bartels were comparable *in terms of ranking* to those given by the other interviewers. The scores she gave *in terms of numbers* were comparable to those given by Mr. Fernandez and were more favorable to all candidates than the scores given by Mr. Chevis.

15. Question 6 asked candidates to say what they knew about Whitefish Dunes State Park (14 point maximum). The scores for question 6 are shown below for the top 3 candidates.

Q6 - Knowledge of Whitefish Dunes

	Chevis	Fernandez	R-Bartels	Total
Harrison	12	14	14	40
Ostrowski	15	15	15	45
Venable	10	11	14	36

Mr. Ostrowski had worked (and was working) at Whitefish Dunes State Park. Ms. Venable had never worked at a state park and had never visited Whitefish Dunes. However, she gave extensive answers to this question based on her preparation for the interview, including obtaining information about the park off the internet. Mr Harrison had knowledge of the park based on his recreational use of the park and some work he had done at the park. The scores for this question were reasonable.

16. All questions asked at the interviews were job related. Questions 3 through 6 would tend to favor current employees who, through working at their jobs, could be exposed

to the knowledge necessary to answer the questions. Question 6 also would tend to favor individuals who used the park for recreation.

17 Ms. Romback-Bartels conducted reference checks for the top three candidates (Exh. R-311). She telephoned each person that the candidates gave as a reference. Two of **Mr. Harrison's** references were DNR employees and one was from the YMCA where Mr. Harrison had undertaken volunteer work. All references were favorable. **Ms. Venable** gave four references. One individual had worked with Ms. Venable and provided a good reference. Two individuals who gave good reports had not worked with Ms. Venable and were personal friends. The final individual had worked with Ms. Venable and gave a good reference, but indicated she did not know her well. All of **Mr. Ostrowski's** references were associated with Whitefish Dunes State Park in one fashion or another. His most recent supervisor (who had retired), without explanation, said he would rather not provide a reference if Mr. Ostrowski had other references. Since other references were given, he did not provide a reference. A second individual gave a mixed review noting Mr. Ostrowski's positives and then saying maybe he was too nice and that he handled employee problems pretty well but gets taken advantage of sometimes. The third individual gave a mixed review but the negative portion of this reference may have been due to Ms. Romback-Bartels' misunderstanding⁵ of what was said. Ms. Romback-Bartels reasonably concluded that Mr. Ostrowski's references were not as good as those given for the other top candidates.

18. The vacant position was in a job category that was underrepresented for females and minorities. Candidates Harrison and Ostrowski were white males. Candidate Venable was a female. Ms. Romback-Bartels was aware prior to the interviews that the position was underutilized for females and minorities. She did not share this information with the other interviewers.

19. Ms. Romback-Bartels went to her supervisor, Mr. Lindauer, to discuss the top three candidates. She expected that she would recommend Mr. Harrison for hire as the most qualified candidate.

⁵ The record does not support a conclusion that Ms. Romback-Bartels purposefully misconstrued what the individual said.

20. Mr. Lindauer and Ms. Romback-Bartels recommended that respondent hire Ms. Venable and respondent adopted their recommendation.

21. Ms. Venable was more qualified for the vacant position than Mr. Ostrowski based on their performance at the interview and based on reference checks.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §§230.44(1)(d) and 230.45(1)(a), Stats.

2. The appellant has the burden to show that respondent committed an illegal act or an abuse of discretion in not appointing him to the vacant Park Manager 2 position at Whitefish Dunes State Park. He has not met this burden.

OPINION

This is an appeal pursuant to §230.44(1)(d), Stats., the text of which is shown below in pertinent part:

(1) APPEALABLE ACTIONS AND STEPS (T)he following actions are appealable to the commission .(d) *Illegal action or an abuse of discretion*. 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.

