

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**STEPHEN C. ELMER**, Appellant,

vs.

**Secretary, WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES and  
Director, OFFICE OF STATE EMPLOYMENT RELATIONS**, Respondents.

Case 12  
No. 64829  
PA(sel)-21

**Decision No. 31380-B**

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**Appearances:**

**Stephen C. Elmer**, appearing on his own behalf.

**Paul Harris**, Attorney at Law, State of Wisconsin, Department of Health and Family Services, P.O. Box 7850, Madison, Wisconsin 53707-7850, appearing on behalf of the Respondent.

**DECISION AND ORDER**

This matter was filed with the Wisconsin Employment Relations Commission on May 31, 2005 by Stephen C. Elmer as an appeal of a non-selection decision. The Office of State Employment Relations (OSER) along with the Department of Health and Family Services was served with the appeal. By letter dated July 6, 2005, OSER indicated that it would not participate in the appeal, and should be treated as a nominal party with respect to any classification issue.

By Order dated June 30, 2005, the Wisconsin Employment Relations Commission designated William C. Houlihan as Hearing Examiner. Examiner Houlihan subsequently convened an administrative hearing on September 21, 2005 at the offices of the Wisconsin Employment Relations Commission, 18 South Thornton Avenue, P.O. Box 7870, Madison, Wisconsin. Hearing was held on the following issues:

Did the Employer abuse its discretion by not hiring the Appellant into the position of Public Health Sanitarian-Advanced, Evaluation and Training Officer?

No. 31380-B

The Appellant proposed the following statement of a second issue:

Whether the Respondent's action of classifying the DHFS' Evaluation and Training Officer position at the Public Health Sanitarian-Advanced level, rather than as a Public Health Program Advisor, was correct?

At hearing, Appellant advanced four classifications he believed to be more appropriate fits for the posted position.

The parties completed their briefing schedule on December 6, 2005. Appellant sought to reopen the record on June 22, 2006. His request was denied on June 29, 2006.

The hearing examiner issued a proposed decision on November 29, 2006. The proposed decision addressed the proper classification of the position in question as well as the non-selection decision. No objections were filed by the requisite date of December 29, 2006. By letter dated January 22, 2007, the Commission advised the Appellant that because he had amended his original non-selection appeal to add a claim that the position in question had been incorrectly classified, he had to submit the filing fee that is imposed by Sec. 230.45(3), Stats., in order for the Commission to review the new claim. Pursuant to Sec. PC 3.02, Wis. Adm. Code, the Commission granted the Appellant a period of 30 calendar days in which to supply the Commission with the \$50 filing fee. Appellant failed to respond. Consequently, his classification claim under Sec. 230.44(1)(b), Stats., must be dismissed. Those portions of the proposed decision addressing that claim have, therefore, been deleted and new language has been added as appropriate.<sup>1</sup>

For the reasons set forth below, the Commission concludes that the Appellant has failed to prove his claim.

### **FINDINGS OF FACT**

1. Prior to the instant dispute, Stephen C. Elmer, the Appellant, worked for the State of Wisconsin, Department of Health and Family Services, Division of Children and Family Services, Bureau of Regulation and Licensing, 1/1/05 to the date of his application. Prior to that, he worked for the State of Wisconsin, Department of Public Instruction, Division for Management and Finance, School Nutrition Team, 1/2/02 – 12/31/04. Prior to that, he worked for the State of Wisconsin, Department of Health and Family Services, Division of Public Health as a Public Health Sanitarian, Senior, from 3/01 to 1/02. Prior to that, he worked for the State of Wisconsin, Department of Health and Family Services, Division of Public Health, as a Public Health Sanitarian, Advanced, Evaluation and Training Officer, 3/98 - 3/01. Prior to that, Mr. Elmer worked in a number of other jobs for the State of Wisconsin, beginning July, 1980.

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<sup>1</sup> The Commission has also made non-substantive changes to those findings setting forth portions of relevant documents.

2. Mr. Elmer resigned his position as Evaluation and Training Officer by letter to Section Chief Greg Pallaske dated February 16, 2001. The letter provided, in part:

This is to inform you that I am resigning from my position as Evaluation and Training Officer.

...

This decision is based on the frustration resulting from Central Office management's failure to understand, recognize and technically support my (and fellow ETOs) dedicated efforts resulting in profound and unparalleled positive impacts on the Environmental Sanitation Section.

3. Mr. Elmer is a Registered Sanitarian in the State of Wisconsin, holds a number of other certifications and/or registrations in the Environmental and Food Safety areas, and has worked in the public health and/or food safety areas during his career with the State of Wisconsin.

