

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**STEPHEN C. ELMER**, Appellant,

v.

**Secretary, DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION**, Respondent.

Case 3  
No. 66236  
PA(sel)-34

**Decision No. 32289**

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**Appearances:**

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

**Mr. Dennis Fay**, Assistant Legal Counsel, Department of Agriculture, Trade and Consumer Protection, 2811 Agriculture Drive, P.O. Box 8911, Madison, Wisconsin 53708-8911, appearing on behalf of the Department.

**DECISION AND ORDER**

This case is before the Wisconsin Employment Relations Commission on an appeal by Stephen C. Elmer (herein the Appellant) of a failure by the Wisconsin Department of Agriculture, Trade and Consumer Protection (herein the Department) to offer him a position as a Meat Safety Supervisor. In a subsequent prehearing conference conducted on September 12, 2006, the parties stipulated to the following formulation of the issue:

Did the Department abuse its discretion in not selecting Stephen Elmer for the position of Meat Safety Supervisor?

A hearing was conducted on December 13, 2006, before Examiner John R. Emery, a member of the Commission's staff. The hearing was tape-recorded. The parties established a briefing schedule, which was completed by March 16, 2007 whereupon the record was closed. The hearing Examiner issued a proposed decision on December 13, 2007. No objections were filed by the requisite due date of January 13, 2008.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

No. 32289

### **FINDINGS OF FACT**

1. In 2006, the Appellant, Stephen C. Elmer, was employed as a Child Care Licensing Specialist with the Wisconsin Department of Health and Family Services.

2. In March 2006, the Department posted a position for a Meat Safety Supervisor in the Division of Food Safety for Dane, Columbia, Iowa, or Sauk County. The position involves supervision of Meat Safety Inspectors, as well as oversight of the Department's meat inspection program and liaison with the meat industry on safety issues. Approximately 60% of the position involves supervisory duties, 30% involves program administration and 10% involves working with the meat production industry and general public.

3. The Appellant applied for the position and supplied a resume and work history to the Department. Significant work history in the Appellant's pursuit of this position includes employment by the Department as a Meat Safety Inspector from 1981 to 1992 and as a Meat Safety Inspection Supervisor from 1992 to 1998. The Appellant also worked in the private sector as general manager of a meat processing plant from 1977 to 1980 and for the Department of Health and Family Services as a Public Health Inspector from 1998 to 2002.

4. On April 13, 2006, the Appellant took an examination for the position on which he scored highest among the fifteen applicants for the position and was ranked first among the applicants.

5. The Department created a certification list for the position, listing the top eight candidates based on the exam results. The exam results were only considered for purposes of creating the certification list and were not an element in the post-certification hiring process. All candidates who were included on the certification list were presumed to possess the minimum qualifications for the position. The certification list indicated that the position was underutilized for women and racial/ethnic minorities. In addition to the Appellant, the list included G.B., J.C, J.L., Helen Pernsteiner, C.R., M.V.D and P.Z. Two of the candidates were women and none were ethnic/racial minorities. Of the candidates, only the Appellant and J.L. had job experience as Meat Inspection Supervisors. The Department scheduled initial interviews with the eight certified applicants on June 7 and 8, 2006. The candidates were supplied in advance with a list of six questions that would be used in the interview, for purposes of preparation. The questions were:

1. Why are you the best candidate?
2. Consider this situation. An inspector is assigned a complex and fairly large establishment. The inspector is not very savvy and seems to lack some basic understanding of HACCP (Hazard Analysis and Critical Control Point) and is confused about the role of an inspector. The plant operator also does not have a good understanding about HACCP concepts or application. In addition, the relationship has been strained between the operators and inspection.

What actions would you take to address this situation? Be explicit

in describing your action steps.

3. You intend to conduct an introductory meeting with all your assigned inspectors. What topics would you include on your agenda?
4. Supervisors are the models of professionalism for the inspection staff. How does your behavior model professionalism needed to be a successful supervisor?
5. If at the end of your first year in this position, you've considered yourself very successful in the job, what is it you've done?
6. Two years from now we might ask two employees that you supervise about the service they've received from you as a supervisor. What qualities do you think they'd identify as your value to them as a supervisor?

5. On June 7 and 8, 2006, the certified applicants were interviewed by a panel comprised of three Department management personnel – James Larson, Jackie Owens and Judy Cardin. The interviews consisted of the six questions referenced in Finding #4 calling for oral responses and two additional questions calling for written responses. The two written questions were:

1. This position is responsible for guiding the education and development of staff, ensuring compliance of industry and implementation of program initiatives. Outline your work plan, including goals and activities, for your 1<sup>st</sup> six months on the job.
2. Can you perform the duties of this position in the following work environment with or without accommodations?

The work is performed in meat packing plants, involving walking on wet slippery concrete floors, around equipment and under and between overhead moving meat carcasses and 10 pound metal trolleys. The slaughter environment (55% of the work time) in summer is very wet, humid and hot, and in the winter months wet, humid and cold. The work environment for processing and sanitation inspection (35% of the work time) involves walking on wet concrete floors in refrigerated coolers and freezers. Employees are at times confronted with angry plant personnel.

Yes or No. Please explain

Each question had specifically articulated benchmarks for more than acceptable, acceptable and less than acceptable responses. The questions and benchmarks were developed by Larson, in consultation with the other panelists. Each candidate was asked the same questions and each panelist rated the responses independently.

