

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

---

**ALLEN BEDYNEK-STUMM**, Appellant,

v.

**Executive Director, BOARD ON AGING AND LONG TERM CARE**, Respondent.

Case 1

No. 62940

PA(sel) – 5

Formerly Case No. 03-0017-PC

**Decision No. 31295**

---

**Appearances:**

**Allen Bedynek-Stumm**, P.O. Box 44771, Madison, Wisconsin 53744, appearing on his own behalf.

**Mark Saunders**, Deputy Legal Counsel, Department of Administration, P.O. Box 7864, Madison, Wisconsin 53707-7864, appearing on behalf of the Board on Aging and Long Term Care.

**FINAL DECISION AND ORDER**

In April 2003 Appellant Allen Bedynek-Stumm filed a timely appeal of the decision not to select him to fill a vacant Clerical Assistant 2 position in the Bureau on Aging and Long Term Care (BOALTC), invoking jurisdiction under Sec. 230.44(1)(d), Stats. Mr. Bedynek-Stumm simultaneously filed a complaint of discrimination based on age, arrest/conviction record, race and sex as well as illegal retaliation arising from the same transaction. He filed both claims with the Wisconsin Personnel Commission which assigned Case No. 03-0017-PC to the civil service appeal and Case No. 03-0055-PC-ER to the discrimination/retaliation complaint. Before a hearing was conducted and while both matters were still pending, the Personnel Commission was abolished, effective July 26, 2003, pursuant to the provisions of 2003 Wisconsin Act 33, and the authority to process this appeal was transferred to the Wisconsin Employment Relations Commission (the Commission). The same legislation transferred the responsibility for processing the complaint of discrimination/retaliation to the Equal Rights Division of the Department of Workforce Development where it was assigned a new case number. Commissioner Susan J. M. Bauman was designated as the hearing examiner over the appeal and presided over a contested case hearing held on June 25, 2004 at the Commission's office in Madison, Wisconsin. A post-hearing briefing schedule was

Dec. No. 31295

established and the parties requested copies of the hearing tapes. The examiner initially concluded that one of the tapes had either not recorded properly or was missing and so advised the parties. On August 3, 2004, Appellant filed a motion requesting that the testimony of George Potaracke, David Cauffman and Terry Kraus be retaken. Respondent filed a response. The examiner denied the motion on August 25, 2004 but provided her hearing notes to the parties in lieu of the missing tape. The tape was later located, the parties received copies thereof and the examiner established a revised briefing schedule. The last brief was received on February 11, 2005 and the record was closed at that time.

The hearing examiner issued a proposed decision on March 30, 2005. Appellant requested oral argument and asked that Commissioner Bauman be recused from further participation in the case. The Commission denied Appellant's oral argument request but granted him an opportunity to supplement his written submission. The final date for submitting a written response was June 27, 2005.

At a prehearing conference, the parties agreed to the following statement of issue for hearing:

Whether respondent's decision to not hire petitioner for the Clerical Assistant 2 position was illegal or an abuse of discretion.

Being fully advised in the premises, the Commission now makes the following Findings of Fact, Conclusions of Law and Order.

### **FINDINGS OF FACT**

1. The Board on Aging and Long Term Care, hereinafter BOALTC, is an independent agency of the State of Wisconsin that is attached to the Department of Administration (DOA) for administrative purposes pursuant to Sec. 15.105(10), Stats. BOALTC's mission is to advocate for the interests of the state's citizens in need of long-term care by stimulating public interest and providing education regarding universal issues affecting long term care. BOALTC operates a long term care ombudsman program and a Medigap Helpline. It also provides advice to the Governor and the legislature on public policy as it relates to long term care.