4. The Bureau of Environmental Health, Division of Public Health, Department of Health and Family Services oversees a number of programs including food safety. The Food Safety Section has 10 employees in its Madison office. Greg Pallaske is the Section Chief. There are 5 Public Health Sanitarians-Advanced, Evaluation and Training Officer (ETO) positions, 3 clerical positions and 1 vacancy as of the hearing in this matter.

5. At one time the Madison-based ETO Sanitarians conducted on-site inspections of facilities to enforce codes promulgated by various Wisconsin administrative agencies. The 1992 Position Description for a Madison-based ETO included the following:

#### POSITION SUMMARY

Provide consultation, training and evaluation for 28 agents and 5 regions in the multiple programs of establishments licensed under Chapter 50, Subchapter III and Section 140.05(17), Statutes and under the general direction of the Unit Supervisor. (This position involves coordinating and conducting sanitation program evaluations and training as set forth by the parameters of the department and needs of the 28 agent health departments and 5 regions. Consultation is provided in a multitude of areas to both government officials and members of the private sector. Evaluations are conducted to determine the uniformity of interpretation and application of state administrative codes and policy guidelines; to analyze the effectiveness of food, lodging and recreational sanitation programs; to make recommendations for the upgrading of administrative codes; and to determine the appropriate training needs).

...

GOALS AND WORKER ACTIVITIES

...

- 45% C. Conduct on-site evaluations of food, lodging, recreational facilities and mobile home parks to determine compliance with administrative rules of the Department of Health and Social Services, Department of Industry, Labor and Human Relations and Department of Natural Resources.

...

- 15% D. Assurance that Regions and Agents are maintaining appropriate records and inspectional procedures.

...

- 15% E. Completion of a detailed and accurate written narrative report describing program strengths and weaknesses of the Region or Agent with recommendations for improvement.

...

- 5% F. Provide consultation and training to staff, agents, industry and the general public relative to department administrative rules regulating facilities under Chapter 50 Subchapter III and Section 140.05(17) of the Stats.

6. By 2001, the Position Description for a Madison-based ETO had evolved to include a greater emphasis on technical assistance, and a diminished responsibility for on-site inspection. The 2001 Position Description for a Madison-based ETO included the following:

POSITION SUMMARY

Provide consultation, training, and evaluation for Agents and Regional offices in the multiple programs of establishments licensed under Ch. 254, subchapter IV and VII, Statutes under the general direction of the Unit Supervisor. The position includes training of Public Health Sanitarians and LPHD's throughout the State, as well as private industry and industry groups. Consultation is provided in a variety of areas related to Public Health to both government officials and members of the private sector. Knowledge of State regulations related to food service facilities, lodging, campgrounds, recreational facilities and pools, and the ability to enforce these regulations, is required.

<u>Time (%)</u>	<u>Goals and Worker Activities</u>
70%	A. Provide technical assistance and training to the statewide program for food safety.  A1. Advise and consult regional staff, agents, architects, engineers, designers, manufacturers of equipment and chemicals, professional organizations and other state agencies on technical aspects of the statewide food safety program.  A2. Conduct field visits with regional and agent sanitarians to provide consultation and training as needed.  ...
20%	B. Select and conduct on-site evaluations of food service facilities in Agent or Regional territories to determine compliance with administrative rules of the Department of Health and Family Services.  ...
10%	C. Represent the Department for all issues regarding the Wisconsin Food Code.

7. By 2004, the Position Description had been further modified to eliminate on-site inspection and to significantly increase the responsibility for working with Agent Health Departments. The 2004 Position Description for a Madison-based ETO included the following:

### **POSITION SUMMARY**

This position is responsible [for] oversight, training, interpretation, revision and maintenance of HFS 175 and HFS 178, and all the duties related to this function. Additionally, this person will be involved in agent evaluation and standardization. Duties will include:

- Liaison with industry associations and organizations to improve performance and reduce enforcement issues in program specialties.
- Take the lead on training of inspections and enforcement of assigned program areas
- Help with the newly revised system of auditing agent health departments.

- Provide instruction and assistance to State inspectors and Local Public Health Departments re questions, issues, and problems in the assigned specialty area.
- Develop the skills and knowledge of the State and Agent staff regarding proper violation writing.
- Develop a template to be used for enforcement of non-complying state-licensed operators.
- Provide advice and feedback to the Section Chief regarding enforcement and data collection issues as needed and on a routine basis as designated.

