

D. KENT HARRISON,
Appellant,

v.

**Secretary, DEPARTMENT OF NATURAL
RESOURCES,**

Respondent.

**INTERIM DECISION
AND ORDER**

Case No. 99-0112-PC

A proposed decision and order was issued to the parties on July 21, 2000. Neither party filed written objections. The Commission has consulted with the hearing examiner and agrees with her credibility assessments. Some changes were made for clarification or to provide additional information. Other changes were made to correct errors. All significant changes are explained in footnotes.

A hearing was held in the above-noted matter on May 23 and 24, 2000.¹ The parties chose not to present closing arguments² and 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

¹ Combined for hearing was this case and *Ostrowski v. DNR*, 99-0111-PC.

² This sentence was changed to add information.

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 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:

<u>Time</u>	<u>Description of Duties</u>
30%	A. Supervision of Employees ³
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.

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

- 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

- 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 administrating 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 education⁴

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.

⁴ Goal I tasks are detailed in the PD but are not repeated here.

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. Each candidate was asked the same set of questions at the interview. Right after the oral interview, each candidate was asked to write a response to a hypothetical letter of complaint. Each candidate was given a maximum of 20 minutes to complete the letter.

7 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 Potawatomi 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.

8. The following chart shows the interview scores of the top 3 candidates based on the interviews (taken from Exh. R-109), 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

9. Ms. Romback-Bartels conducted reference checks for the top three candidates. In her opinion, both Mr. Harrison and Ms. Venable received equally favorable reports.

10. 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.

11. 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. She also expected that Mr. Harrison might have to be "bypassed" due to affirmative action concerns. It was Ms. Romback-Bartels' understanding that, if a position were underrepresented for females or racial minorities, respondent was required to hire a candidate who was a female or racial minority even if that candidate was not the most qualified candidate or as qualified as the most qualified candidate. She understood the only exception would be if the decision-makers could demonstrate or "justify" that the female or minority candidate would not be qualified for the job within a year after he/she was hired. It was Mr. Lindauer's understanding that they were "heavily mandated" to consider affirmative action. He conceded that his decision to recommend Ms. Venable was "heavily weighted" by affirmative action concerns and that his input changed the recommendation from hiring Mr. Harrison to hiring Ms. Venable. His "only reservation" about Ms. Venable was whether she possessed the basic skills and knowledge to perform the duties of the position within a year. He asked Ms. Romback-Bartels and she said Ms. Venable had the qualifications to perform the duties of the position within a year.⁵

12. Mr. Lindauer and Ms. Romback-Bartels recommended that respondent hire Ms. Venable. They made this recommendation even though they were aware that the interview panel had identified Mr. Harrison as the most qualified person for the position. They were

⁵ This paragraph was changed to include Mr. Lindauer's understanding of affirmative action.

aware that Mr. Harrison had worked for respondent in the parks program for slightly over 20 years (since August 1979) whereas Ms. Venable had no experience in the parks program. She had worked for DNR for less than 3 years in the forestry program overseeing saw timber harvesting. They made the hiring recommendation even though they were aware that Mr. Harrison had experience in all aspects of the duties for the vacant position, whereas Ms. Venable had no experience performing 80% of the duties listed in the PD. They were aware that Ms. Venable had no experience performing the duties in goal A of the PD (30% of the position's time), no experience *in a park* performing the duties in goal B of the PD (20% of the position's time), no experience performing the duties in goal C of the PD (20% of the position's time) and no experience performing the duties of section D of the PD (10% of the position's time). They also were aware that Mr. Harrison had attained law enforcement credentials many years ago and had maintained his credentials, whereas Ms. Venable had no law enforcement credentials.

13. After Ms. Romaback-Bartels and Mr. Lindauer decided to recommend Ms. Venable for hire, one or both of them, prepared an "Applicant Flow Data Report" (Exh. R-310). The form indicates that Ms. Venable is white. The form recites the following explanation of why Ms. Venable was being recommended for hire:

Ms. Venable is currently working for the WIDNR, and therefore she has a great knowledge of the Department's goals and objectives. She has limited knowledge of the parks system, but has the ambition to learn the job quickly. She has a strong background in forestry, with job experience a degree in that field (sic). Ms. Venable is skilled in computers, customer service, budgeting, and partnerships. The interview performance was excellent. She came in prepared, knowing about the master plan, general features of the park and area, current issues within the DNR, and the organizational levels and duties of those levels in the DNR. The reference check and background investigation was (sic) highly successful. Ms. Venable is a highly intelligent and personable individual. Her communication skills are extensive and well versed.