2. BOALTC had a vacancy in a half-time Clerical Assistant 2 position in January 2003. The position is funded by the Wisconsin Senior Employment Program (WSEP) that is administered by the Wisconsin Department of Health and Family Services. Only persons who fall below a specified level of income and who are at least 55 years old satisfy the federal grant requirements and may be employed in the position. George Potaracke, BOALTC's Executive Director, initiated the process to fill the vacancy by submitting a "Request to Staff Position" form to DOA's human resource unit. The federal guidelines for the position are designed, in part, to develop job skills necessary for low income persons over 55 who are re-entering the workforce and need job training or updating of their skills. Terry Kraus, a Human Resources Specialist - Senior with DOA, was assigned to work with BOALTC to fill the position.

3. Mr. Kraus posted a job announcement on DOA's employment website. In pertinent part, the announcement read as follows:

**Job Duties:**

Provide primary program support to the central office staff of the BOALTC. Organize and maintain all publications to be distributed by the agency. Coordinate outgoing mail for the office. Provide assistance to staff on in-house and external photocopying. Provide ongoing program support for supervisory and professional staff.

**Job Knowledge:**

SPECIAL NOTES: This position is funded by the Wisconsin Senior Employment Program. Federal requirements are that the person selected must be 55 years of age or older and have annual income for the twelve month period prior to application at or below the following: Family size, one person - \$11,075; two persons - \$14,925; three persons - \$18,775; Each additional family member, add \$3,850. KNOWLEDGE, SKILLS AND ABILITIES REQUIRED to follow modern office practices and procedures; record maintenance; file management; and telephone courtesy.

4. Mr. Kraus developed an "Objective Inventory Questionnaire" to serve as the examination for any applicants. The application deadline was March 11, 2003. Appellant and Janet Josvai, who was ultimately hired, were the only two applicants.

5. The submissions indicated Ms. Josvai was born on April 19, 1943, while Appellant, a non-disabled veteran, was born on April 17, 1935.

6. Mr. Kraus examined the applicants' responses to the questionnaire and prepared a register reflecting his conclusion that both applicants had met the minimum requirements. On March 12, 2003, after preparing a certification list from the register, Kraus sent the certification list to Mr. Potaracke. The list showed only the names and addresses for Appellant and Ms. Josvai. It did not include any indication of the applicants' precise age, date of birth, military service or race. Mr. Kraus also provided Mr. Potaracke with suggested procedures for developing interview questions and assembling an interview panel so that BOALTC could make its selection decision.

7. Mr. Potaracke interviewed both applicants on Wednesday, March 26, 2003 at the BOALTC offices. David E. Cauffman, BOALTC's Office Manager, was present during both interviews as an observer. The applicants were asked to appear 15 minutes in advance of the actual interview and were provided a copy of the questions so they could prepare. One-half hour was scheduled for each interview, with 15 minutes between. Mr. Potaracke took notes during the interviews, but only of information he considered important. The interview

questions along with Mr. Potaracke's notes relating to the responses of the Appellant (in bold) and Ms. Josvai (in italics) read:

Please describe for us your work history, the types of jobs you have held and the work that you have performed.

**(A B-S) Educator/Referral Consultant**

*(JJ) MS in Labor – reference librarian./State Hist. Society. Recently freelancing for publishers.*

A major portion of this job is organizing and maintaining our publications. This involves keeping an inventory of existing supplies, timely ordering and keeping the mail area neat and accessible for other staff. Describe your experience performing these kinds of activities.

**(A B-S) [blank]**

*(JJ) Claims to be highly organized. Described detail work with libraries.*

This position requires basic knowledge of a computer to generate mailing labels, memos, letters and to notate telephone calls. What kind of computer experience do you have, if any? Are you familiar with WORD? Outlook (email)? Any other applications?

**(A B-S) [blank]**

*(JJ) Word / Has strong basic skills. Will need re-orientation.*

Please describe your familiarity with basic office machines such as photocopiers, faxes or printers?

**(A B-S) [blank]**

*(JJ) Yes*

What kind of training do you think you will need to successfully perform the duties of this position?

**(A B-S) [blank]**

*(JJ) Understanding work rules / office procedures*

What attracts you to seek work at the Board on Aging and Long Term Care?

**(A B-S) [blank]**

*(JJ) A first step toward re-entering work-world-perfect for Title 5.*

Do you have any questions regarding this position or the Board?