The Commission has long held that the term “abuse of discretion” is defined as “a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence.” See, for example, *Lundeen v. DOA*, 79-208-PC, 6/3/81), *Paul v. DHSS & DMRS*, 82-156-PC, 6/9/86, *Royston v. DVA*, 88-0222-PC, 3/10/88 and *Kelley v. DILHR*, 93-0208-PC, 3/16/95. The question before the Commission is not whether it agrees or disagrees with the appointing authority’s decision, in the sense that the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather, it is a question of whether, on the basis of the facts and evidence presented, the decision of the appointing authority may be said to have been “clearly against reason and evidence.” See the *Royston* and *Paul* cases previously cited.

It appeared at hearing that Mr. Ostrowski argues that an abuse of discretion occurred because of claimed irregularities with the scoring of responses to the questions. Scoring irregularities are noted in ¶9 and ¶10 of the Findings of Fact (FOF). The scoring irregularity noted in ¶9 would have resulted in one less point for Ms. Venable. Two scoring irregularities were noted in ¶10, one by Mr. Chevis and one by Ms. Rombach-Bartels. If Mr. Chevis had applied the scoring methodology he used for Ms. Venable to Mr. Ostrowski, Mr. Ostrowski would have received five less points. Correcting for the error by Ms. Rombach-Bartels, Mr. Ostrowski would have received one additional point. Taking all the irregularities together, Mr. Ostrowski would have received four less points (-5 & +1 = -4) and Ms. Venable would have received one less point.^D

Mr. Ostrowski also appeared to argue that the lack of significant benchmarks for some questions and the failure to instruct interviewers how to apply numerical scores to the benchmarks constitute an abuse of discretion (see ¶8, FOF). The Commission rejects this contention where, as here, the interviewers appeared to be consistent in their method of scoring with few exceptions (noted in the prior paragraph) and the exceptions, overall, worked to the appellant's benefit.

Ms. Rombach-Bartels prepared question three (roles defined – see ¶12, FOF). She was asked at hearing to explain how the question was job related. She responded that it is important for a park manager to be a team player, which is enhanced when the park manager knows his/her responsibilities in the context of the supervisory hierarchy. She also explained that knowledge of the hierarchy would help the park manager know who to consult when he/she is in need of specific areas of expertise. She observed that a permanent employee in the parks program should be able to answer the question. Her explanations and observation were reasonable and were not refuted.

Mr. Lindauer prepared question 4 (strategic plan – see ¶13, FOF). He was asked to explain how the question was job related. He explained that it pertained to maintaining ecosystems. His explanation was reasonable and was not refuted.

^D The text of this paragraph was changed to reflect the changes made to paragraphs 9 and 10 of the Findings of Fact.

Mr. Ostrowski appeared to argue at hearing that questions 3 through 6 were improper because a candidate could obtain the required knowledge by preparing for the interview, as Ms. Venable did. The fact that candidates could obtain the knowledge required to answer the questions either from working in the parks or from other sources, such as the Internet, does not change the fact that the questions were related to duties of the vacant position. Varying sources of gaining the knowledge required to respond to a job-related question does not constitute an abuse of discretion.

The Commission concludes from the foregoing discussion, that the appellant failed to establish that an abuse of discretion occurred. He also failed to establish that he was entitled to appointment in the position vis-a-vis Mr. Harrison, the most qualified candidate for the job.

An illegality was found in regard to this hiring transaction with regard to Mr. Harrison (see Interim Decision and Order issued in *Harrison v. DNR*, 99-0112-PC, 8/28/00). Specifically, Mr. Harrison should have been hired for the position as the most qualified person yet Ms. Venable was hired because of her sex. This illegality did not exist in regard to the decision not to hire Mr. Ostrowski. Nor was any other argument of illegality apparent with regard to Mr. Ostrowski's case.

ORDER

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

Dated: September 20, 2000.

STATE PERSONNEL COMMISSION
Laurie R. McCallum/jrs
LAURIE R. McCALLUM, Chairperson

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Judy M. Rogers
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