14. The regional affirmative action designee who was responsible for this position was Marcia St. Louis. Her perception of affirmative action requirements was that if there is an affirmative action candidate who was competent and qualified for the job, respondent

encourages the decision makers to hire that candidate if that candidate “would fit in with the team” in terms of work ethic and reference checks. She further believed that if the decision makers decided not to hire an AA candidate, the decision makers would have to “justify” why the AA candidate could not do the job. Ms. St. Louis accepted the recommendation to hire Ms. Venable without question.

15. Ms. Venable was hired because of her sex. She was not as qualified for the position as Mr Harrison.

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 met this burden.

3. Respondent’s decision to appoint someone other than the appellant to the vacant Park Manager 2 position at Whitefish Dunes State Park was illegal.

OPINION

The respondent committed an illegal act when it hired Ms. Venable because of her sex when she was not as qualified for the vacant position as Mr Harrison. The Civil Service Code (Chapter 230, Stats.) requires that hiring decisions be based on a candidate’s qualifications for a position. Section 230.15(1), Stats., specifically provides that appointments in the classified service “shall be made only according to merit and fitness.” Section 230.18, Stats., specifically prohibits discrimination in the hiring process (“No discrimination may be exercised in the . hiring process against or in favor of any person because of the person’s sex ”).

It is true that hiring authorities must establish an affirmative action plan and must comply with the plan (§§230.06(g) & (h), Stats.) This does not mean, however, that a candidate must be hired because of a protected status (i.e., sex) when that person is not as

qualified for the vacancy as the most qualified candidate. In *Balele v. DHFS*, 99-0002-PC-ER, 07/12/00, the Commission stated as shown below:

A third argument raised in Mr. Balele's rehearing petition is whether respondent was "mandated to take affirmative action for the positions at issue" (see, pp. 3 & 6-7, of the rehearing petition). This line of argument, however, is based on Mr. Balele's apparent belief that if a position is underutilized for minorities then the hiring authority must hire a minority candidate even though the minority candidate is neither the most qualified individual for the position nor as qualified as the person hired. The Commission already has addressed and rejected this argument under similar facts presented in at least one other case filed by Mr. Balele (see *Balele v. UW System*, 98-0159-PC-ER, 10/20/99, p. 7).

In accord, *Byrne v. DOT & DMRS*, 92-0672-PC & 92-0152-PC-ER (9/8/93), affirmed *Byrne v. State Personnel Commission*, 93-CV-003874 (Dane County Cir. Ct. 8/15/94) ("Contrary to petitioner's assertion, an agency is not mandated by law to hire a person with a disability if the agency elects to use HEC⁶").

Both decision-makers unconvincingly testified that they would have hired Ms. Venable. They asserted that Mr. Harrison would not have been hired even if Ms. Venable had been a man because of her enthusiasm, ambition, the ability to get a point across and the amount of background preparation she did for the interview. Ms. Venable's exhibition of these qualities at the interview, however, already was considered during the interview and purportedly accounted for her high ranking despite her lack of experience in the parks program. Furthermore, Ms. Romback-Bartels' assertion that Mr. Harrison would not have been hired in any event directly conflicts with her testimony that he was the most qualified candidate and that she went to Mr. Lindauer's office with the intention of recommending Mr. Harrison for hire.

Mr. Lindauer testified that he would not have hired Mr. Harrison for the position because of his prior experience working with Mr. Harrison. Mr. Lindauer was the manager of the Potawatomi State Park from 1981 until he was promoted in December 1996. Mr. Harrison

⁶ "HEC" is an acronym for "handicapped expanded certification." The current statutory provision is §230.25(1n), Stats.

was the assistant manager starting in March 1986. The two worked together from March 1986, until Mr. Harrison was promoted (about 10-3/4 years).

Mr. Lindauer testified that Mr. Harrison had said he was content working as the assistant park manager and would not want the headaches of being a park manager. Mr. Harrison⁷ conceded that he might have said words to this effect in 1987. But later Mr. Harrison told Mr. Lindauer that he wanted to be the manager of a park in Newport where the manager was expected to retire. Since that time, Mr. Harrison competed for the park manager position in Newport (1997) and for the vacancy at Whitefish Dunes (1999). It should have been evident that Mr. Harrison's career plans had changed. It was unreasonable for Mr. Lindauer under these circumstances to hold a statement made 12 years before the vacancy at Whitefish Dunes against Mr. Harrison as a reason for not hiring him.