**(A B-S) [blank]**

*(JJ) [blank]*

If selected when would you be able to begin employment with us?

**(A B-S) [blank]**

*(JJ) 2 weeks*

In addition, the following notations were made at the bottom of the question sheets:

Grant Requirements:

Low income?

(A B-S) Yes

(JJ) Yes

Over 55[?]

(A B-S) Yes

(JJ) Yes

Anything in your present situation to prevent you working a 20/hr/wk job?

(A B-S) No

(JJ) No

[Additional notes]

(A B-S) **Has strong professional background. Clerical support position may not be appropriate.**

(JJ) *Seeking to polish clerical skills.*

8. During the course of interviewing Appellant, Mr. Potaracke made a comment to the effect that he (Appellant) might be overqualified and asked him when he was last employed. However, he did not ask if Appellant had “any warrants?” Mr. Potaracke similarly asked Ms. Josvai about the date of her most recent employment.

9. By letter dated March 27, 2003, Mr. Potaracke advised Ms. Josvai that she had been selected for the Clerical Assistant 2 - 50% position, effective April 21, 2003.

10. In his March 31<sup>st</sup> rejection letter to Appellant, Mr. Potaracke wrote, in part:

Unfortunately I am not able to offer you the position. I am obligated to select the person who will benefit the most from the work experience which will prepare that individual for work outside Title 5.

11. On April 14, 2003, Mr. Kraus completed a form denominated “Written Hiring Reason for Classified and Project Appointment” on which he noted that Ms. Josvai was the “[m]ost qualified of those interviewed.” The form allowed Kraus to choose between five options as “the most significant reason” for selecting Ms. Josvai. Kraus indicated the successful candidate had “greater or more relevant experience for performing the duties” of the position, rather than that she had previously served in the position or a similar position, had superior relevant education and/or training, had demonstrated superior ability to perform the key tasks required, or had more favorable recommendations. Mr. Potaracke agreed with the information found on the form.

12. Respondent’s decision to hire Ms. Josvai, rather than Appellant, was based on Mr. Potaracke’s understanding of the position’s responsibilities, the requirements of Title 5 of the Older Americans Act, and the relative qualifications of the applicants.

**CONCLUSIONS OF LAW**

1. The Appellant has failed to establish adequate grounds for disqualifying Commissioner Bauman.

2. This matter is appropriately before the Commission pursuant to Sec. 230.44(1)(d), Stats.

3. The Commission lacks the authority to determine whether Respondent violated the Older Americans Act or the Wisconsin Fair Employment Act when it failed to hire Appellant.

4. Appellant has the burden of proof to establish by a preponderance of the evidence that Respondent's action of not hiring him for the Clerical Assistant 2 position was illegal or an abuse of discretion.

5. Appellant has failed to sustain his burden of proof.

6. Respondent's decision not to hire the Appellant was neither illegal nor an abuse of discretion.

**ORDER**

Appellant's request to recuse Commissioner Bauman is denied, Respondent's decision not to select the Appellant is affirmed and this case is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 10<sup>th</sup> day of August, 2005.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

Judith Neumann /s/

---

Judith Neumann, Chair

Paul Gordon /s/

---

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

---

Susan J. M. Bauman, Commissioner

Parties:

Allen Bedynek-Stumm  
P.O. Box 44771  
Madison, WI 53744

George Potaracke  
Executive Director, BOALTC  
1402 Pankratz Street, Suite 111  
Madison, WI 53704-4001

**Allen Bednyek-Stumm v. Bureau on Aging and Long Term Care**

**MEMORANDUM**

This matter is before the Commission on Appellant's contention that the failure of the Respondent, Bureau on Aging and Long Term Care (BOALTC), to hire him as a Clerical Assistant 2 was illegal or an abuse of discretion. The Commission's authority to review the matter is found in Sec. 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.

This authority is specifically limited to reviewing those personnel actions that are taken after the names of eligible candidates have been forwarded, via a certification list,<sup>1</sup> to an appointing authority for making a selection decision.