<u>Time (%)</u>	<u>Goals and Worker Activities</u>
50%	<p>A. Provide technical assistance and training to the statewide program(s) for lodging, campgrounds, recreational/educational camps, body art, or any other program as regulated by this section and as assigned by the Section Chief.</p> <p>A1. Advise and consult regional staff, agents, architects, engineers, designers, manufacturers of equipment and chemicals, professional organizations and other state agencies on technical aspects of the statewide program.</p> <p>A2. Conduct field visits with regional and agent sanitarians to provide consultation and training as needed.</p> <p>...</p>
30%	<p>B. Work with Agent Health Departments to ensure compliance with administrative rules of the Department of Health and Family Services, Department of Industry, Labor and Human Relations, Department of Natural Resources, and any other State or Federal Agency as required.</p> <p>B1. Develop and conduct training in the assigned program(s) for both Agent and State inspectors as well as industry.</p>
20%	<p>C. Work with State Inspectors to ensure legal compliance with all codes by licensed operators.</p> <p>C1. Develop standard formats for issuance of punitive actions such as conditional permits.</p>

8. The Secretary of the Department of Health and Family Services (DHFS) directed a study of the public health system of Wisconsin. That study was formally released on or about February 3, 2004, and called for a modification of the relationship between DHFS and local health agencies. The report included the following:

**Priority 1. Implement major systems and organizational changes**

1. Simplify the performance based contracting with local health departments.

...

5. Require by law that local health departments regulate restaurants and other establishments and establish a statewide fee schedule that fully funds this service in all parts of the state.

...

***E. Realigning state and local responsibilities***

One component of this restructuring review is to identify ways in which regulatory functions and case-specific services now performed by state staff and the resources that support the functions could shift to local health departments. The rationale is that these services can be performed more efficiently and effectively by local health departments operating independently or in regional consortia and that they are a good fit with the mission of local health departments.

...

***Opportunities for regional consortia***

Consortia can be an effective strategy for managing services that are shifted from the state to local government such as for the licensing of restaurants and other establishments. Formal arrangements for consortia of multiple health departments offer the opportunity to maintain a level of public health services to citizens when an individual jurisdiction is not able to provide that service efficiently or does not have adequate funding for this purpose. The use of consortia to deliver public health services encourages collaborative relationships between local health departments that may eventually lead to mergers of local health departments.

...

1. The Department remains responsible for leadership of the state's public health system. Therefore it is important that the Department maintain control of public health data, funding, program direction and mission.
2. The role of the Department of and Health and Family Services should change to focus most of its resources on population-based health functions that are essential to the public health mission.
3. To focus on population health and to free up state level resources to support local health departments, the Department should shift both the regulatory functions and the case-specific services it now performs to the local health departments to the extent this is possible.

...

5. Require by law that local governments regulate restaurants and other establishments as a replacement for the current situation that has two levels of inspection based on the government agency that handles these functions. This would shift work now done by state staff in certain parts of the state to local governments so that there is a uniform system statewide. To support this shift, establish a statewide fee schedule that fully funds the service in all parts of the state so that the mandate is funded.
  - a. A voluntary approach has not succeeded.
  - b. The current fee schedule used to support this function is inadequate to support the frequency of inspection required by contract of agent health departments. This results in agents having to charge higher fees than the state does which is a significant disincentive for development of new agents.
  - c. Actual delivery of inspection, licensing, and regulatory services would occur at the local level.
  - d. With this transition, the primary future role of the State is envisioned as a resource for training, policy development, rules maintenance and oversight. The regional offices would continue to work with local health departments and each region would have one or more Regional Coordinators to assist with training and evaluation. Policy, codes, rules, and large-scale training would continue to be a function of the Central Office.

...

9. Sanitarians – credentials. Analyze options to shift this work to the Department of Regulation and Licensing. If the function remains in DPH – reduce effort for this activity including the possibility of using a new Internet based registration system that OCI is implementing for insurance agents.
10. Food manager certification – Analyze options to have this done either by the Department of Regulation and Licensing or by a private contractor.

...

9. The position in question had been vacant since January, 2004. Greg Pallaske and the Division of Public Health Regional Directors met in the Fall of 2004 and discussed how certain vacancies would be filled. They issued a memo on December 3, 2004. The relevant portions provide:

During the course of the November Regional Director's [sic] meeting, discussion occurred regarding the following three issues:

1. Filling the vacant Central Office ETO position.
2. Filling vacant sanitarian positions in the regional offices.
3. Recommendations on how to fill regional vacancies.

As a result of this discussion, it was decided that regional directors and central office management staff meet in the near future to clarify the issues and develop recommendations. The following reflects the results of this discussion. We would appreciate your positive consideration regarding the following recommendations.