Mr. Lindauer testified that park managers must be willing to put up with supervision of difficult employees and that shortly after Mr. Harrison started at Potowatomi he told Mr. Lindauer that he did not wish to supervise MH⁸, a problem employee. Mr. Harrison denied ever supervising MH and ever asking Mr. Lindauer⁹ to take on the supervision of any problem employee. This factual dispute was resolved in the appellant's favor based on the credible testimony of Mr. Harrison¹⁰ and Milton Lenius. Mr. Lenius worked at Potowatomi when MH was scheduled to start working there; at which time, Mr. Lindauer was the park manager and Mr. Paul Sangler was the assistant park manager. Mr. Lenius was part of a discussion about MH before MH came to the park. During this discussion, Mr. Lindauer said he would supervise MH because he did not think it was fair to put "this problem" on others. Mr. Harrison took the position as the assistant park manager shortly after MH came to the park. It does not appear likely that Mr. Lindauer would transfer the supervision of MH to Mr. Harrison, a newcomer, when he did not have Mr. Sangler supervise her.¹¹

⁷ This sentence was changed to correct an error.

⁸ The initials of this employee are used in this decision instead of the full name.

⁹ This sentence was changed to correct an error.

¹⁰ In cross-examination by respondent's attorney, Mr. Harrison was candid about issues with other problem employees. This honesty contributed to the finding that he was a credible witness.

¹¹ Mr. Harrison testified before Mr. Lindauer. Respondent's attorney was allowed to ask questions about other problems with subordinates with the understanding that such problems would not be

Respondent's hiring decision violated §§230.15(1) & 230.18, Stats., and, accordingly, constitutes an illegal act within the meaning of §230.44(1)(d), Stats. *In accord, Paul v. DHSS & DMRS*, 82-156-PC & 82-PC-ER-69, 6/19/86. ("But for the illegal action of certifying Mr Young's name as eligible for appointment, Mr. Young could not have been selected for appointment . . . Therefore, the decision of DHSS to appoint Mr Young to the ISD-1 position at MMHI was also illegal.").

The Commission now turns to the question of remedy. Mr Harrison competed for the position as a transfer candidate and, accordingly, there is no entitlement to back pay for lost wages as he would not have received a raise if he had been hired. Even if an argument could be made that he has lost pay in a some fashion, the Commission lacks authority to award back pay in this appeal, *Seep v. Personnel Commission*, 140 Wis.2d 32, 41-42,409 N.W.2d 143 (Ct. App., 1987).

The Commission also lacks authority to order respondent to place Mr. Harrison in the Park Manager 2 position at Whitefish Dunes State Park. As explained in *Zebell v. DILHR*, 90-0017-PC, 10/4/90:

In *Pearson v. UW.*, Case No. 84-0219-PC, 99/16/85; aff'd by Dane County Circuit Court, *Pearson v. UW & Per. Comm.*, 85-CV-5312 (6/225/86); aff'd by Court of Appeals District IV, 86-1449 (3/5/87), the Commission held that in a successful appeal under §230.44(1)(d), Stats., it lacked the authority to remove an incumbent (see §230.44(4)(d), Stats.) but ordered the respondent to "appoint the appellant, if still qualified, to the disputed position (or comparable promotional position) upon its next vacancy "

The current text of §230.44(4)(d), Stats., also does not allow the Commission to remove Ms. Venable from the contested position. The remedy is appointment to the next available comparable position (manager of a park) in a geographic area acceptable to the appellant, as well as a cease-and-desist order.

considered by the decision-makers if there was no later "tied in" to the hiring decision. Mr. Lindauer mentioned as a reason for not hiring Mr. Harrison, the situation about "MH." He did not mention the situation about other employees. Accordingly, Mr. Harrison's testimony about other subordinates was not "tied in" to the hiring decision and was not considered here. (The wording was changed in this footnote for clarification.)

The appellant also is entitled to seek an award of attorney fees and costs pursuant to §227.485, Stats. The Commission will reserve jurisdiction to entertain a motion for such costs.¹²

ORDER

Respondent's decision is rejected. Respondent is ordered to cease and desist from discriminating against appellant as occurred here if he becomes an applicant for a position with respondent in the future.¹³ This matter is remanded for action in accordance with this decision. The Commission will retain jurisdiction to consider a request for fees and costs.

Dated: August 28, 2000.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

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¹² The prior footnote here was deleted as no longer necessary. The word "seek" was added to the first sentence. The change was made to avoid any impression that the Commission already has determined that complainant is entitled to an award of fees and costs.

¹³ The first sentence of the order was changed because it was overly restrictive. The new sentence is stated in more general terms to give the parties greater latitude to effectuate the intent of this decision.