**Alleged Illegality**

As indicated above, Mr. Bednyek-Stumm filed claims with the Wisconsin Personnel Commission as both an appeal, based on Sec. 230.44(1)(d), Stats., and as a complaint of discrimination/retaliation under the Wisconsin Fair Employment Act (WFEA), subch. II, ch. 111, Stats. Although acknowledging that his discrimination complaint under the WFEA was/is properly pending before the Equal Rights Division of the Department of Workforce Development, Appellant has continued to argue that the failure to hire him was illegal because it was based on his age or his gender in violation of the WFEA. As the WERC does not have jurisdiction over discrimination cases under WFEA, we cannot consider this claim as a basis for determining that the Respondent engaged in an illegal action.

The Appellant also contends the hiring decision should be rejected because Respondent engaged in illegal activity when Mr. Potaracke allegedly committed perjury<sup>2</sup> at the administrative hearing held on June 25, 2004. Even if Respondent's agent committed perjury

---

<sup>1</sup> As explained in some depth in DEPT. OF TRANSPORTATION (GOGGIN), DEC. NO. 31153 (WERC, 11/23/04): [T]he reference to "after certification" is to a point in the hiring process that differentiates the authority of the Administrator of the Division of Merit Recruitment and Selection (DMRS) to provide the appointing authority with a list of candidates to be considered for hire, from the authority vested with the employing agency to make a selection decision. (footnote omitted)

<sup>2</sup> According to STATE V. MUNZ, 198 WIS. 2D 379, 541 N.W.2D 821 (CT. APP. 1995), the State must prove the following elements in order to convict someone of perjury: (1) that the person made a statement under oath (2) that was false, (3) that the person knew was false when he or she made it (4) in a legal proceeding, and (5) that the statement was material to the proceeding.

at that time,<sup>3</sup> it clearly post-dated the decision not to select Appellant for the vacant Clerical Assistant 2 position. Accordingly, Appellant's claim of perjury cannot form the basis for concluding that Respondent engaged in illegal action by failing to hire Appellant.

Appellant contends that Respondent violated the Older Americans Act (OAA) by its failure to afford Appellant the position despite the fact that he was over 60 at the time he submitted his application. Appellant contends that because the successful applicant was not over 60 years of age, he should have been hired instead. Appellant relies upon 20 CFR 641.306 which reads as follows:

Sec. 641.306 enrollment priorities.

(a) As set forth in sections 502(b) (1) (M) and 507 (1) of the OAA, enrollment priorities for filling all positions shall be as follows:

- (1) Eligible individuals with the greatest economic need;
- (2) Eligible individuals who are 60 years old or older; and
- (3) Eligible individuals who seek re-enrollment following termination of an unsubsidized job through no fault of their own or due to illness, provided that re-enrollment is sought within one year of termination,

(b) Within all re-enrollment priorities, those persons with poor employment prospects shall be given preference.

(c) Enrollment priorities established in this section shall apply to all vacant community service positions, but shall not be interpreted to require the termination of any eligible enrollee. The priorities do not apply to the experimental private sector projects authorized by section 502(e) of the OAA.

Appellant contends that inasmuch as he was over 60 at the time, Respondent was precluded from hiring Ms. Josvai. Appellant construes the meaning of priority, as that term is used in s. 641.306(a)(2), to mean that he had to be hired before Josvai, regardless of any other factors.

The WERC, like those administrative agencies that formerly were responsible for hearing appeals of State civil service decisions, is an agency of limited jurisdiction as set forth in the statutes, and its jurisdiction does not encompass consideration of questions that are of federal concern. *BRANDSTEDTER V. DHSS & BUREAU OF PERSONNEL*, CASE NO. 77-32 (PERS. BD., 6/16/78):

The appellant has argued that the respondent's failure to apply veterans points to his examination score is in violation of state and federal laws, federal guidelines, and contracts between the state and the federal government. While the Board has jurisdiction to determine whether state law requires the

---

<sup>3</sup> We further discuss Appellant's contention that Respondent's agent perjured himself later in this memorandum.

respondent to apply veterans points in the present case, it does not have jurisdiction to determine whether this application of points is required by federal laws or guidelines. Nor does the Board have jurisdiction to interpret contracts between the state and a federal agency to determine whether these agreements require the application of the points.