1. **Filling the vacant ETO positioning the Food Safety and Recreational Licensing section in Madison.** Both central office and the regional office director's [sic] feel that the vacant ETO position located in the central office should be filled. With the increase in new agent health departments and the demands currently placed on the remaining four ETO positions it is felt that filling this position would assist in DPH's goal of adding more agent health departments to our public health structure. This position would also be an important part of the necessary infrastructure needed to assist the Food Safety and Recreational Licensing section cope with the added demands of additional agent health departments.

The primary job duties of the ETO position would be to work with interested health departments to become an agent of the state. In addition, the ETO position would be responsible for data analysis and completion of specific assignments necessary for the operation of the Food Safety and Recreational Licensing program. The ETO would also provide technical assistance and consultation to state and local staff.

2. **Filling vacant sanitarian positions in the regional offices.** There are currently three Public Health Sanitarian vacancies in the five regional offices. These vacancies are: 1 – Southeast Region, 1- Western Region, 1- Northeast Region. In addition to these three, the Western Region will be experiencing the retirement of one of the most senior sanitarians in the first quarter of next year. This will leave the Western Region with only two sanitarians for an area normally covered by four sanitarians. We believe that it is imperative that the state fill these vacant positions.

If all of the 27 state-sanitarian vacancies are filled, the state sanitarian to establishment ratio is approximately 600 facilities per sanitarian. It is impossible for the sanitarians to keep up with this workload. The current vacancies make this situation even worse.

We recommend that the 3 sanitarian vacancies and the upcoming vacancy in the Western Region be filled. What will be discussed in the following sections are our recommendations for filling these vacancies. We feel that filling these positions will provide an opportunity for those hired to gain valuable work experience which in turn would make the individuals filling these positions more employable by the “new” agent health departments when new agent health departments are added. Filling these positions will also assist each respective regional office in coping with the demands of this program.

10. At the time, a hiring freeze was in effect. A request for an exemption to the freeze was submitted for the subject position, and granted. The rationale for the request included the following:

**Bureau of Environmental and Occupational Health Food Safety & Recreational Licensing Section**

...

2. Why is this position considered essential?

We administer and oversee 10 different programs. There are 5 Evaluation and Training Officer (ETO) positions (this one vacant for 12 months). Each ETO is expected to provide expertise in at least 2 of the

program areas, as well as providing backup for another position. Additionally, the ETO is expected to work closely with new and potential agent health programs. We have added 8 such programs in the past 3 years, and have a large number pending because of the restructuring recommendation that inspection services be moved to the local level. Finally, almost every administrative code within our area of responsibility is in need of revision. There is no one in another program that can assume these responsibilities.

3. What consequences will likely occur if position is not filled?
  - We have become unable to meet basic requests for service and information.
4. Are there any alternatives to avoid adverse consequences of not filling the position?

An additional consideration is the strong possibility that an increase in the number of agent programs will lead to a decrease in the number of state inspectors. The Secretary and the Governor have determined that increasing agent programs is the best possible model for the future of WI regulatory services. That agent growth cannot occur without a fully staffed central office to manage the transfer and provide the training and support needed.

11. Following approval, the position was posted in March, 2005. That posting included the following:

**Public Health Sanitarian–Advanced**

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**Special Qualifications:**

Well-qualified candidates will have a Bachelor of Science degree or better in science, math, statistics, or public health; will also be highly proficient at Excel or similar software applications; and will have considerable experience in local politics and economics.

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**Job Duties:**

This highly visible position focuses primarily on two issues. First, identifying and then eliminating the obstacles preventing local public health departments from acting as agents for DHFS and other state agencies. Second, creating and maintaining a system of data collection and monitoring that will enable public health decision makers at the state and local level to analyze the impacts of inspection and enforcement programs.

• • •

**Job Knowledge, Skills and Abilities:**

Excellent oral and written communication skills, knowledge of communicable disease control techniques and public health principles; policies, procedures, and politics of local governments; principles of inspection, enforcement, and public relations; basic business and marketing principles and concepts applied by government services; Microsoft Excel, Access, or other statistical analysis and reporting software; ability to analyze and interpret data; provide training and produce excellent visual aids; use PowerPoint for presentation and training; and public speaking skills.

**How To Apply:**

**Apply with an Application for State Employment (OSER-DMRS 38); a current resumé; and a paper (up to three pages) describing your professional work experience or education, including your role, specific responsibilities, and the length or duration of experience related to: 1) conducting data collection and analysis, statistics, and/or performance evaluation; 2) developing and conducting educational training to individuals or groups; 3) writing technical reports (include the types of reports); and 4) using computer programs (specify programs/software used). These materials are the examination for this position.**

12. The Questionnaire responses were graded. Mr. Elmer was awarded a 100 out of 100 on his responses. Fourteen candidates, including Mr. Elmer, were selected to be interviewed.