The OAA is not within the Commission's jurisdiction. Therefore, our decision does not address this contention. *COX v. DER*, CASE NO. 92-0806-PC (PERS. COMM., 11/3/94)<sup>4</sup> (efforts by the appellant to be granted protected occupation status in the state retirement program pursuant to Ch. 40, Stats., was outside the review authority granted under Sec. 230.44). We lack the authority to interpret the Older Americans Act and the related federal regulations to ascertain whether Respondent acted illegally in failing to hire Appellant when he was over 60 and Ms. Josvai was not.<sup>5</sup>

Appellant's remaining contention of illegal action by Respondent is that his status as a veteran provided him with preference points that rendered him the highest ranking candidate and, therefore, should have resulted in his hire. Appellant misreads the statutory provisions relating to the application of veterans preference points which merely make it more likely that veterans on an employment register will be among those candidates on a certification list provided to the employing agency for hiring consideration. As provided in Sec. 230.16(7), Stats.:

(a) A preference shall be given to those veterans . . . who gain eligibility on any competitive employment register and who do not currently hold a permanent appointment or have mandatory restoration rights to a permanent appointment to any position. A preference means the following:

1. For a veteran, that 10 points shall be added to his or her grade. . . .

---

<sup>4</sup> Also see *PETTAWAY v. DPI*, CASE NO. 01-0013-PC (PERS. COMM. 9/23/01) (a 230.44(1)(d) appeal of a non-selection decision does not encompass an alleged violation of the Americans with Disabilities Act during the course of the interview).

<sup>5</sup> We note that 20 CFR 641.324 describes, at least in general terms, a separate procedure for "Enrollee and applicant complaint resolution":

(a) Each grantee shall establish and describe in the grant agreement procedures for resolving complaints, other than those described by paragraph (c) of this section, arising between the grantee [herein Respondent] and an enrollee [herein Appellant].

(b) Allegations of violations of federal law, other than those described in paragraph (c) of this sections, which cannot be resolved within 60 days as a result of the grantee's procedures, may be filed with the Chief, Division of Older Worker Programs, Employment and Training Administration, U.S. Department of Labor, Washington, DC 20210.

(c) Grantees that do not receive any funds under the JTPA shall process complaints of discrimination in accordance with 29 CFR parts 31 and 32. Grantees that receive any funds under JPTA shall process complaints of discrimination in accordance with 29 CFR part 34.

(d) Except for complaints described in paragraphs (b) and (c) of this section, the Department shall limit its review to determining whether the grantee's appeal procedures were followed.

The State Civil Service Code, as found in both subch. II, ch. 230, Stats., and the administrative rules promulgated by the Office of State Employment Relations (OSER) and the Division of Merit Recruitment and Selection (DMRS), delineates various steps that ultimately result in a hiring decision. It differentiates the examination process, which generates an employment register, from the certification list<sup>6</sup> that is supplied to the appointing authority and from which an appointment decision is made. *POSTLER V. WIS. PERS. COMM., ET AL, DANE COUNTY CIRCUIT COURT, 95CV003178, 10/9/96; AFFIRMED BY COURT OF APPEALS, POSTLER V. WIS. PERS. COMM., 96-3350, 1/27/98* (the criteria applied as part of the competitive examination process described in Sec. 230.16, Stats., apply only to the point of developing the certification list, and the subsequent selection decision need only be based on criteria that are reasonably related to the responsibilities of the position). Here, there were only two applicants and the examination consisted of an Objective Inventory Questionnaire that reflected the applicant's experience performing a variety of clerical tasks. Both applicants passed the examination and both were on the certification list that was sent to the appointing authority. The list only included the candidates' names and addresses without any other description of their score or rank. In fact, in his cover memo to the certification list, Mr. Kraus specifically notified Mr. Potaracke that "[a]ll certified candidates must be given equal employment consideration."<sup>7</sup>

The role of veterans' preference points is to add qualifying applicants to certification lists so that, during the appointing authority's selection process, the veterans may be considered on the same footing as the candidates who appear on the list based solely on their examination score. Veterans' points come into play only during the examination process, prior to the certification. *NOWACKI V. DOT, 75-125 (PERS. BD., 12/12/77)*. The underlying facts in *NOWACKI* are comparable to those in the present matter. Mr. Nowacki was a disabled veteran and one of only three applicants to participate in the examination for a Real Estate Agent 2-Trainee position. All three candidates were on the certification list provided to the

---

<sup>6</sup> The certification process, including the role of veterans preference points that are awarded under Sec. 230.16(7), Stats., is described in Sec. 230.25, Stats., as follows:

(1) Appointing authorities shall give written notice to the administrator of any vacancy to be filled in any position in the classified service. The administrator shall certify, under this subchapter and the rules of the administrator, from the register of eligibles appropriate for the kind and type of employment, the grade and class in which the position is classified, any number of names at the head thereof. In determining the number of names to certify, the administrator shall use statistical methods and personnel management principles that are designed to maximize the number of certified names that are appropriate for filling the specific position vacancy. . . . Certification under this subsection shall be made before granting any preference under s. 230.16(7). . . .

(1m) After certifying names under sub. (1), additional names shall be certified in rank order of those who with the combination of veterans points awarded under s. 230.16(7) and examination score earn a total score equal to or higher than the lowest score of those certified on the basis of examination only. . . .

<sup>7</sup> *THOMPSON V. DMRS & DNR, CASE NO. 87-0204-PC (PERS. COMM. 4/28/89)* (the policy not to supply examination scores and rankings with the names of the candidates does not violate the civil service code).

appointing authority despite the fact that Nowacki had not received the 10 veterans' preference points to which he was entitled under the law at the time. All three candidates were interviewed and Nowacki, just like Mr. Bedynek-Stumm, was not the one selected. The Personnel Board held that the failure to award and use the veterans' preference "was, at most, harmless error because the appellant was certified [as] eligible and interviewed for the position despite the failure to award such a preference."

Preference points that are granted to a qualifying veteran as part of the examination process do not transfer to the appointing authority's selection process and do not require the appointing authority to hire the veteran. It is entirely possible that an individual entitled to and receiving veterans' preference will not be the successful candidate, for the same reason that any candidate who receives the most points through the examination process has no entitlement to the position. *WILTERDINK V. DOR*, CASE No. 85-0072-PC (PERS. COMM. 2/6/86).

We find that Respondent did not violate Sec. 230.16(7) when it did not take veterans' preference points into consideration in evaluating Appellant and Ms. Josvai for the vacant position.

As we do not have jurisdiction with respect to his WFEA and OAA claims, and we have found the claim of illegality with respect to veterans preference to be without merit and the perjury allegation to relate to events after those giving rise to this proceeding, we reject Appellant's claim of illegal action relating to Respondent's hiring decision.

### **Abuse of Discretion**

We turn next to an analysis of Respondent's action to determine whether the non-selection of Appellant Bedynek-Stumm was an abuse of discretion. In *DEPARTMENT OF CORRECTIONS (ZEILER)*, DECISION No. 31107-A (WERC, 12/7/04), the Commission applied the following interpretation of "abuse of discretion":

An "abuse of discretion" is "a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." 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. (citations omitted)

As a general matter, when determining whether an abuse of discretion occurred in the context of a hiring decision, the Commission considers whether the selection criteria used by the appointing authority were related to the duties and responsibilities of the position and whether the criteria were uniformly applied. *ROYSTON V. DVA*, CASE No. 86-0222-PC (PERS. COMM.