The interview panel consisted of Greg Pallaske, David Pluymers, who works in another Division of DHFS, and Tommye Schneider, who directs the City of Madison Health Department. Each candidate was asked seven questions. These questions addressed statistical, analytical, political, and agent-related questions. None of the questions specifically addressed food safety or inspection standards.

Each panel member was given a grading guide, and evaluated each candidate's answer to each question. Three candidates, Sara Kehrli, Marc Oliver Wright, and Jeff Kunz, were recommended for further consideration. The other candidates, including Mr. Elmer, were not. A number of the unsuccessful candidates, including Mr. Elmer, are licensed Sanitarians. None of the successful candidates is a licensed Sanitarian.

13. The position was initially offered to Mr. Wright, who declined the offer. It was subsequently offered to Ms. Kehrli, who accepted. Following completion of the interview and hiring process, Mr. Pallaske discarded the interview notes for all but the top three candidates. Mr. Pallaske testified as to the candidate interviews, and how various candidates performed. Neither Pluymers nor Schneider were called to testify.

14. The three successful candidates understood and answered the interview questions accurately. Mr. Elmer struggled with some of the questions, and did not do well in the interview. All three panel members recommended that the three finalist advance in the process. All three panel members recommended that Mr. Elmer not proceed further.

15. Mr. Pallaske informed departmental employees of Ms. Kehrli's selection with the following e-mail:

Most of you are aware that we have a vacancy in the central office. We advertized (sic) recently to fill this position, and the response was overwhelming. Well, after several rounds of interviews and many reference checks, we have finally made an offer which has been accepted.

Sara Kehrli will start in her new position here in Madison on May 16<sup>th</sup>. Tom Sieger and I have no doubt that she will be a tremendous asset to our team, and the delivery of regulatory services across Wisconsin.

This appointment marks a radical change from our normal hiring practices. Sara is NOT an "Evaluation and Training Officer" – her background is very similar to mine – that is, a masters in environmental sciences and policy. Thus, she will not be a person you call for questions about campgrounds or bare hand contact. That is not her intended role, and we purposefully looked for someone with an "outsiders" perspective.

What Sara will be involved with is analysis and interpretation of data, including CDC risk factors and (in the future) data from other types of inspections. That, plus a number of other related projects, should take up much of her time. The remainder of her time will be spent working with local public health departments to build capacity toward attaining agent status. She will also be charged with managing existing agent contracts.

Sara brings to the position a unique combination of education, academic excellence, and experience in data analysis and interpretation. I hope you will all join me in making her feel welcome to DHFS, and to our state public health program. Thank you.

16. A new position description applicable to Ms. Kehrli was created, and made effective May 16, 2005. It provides the following:

POSITION SUMMARY

Provide consultation, data analysis, and evaluation for Agent LPHDs in the multiple programs of establishments licensed under Ch. 254, subchapter IV and VII, Statutes under the general direction of the Section Chief. Knowledge of State regulations related to food service facilities, lodging, campgrounds, recreational facilities and pools, and the ability to enforce these regulations, is required.

There are two primary areas of responsibility: 1) Establish a positive working relationship with non-agent LPHDs, moving them toward agent status; 2) Perform analysis of inspection data and evaluation results to provide direction for future efforts of the FSRL program, the ultimate goal to strengthen the delivery, consistency, and uniformity of program services at the local level.

TIME (%)      GOALS AND WORKER ACTIVITIES

- 40%    A.    Evaluate, improve, and report on Agent and State inspection data.
- A1.    Establish a system of routine inspection data collection.
  - A2.    Conduct field visits and agent programs to provide consultation and training in data collection and submission techniques as needed.
  - A3.    Develop programs in Excel, Access, and statistical software to measure the significance of the data collected.
  - A4.    Develop replicable reports which can be shared by state and agent programs showing trends, comparisons, and performance issues.
  - A5.    As directed by the Section Chief, present results, report on findings, draw conclusions, and make recommendations to address issues found in the data.
  - A6.    Serve on committees as directed to develop uniform standards and procedures for data collection and processing.
  - A7.    Prepare and present technical training programs for regional and agent inspectional staff and the industry.
  - A8.    In coordination with the Section Chief and Regional Directors, assess the impact on the public health in regard to the FSRL program and revise operating procedures as needed to insure maximum quality and efficiency in the protection of the public health.
  - A9.    Develop forms, reports, technical documents and training materials as assigned by the Section Chief.