5/10/88), JORGENSEN V. DOT, CASE NO. 90-0298-PC (PERS. COMM. 6/12/91). SEE ALSO, ROSENBAUER V. UW-MILWAUKEE, CASE NO. 91-0071-PC-ER & 91-0086-PC (PERS. COMM. 9/24/93)

Neither the pleadings nor the briefs filed by Appellant in this matter clearly identify the bases for his contention that Respondent abused its discretion when Mr. Potaracke failed to select him for the vacant position. It appears that Appellant claims he was not asked five of the questions posed to Ms. Josvai. It also appears that Appellant contends Potaracke made comments or asked him questions that reflected reliance on factors unrelated to Appellant's ability to perform the duties of the position. According to Appellant, Potaracke commented/asked: 1) "you're overqualified . . . you had high powered positions in the past"; 2) "any warrants?"; and 3) "when did you retire?" Inasmuch as we have found that Respondent's failure to hire Appellant based on his age and veteran status were not illegal acts, and Respondent exercised discretion to select the somewhat younger candidate who was not a veteran, we will also review whether the failure to hire Appellant on these bases would constitute an abuse of discretion.

Mr. Potaracke, with Mr. Cauffman present as an observer, conducted each interview. Mr. Potaracke relied on a printed set of questions and jotted down notes when he considered a response pertinent to the information he sought. The question sheet from Appellant's interview lacks any notes for five of the first six questions. In contrast, Mr. Potaracke took notes about Ms. Josvai's responses to every one of the first six questions and the notes reflect information that is generally relevant to the question. We credit Mr. Potaracke's testimony that he posed all of the questions to both applicants and that Appellant's responses to these particular questions were not relevant so he (Mr. Potaracke) did not make any notations. Mr. Potaracke's testimony is supported by other notations on Appellant's question sheet that reflect reasonably relevant responses for some of the other questions. In addition, Ms. Josvai's question sheet is blank for the seventh question, which would be consistent with the conclusion that she lacked a relevant response to that question. The Commission believes it is highly unlikely that the various blanks on the two question sheets would reflect a failure to ask questions rather than merely the absence of a relevant response.

Appellant contends that Mr. Potaracke asked questions and made the following comments that were inappropriate: 1) "you're overqualified. . .you had high-powered positions in the past"; 2) "any warrants?"; and 3) "when did you retire?" Potaracke denies asking these specific questions of Appellant, and Mr. Cauffman, who was present throughout the interview as an observer, had no recollection of anything relating to the interviews. While perhaps he did not use exactly those words that Appellant has attributed to him, we find it more likely than not that Mr. Potaracke commented to the effect that Appellant appeared to be overqualified for a clerical position in light of his previous employment, which included serving as an Employment Examiner for the U.S. Office of Personnel Management; as a Lecturer for the Department of Psychology, University of Wisconsin-Madison, Campus Extension Services; Director of Pupil Services and Special Education; and several other

instructor and teacher positions involving special education. However, even if Mr. Potaracke commented to Appellant about the professional nature of his prior employment, the question remains whether it is an abuse of discretion not to hire a candidate if the decision is based, at least in part, on the conclusion that the candidate is overqualified for the position. Appellant appears to take the view that the answer to this question is self-evident. The Commission disagrees. Respondent would not be acting “clearly against reason and evidence” if its hiring decision, at least in part, was based on an expectation that an overqualified applicant would only briefly remain in the position if hired, or an expectation that the overqualified candidate would not encounter the same barriers to reentering the work force as a woman over 55 who did not have experience filling “high-powered” positions.

We also find that Mr. Potaracke questioned Appellant about when he was last actively employed, although we do not find that the specific question asked was “When did you retire?” Potaracke acknowledged that he asked Appellant when he was last employed, in order to determine how long Appellant had been out of the work force and how old his skills would be. Potaracke asked a similar question of Ms. Josvai for the same reason. These questions were relevant to the specified goal of developing necessary job skills for persons seeking to re-enter the work force.

We find Mr. Potaracke’s testimony that he did not ask Appellant if he had “Any warrants?” to be credible. We base this, in part, on the notes that Appellant wrote on the reverse side of the letter scheduling him for an interview (Exhibit A-9). Appellant’s notations on that page, probably written soon after his interview, indicate that Potaracke stated/asked the following:

“overqualified” because of “previous high-powered positions you held.”  
“when did you retire?”  
“ . . . essentially after employment examiner?”<sup>8</sup>

These notes do not include any reference to an inquiry or statement about warrants, arrest record or criminal record.

As noted above, Mr. Potaracke denied making any of the three alleged comments. Appellant contends that by denying the comments while under oath, Mr. Potaracke committed “perjury.” We are not persuaded that Mr. Potaracke made the comments in precisely the words that Appellant claims but find that he made comments Appellant may have interpreted as questioning whether Appellant was overqualified for the position and when he was last employed. We find the nature of the inquiry to be appropriate for the position sought and, further, find that Respondent did not abuse its discretion in the non-selection of Appellant based upon this inquiry.

---

<sup>8</sup> We also note that Appellant’s notes indicate “not per se” which we interpret as indicating Appellant’s description was something less than an exact quotation.

Appellant's final contentions relating to the question of whether Mr. Potaracke's decision was an abuse of discretion return to his status as a veteran over 60 years of age at the time he applied for the position while Ms. Josvai was neither over 60 nor a veteran. We find that it was not an abuse of discretion on the part of Respondent to fail to hire Appellant for the position because he was the older applicant or because he is a veteran. Both candidates met the basic eligibility requirements for the position and were certified to the Respondent on equal footing for further consideration. At that point, Respondent developed interview questions that were premised on many of the factors that Respondent considered most salient for the particular vacancy. Neither the fact that Appellant is older than Josvai, nor the fact that he has served in the Armed Forces, on their face, indicate that Appellant was the more qualified of the two applicants. The burden was on the Appellant at the interview stage of the hiring process to convince Respondent that he was the more qualified applicant, that he was interested in the position and that he could perform it well. Appellant failed to convince Respondent that he was the more qualified applicant, and he has failed to demonstrate that Respondent abused its discretion in failing to hire him.

Mr. Potaracke decided to offer the position to Ms. Josvai. She met the criteria for the grant: she was over 55, had a low income and sought to re-enter the workforce. The same can be said of the Appellant. However, it was Mr. Potaracke's reasonable opinion, based on the factors he reasonably chose and applied, that Ms. Josvai's background made her the preferred candidate. She was seeking to polish her skills and to take a step towards obtaining unsubsidized employment, both important goals of Title 5 of the OAA. We find Mr. Potaracke's selection decision to be a rational one, based on the information provided by the candidates during the interviews.

Respondent chose reasonable selection criteria and applied them in a reasonable and rational manner. Accordingly, we find that Respondent did not abuse its discretion in its decision not to hire Mr. Bednyek-Stumm and, therefore, dismiss the appeal.

### **Other Matters**

After Commissioner Bauman, serving as the designated hearing examiner, issued a proposed decision in this matter, Appellant asked that she be recused from any additional review of the case.<sup>9</sup> The mere fact that a commissioner, in her role as examiner, has issued a proposed decision favorable to a respondent does not disqualify her from participating

---

<sup>9</sup> Mr. Bedynek-Stumm suggests that Commissioner Bauman exhibited "unusual zeal" by referencing, in the cover letter to the proposed decision, the prevailing party's option (under certain circumstances) to submit a motion for costs under Sec. 227.485, Stats. The language that Bedynek-Stumm is referencing is part of the standard text included in all cover letters to proposed decisions. The language was not specific to this case and is not indicative of bias towards Bedynek-Stumm.

in rendering the Commission's final decision. **BROWNLEE V. STATE PUBLIC DEFENDER, CASE NO. 83-0107-PC-ER (PERS. COMM. 12-6-85)**. Appellant's request to recuse Commissioner Bauman is denied.

Dated at Madison, Wisconsin, this 10<sup>th</sup> day of August, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

---

Judith Neumann, Chair

Paul Gordon /s/

---

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

---

Susan J. M. Bauman, Commissioner