- 40% B. Following the tenets of the 10-year restructuring plan, create a systematic approach to new agent development.
- B1. Become familiar with the structure and key personnel in each agent and non-agent LPHD.
  - B2. Work with the Section Chief to upgrade and improve the new agent manual and the systems and procedures to create new agent programs.
  - B3. Provide expertise and knowledge in coalition-building, consortia creation, and contractual relationships for new/potential agent programs.
  - B4. Establish and maintain expertise in ordinances, policies, procedures, and rules required to become agents.
  - B5. Work with other state programs such as DATCP, DNR, and COMM to streamline and condense the agent program into a single package.
  - B6. Visit with, encourage and assist LPHD Health Officers in the agent building process.
  - B7. Annually submit a detailed report describing strengths and weaknesses of the non-agent LPHD infrastructure, identify obstacles, make recommendations for improvement, and include a plan to achieve 100% coverage by 2015.
- 20% C. Provide standardization methods, services, and support in all inspection programs.
- C1. Work with Section Chief and program managers to develop a standard method for collecting inspection data for lodging, recreation, and body art inspections.
  - C2. Work with agent LPHDs to create a system of seamless data collection for each of these programs.
  - C3. Produce reports and recommendations for these programs as in Section A.

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KNOWLEDGE AND SKILLS

- 1) Considerable knowledge of the principles of oral and written communication skills.
- 2) Extensive knowledge of Section 140.05(17), Statutes, and Wisconsin Administrative Codes, HFS 172, 173, 175, 178, 192, 195, 196, 197, 198, and related public health administration principles and practices.

- 3) Considerable knowledge and expertise of Microsoft Excel, Access, or other statistical analysis and reporting software, and the ability to analyze and interpret data.
- 4) Extensive knowledge of the policies, procedures, and politics of local governments.
- 5) Extensive knowledge of the principles of inspection, enforcement and public relations.
- 6) A strong background, such as formal education or extensive experience, in presenting training in a group environment. This should include the ability to produce excellent visual aids such as educational handouts, familiarity with PowerPoint presentation software, and experience in public speaking.
- 7) Familiarity with Microsoft Office products software.

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17. On May 31, 2005 Mr. Elmer appealed the hiring decision of the Department of Health and Family Services based on an alleged abuse of discretion.

### **CONCLUSIONS OF LAW**

1. The Commission has the authority to review a non-selection decision pursuant to Sec. 230.44(1) (d), Stats.
2. Mr. Elmer has the burden to establish that DHFS acted illegally or abused its discretion when it decided not to hire him for the Public Health Sanitarian-Advanced, Evaluation and Training Officer position in the Division of Public Health.
3. Mr. Elmer has failed to sustain his burden of proof.
4. The Division of Public Health, DHFS, did not act illegally or abuse its discretion when it decided not to hire Mr. Elmer for the Public Health Sanitarian-Advanced, Evaluation and Training Officer position.
5. Mr. Elmer failed to timely submit the required filing fee in order to pursue a contention that the position in question was classified incorrectly at the Public Health Sanitarian-Advanced, Evaluation and Training Officer class.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

**ORDER**<sup>2</sup>

Appellant's classification claim is dismissed due to the absence of a filing fee, Respondent DWD's hiring decision is affirmed and this matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 7<sup>th</sup> day of March, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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<sup>2</sup> Upon issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

**Wisconsin Department of Health and Family Services and  
Office of State Employment Relations (Elmer)**

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

This matter, which arises from the decision not to select Mr. Elmer for the Public Health Sanitarian-Advanced, Evaluation and Training Officer position in the Madison office of the Department of Health and Family Services, Division of Public Health is being reviewed pursuant to the Commission's authority under Sec. 230.44(1)(d), Stats.:

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.

In order to prevail on his Sec. 230.44(1)(d) claim, Mr. Elmer must show that DHFS's decision not to hire him was either illegal or an abuse of discretion. Mr. Elmer contends that DHFS abused their hiring discretion by not hiring the best qualified candidate for the Public Health Sanitarian-Advanced, Evaluation and Training Officer position based on classification specifications and inherent responsibilities established throughout the entire history of the classification series. Mr. Elmer bears the burden of proof relative to his claim.

Elmer contends that the Department had no intention of hiring a qualified Public Health Sanitarian as that term is defined in Sec 440.98, Stats. He asserts that there was a hiring freeze in place at the time, and that in order to circumvent the freeze, DHFS misrepresented the content of the position to be posted. Elmer contends that by changing the job duties so dramatically without OSER approval, DHFS has violated Sec. 230.09(2)(c), Stats. Elmer asserts that this is the first time in history where a sanitarian licensing or eligibility requirement was not included.

Elmer points to process violations, each of which is alleged to constitute abuse of discretion. He contends that Pallaske was provided with a list of candidate names, addresses, and telephone numbers prior to the time he finalized and submitted the interview questions, contrary to the requirement of ER-MRS 6.08 (3) and (3)(c). Following the selection process, Pallaske destroyed interview notes, contrary to the OSER Interview Guide.

**DISCUSSION**

Mr. Elmer disagrees with the decision to award the Advanced Sanitarian position to a non-Sanitarian. He finds that result to be professionally offensive, and a degradation of the Sanitarian series. To the extent he challenges the job content of the position in question, he raises matters outside the subject matter jurisdiction of the Commission. The decision of an

employing agency to assign a particular set of duties to a position is premised on Sec. 230.06(1)(b) and does not fall within the scope of an appeal under Sec. 230.44(1)(d) which refers to an action “after certification”. The assignment of duties occurred prior to DHFS receipt of the certification list.

Similarly, Mr. Elmer’s assertion that Respondent misrepresented the content of the position in order to circumvent the freeze on hiring is not supported by the record and is also outside the scope of Sec. 230.44(1)(d). Mr. Elmer asserts that DHFS was under an obligation to notify and seek input from the Office of State Employment Relations before making dramatic changes to the Public Health Sanitarian-Advanced, Evaluation and Training Officer position. Again, the Commission has no jurisdiction over this question. While under Sec. 230.44(1)(b) the Commission has authority to review certain classification decisions, such review must arise from decisions made pursuant to either Sec. 230.09(2)(a), allocating, reclassifying or reallocating positions, or Sec. 230.09(2)(d), regrading the incumbent. Such jurisdiction does not extend to alleged violations of Sec. 230.09(2)(c), arising from a reassignment of duties. *REDING V. DER, CASE NO. 83-0149-PC (PERS. COMM. 11/9/83)*.<sup>3</sup> In addition, Mr. Elmer failed to submit the filing fee necessary to pursue a classification claim under Sec. 230.44(1)(b), Stats.

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<sup>3</sup>

**230.09 Classification. (1)** The director shall ascertain and record the duties, responsibilities and authorities of, and establish grade levels and classifications for, all positions in the classified service.

...

(2)(a) After consultation with the appointing authorities, the director shall allocate each position in the classified service to an appropriate class on the basis of its duties, authority, responsibilities or other factors recognized in the job evaluation process. The director may reclassify or reallocate positions on the same basis.

...

(c) If anticipated changes in program or organization will significantly affect the assignment of duties or responsibilities to positions, the appointing authority shall, whenever practicable, confer with the director within a reasonable time prior to the reorganization or changes in program to formulate methods to fill positions which are newly established or modified to the extent that reclassification of the position is appropriate. In all cases, appointing authorities shall give written notice to the director and employee of changes in the assignment of duties or responsibilities to a position when the changes in assignment may affect the classification of the position.

(d) If after review of a filled position the director reclassifies or reallocates the position, the director shall determine whether the incumbent shall be regraded or whether the position shall be opened to other applicants.

Mr. Elmer contends that he was a better qualified candidate for the posted position than was Ms. Kerhli. Inherent in this contention is his view that the Public Health Sanitarian-Advanced position should be filled with a Registered Sanitarian. While such a claim has a logical attraction, it is not required by the Classification Specifications. The fact that the Public Health Sanitarian-Advanced position was historically filled by a Registered Sanitarian does not require that it forever be so.

The Evaluation and Training Officer position has evolved in job content over the course of several years. Specifically, that portion of the job concerned with hands on inspection has been systematically reduced. The January, 2004 Public Health Restructuring Report articulated a policy vision that shifted facility inspection to the local level. The Restructuring Report identified the primary future role of the State “as a resource for training, policy development, rules maintenance and oversight”. Consistent with that philosophy, Pallaske and the regional Directors issued a memo in late 2004 which proposed to fill the vacant Public Health Sanitarian-Advanced, ETO position in Madison: “The primary job duties of the ETO position would be to work with interested health departments to become an agent of the state.”

The justification for filling the position in the face of a hiring freeze made specific reference to the expectation that the position “work with new and potential agent health services”, and further referred to the “restructuring recommendation that inspection services be moved to the local level.” The justification goes on to provide that “[t]he agent growth cannot occur without a fully staffed central office to manage the transfer and provide the training and support needed.” There was no hidden agenda or sleight of hand at work.

The Public Health Sanitarian-Advanced ETO position was announced. The required job duties included “identifying and eliminating the obstacles preventing local public health departments from acting as agents for DHFS. . . .” and “creating and maintaining a system of data collection and monitoring that will enable public health decision makers . . . to analyze the impacts of inspection and enforcement programs. . . .” On its face, this description continues the evolution of the position, is consistent with and responsive to the Public Health Restructuring Report, and addresses the justification used to fill the position in the face of a hiring freeze.

The skills required included an academic background in science, math, statistics, or public health, communications skills, a knowledge of government, a knowledge of public health, and statistics and computer skills. The application was to specify experience in those areas. All of this is internally consistent with the evolution of DHFS relative to public health inspection.

The interview panel included Pallaske, who was to supervise the position, Pluymers, who worked in a separate Division of DHFS, and Schneider, who directs an Agency that would presumably be a local Agent under the delegation plan. The panelists asked the candidates seven questions which emphasize statistics, data collection, the relationship to and dealing with local governments and Agent development. All of this seems compatible with

where the inspection program is heading. The criteria appear reasonably related to the responsibilities of the position. See, *POSTLER V. WIS. PERS. COMM., ET AL, DANE CO. CIR. CT., 95CV003178, 10/9/96; AFFD. COURT OF APPEALS, POSTLER V. WIS. PERS. COMM., 96-3350, 1/27/98*. It is not the Commission's role to determine what selection criteria would be appropriate under all the circumstances, but rather to review whether the criteria used were reasonably related to the duties and responsibilities of the position to be filled, and were uniformly applied. *ROYSTON V. DVA, CASE NO. 86-0222-PC (PERS. COMM. 3/10/88), ROMAKER V. DHSS, CASE NO. 86-0015-PC (PERS. COMM. 9/17/86)*.

Mr. Elmer has strong feelings that the position should require Registered Sanitarian status. However, the criteria for the position are not something Mr. Elmer is free to dictate. *THORNTON V. DNR, CASE NO. 88-0089-PC (PERS. COMM. 11/15/89)*.

Following the interviews Pallaske destroyed the interview notes for all but the three finalists. Elmer contends that the destruction of these interview notes is further evidence of an abuse of discretion. The OSER Interview Guide provides that: "Interview notes/evaluations should be kept for four calendar years from the date of interview." That was not done here, and is a flaw in the selection process. Nothing in the record suggests this was done to cover up mischief. Pallaske testified as to the interview process. Her testimony, relative to the finalists, was supported by the interview notes of Pluymers and Schneider.

Neither Pluymers nor Schneider was called to testify. If their observations were other than as described by Pallaske they could have so indicated in testimony. However, both parties were content to have Pallaske be the sole interviewer called to testify. Each must then be satisfied with the record so created, notwithstanding the hearsay aspects of some of that testimony. This record supports the conclusion that all three interviewers supported the three finalists. None of the interviewers supported the candidacy of Mr. Elmer.

Mr. Elmer complains that Pallaske may have had the names of interview candidates before finalizing the interview questions. He alleges a violation of ER-MRS 6.08.<sup>4</sup>

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4

**ER-MRS 6.08 Release of Examination Information.**

- (1) The following examination information may be released to an examinee:
  - (a) The composition of the examination;
  - (b) The weight of, the total possible score of, and the examinee's score on, each separately scored component of the examination; and
  - (c) Information as to whether veterans preference was included in his or her final grade.
- (2) Except as provided in sub (3), examination information which may not be released includes but is not limited to the following:
  - (a) copies of examination booklets, rating guides and scoring keys;
  - (b) copies of written comments of examination raters including oral board members;
  - (c) tapes or oral examinations;
  - (d) results of medical examinations except through the examinee's designated physician;
  - (e) scores of candidates identified by name; and
  - (f) answers to specific items on written examinations.

Subsections (1) and (2) address the release of examination information which may not be released. Elmer was certified. His claim is that after he was certified, but before he was interviewed, the certification list went to Pallaske. Subsection (3) addresses the release of information to the appointing authority relating to certified individuals. It does not address the release of names. Even if Pallaske had the names of the certified individuals, the interview questions were all but final and reflected the modified job description.

Mr. Elmer sought to re-open the record to introduce evidence that Sara Kehrli had subsequently resigned from the position, and that the DHFS had revised the job duties and sought to have the position announced and filled as a Program Planning Analyst-Advanced. Respondent objected and the Examiner denied the request. The additional evidence would have related to Mr. Elmer's classification claim, which is no longer before the Commission.

Dated at Madison, Wisconsin, this 7<sup>th</sup> day of March, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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(3) For certified individuals, the administrator may release to the appointing authority the following examination information, but only after the employment interview questions have been finalized:

- (a) Narrative responses to open-ended examination questions such as essay or achievement history.
- (b) Tapes of oral examinations.
- (c) Resumes, letters of interest, and other narrative examination material provided by the certified candidates as long as the materials released do not contain scores, comments, ratings, or other evaluations.