6. Subsequent to the interviews, the candidates were ranked according to the total number of more than acceptable, acceptable and less than acceptable answers they provided to the interview questions. Three candidates, Helen Pernsteiner, G. B. and J. L., had more than half of their responses that were deemed more than acceptable and were asked to return for second interviews. The Appellant ranked fifth among the eight candidates and was not offered a second interview. The second interviews were conducted on June 22 and 23, 2006.

7. Subsequent to the second round of interviews and a check of references, the Department selected Helen Pernsteiner for the Meat Safety Supervisor position. In the initial examination, Pernsteiner had ranked seventh among the fifteen original applicants. Her significant work history relative to this position includes employment as a chef/manager in a number of restaurants between 1986 and 2003 and employment as a Chef Instructor at Le Cordon Bleu School of Culinary Arts in Las Vegas, Nevada from 2003 to 2005. She has no previous work experience in meat inspection for regulatory agencies.

8. A Hiring Justification Worksheet for the appointment was submitted on June 27, 2006 by Division Administrator Steven Steinhoff and was approved on June 28, 2006 by Human Resources Director Georgia Pedracine. In his comments justifying the selection, Steinhoff stated:

This candidate does not have great experience in the meat production industry, however, her background in food safety as a chef, her project management experience, and her supervisory and teaching experience has given her exceptional interpersonal skills, knowledge and attributes highly desired of a field supervisor. She expressed a strong value of helping assigned staff improve performance and to acquire a certain degree of professionalism. She also seemed to have a strong desire to nurture the leadership abilities in others. These values form the basis for a field supervisor to succeed. Her understanding of systems, ranges of people and situations, and of learning differences, combined with a "fresh" outlook she'd bring to the job, will make her a valued asset to the overall supervisor team and management team in the Bureau and Division.

9. Pernsteiner's selection and appointment were announced on July 7, 2006.

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

### **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction to review non-selection decisions in the State civil service pursuant to Sec. 230.44(1)(d), Stats.

2. The Appellant has the burden to show, by a preponderance of the credible evidence, that the Respondent acted illegally or abused its discretion in failing to select him for the position of Meat Safety Supervisor.

3. The Appellant has not met his burden as set forth above.

4. The Respondent's action in not selecting the Appellant for the position of Meat Safety Supervisor was not illegal or an abuse of discretion.

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

**ORDER**<sup>1</sup>

The appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 14<sup>th</sup> day of February, 2008.

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. Bauman /s/

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Susan J. Bauman, Commissioner

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<sup>1</sup> Upon the 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.

**Department of Agriculture, Trade and Consumer Protection (Elmer)**

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

This matter arises under Sec. 230.44(1)(d), Wis. 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.

In DEPARTMENT OF CORRECTIONS (ZEILER), DEC. NO. 31107 (WERC, 12/7/04), the Commission adopted the following interpretation of an “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.

In this case, the Appellant contends that the Department’s selection of Helen Pernsteiner for the position of Meat Safety Supervisor (and non-selection of himself for the position) constituted an abuse of discretion for two principal reasons. First, the Appellant submits that he was clearly more qualified for the position and, therefore, the Department’s selection of Ms. Pernsteiner was “clearly against reason and evidence.” Second, he submits that the selection process was inherently biased against him personally due to his previous “whistleblowing” activities, which led the Department to deliberately reject him as a candidate. As discussed below, we do not believe the Appellant has sustained his burden on either allegation and, therefore, dismiss his appeal.

**Merit Selection**

Mr. Elmer first argues that the record establishes that he was the most qualified candidate for the Meat Safety Supervisor position, and was clearly superior to the selected candidate. In support of this contention, he points out that Sec. 230.20(1) states “...the selection of classified state employees shall be based solely on merit...” Mr. Elmer notes that he rated highest among the candidates on the initial written examination and he highlights his considerable experience in meat safety inspection and working in food industry regulation. By comparison, he points out that Ms. Pernsteiner rated lower on the initial examination and that her employment has primarily been in the restaurant industry and as a faculty member in a cooking school, not in food safety regulation. Also, in support of his position, he cites DATCP (ELMER), DEC. NO. 31317-A (WERC, 6/05), wherein the Commission, in dismissing a

previous appeal by this Appellant, upheld the Department's selection for the position of Animal Health Investigator Supervisor based on the successful candidate's superior qualifications. In that case, we stated:

Finally, it is clear that the critical factor for the interview panel in recommending a candidate for the position was experience, background, knowledge of Animal Health issues, programs, practices, policies and procedures. In this regard, Partridge was the best qualified candidate. . . .

Mr. Elmer asserts that in this case he was most qualified based on the "critical factor" of experience, background and knowledge directly related to the program and should, therefore, have been selected.

First, the Appellants's argument with respect to the initial examination and ranking of the candidates thereon is based on Sec. 230.15, Wis. Stats., which states, in pertinent part, ". . . appointments to, and promotions in, the classified service shall be made only according to merit and fitness, which shall be ascertained so far as practicable by competitive examination. . . ." He contends, therefore, that his top score on the initial examination, as compared to Ms. Pernsteiner's lower score, should have been considered by the Department in selecting between them. However, as we stated in DEPARTMENT OF WORKFORCE DEVELOPMENT (JUNCEAU), DEC. NO. 32050 (WERC, 8/07):

The strict selection criteria designed to predict successful performance on the job and described by Sec. 230.15, Stats., apply only up to the time the certification list of qualified candidates is developed. POSTLER V. WIS. PERS. COMM., ET AL, Dane County Circuit Court, 93-CV-3874, 10/96; *aff'd* POSTLER V. WIS. PERS. COMM., Case No. 96-3350 (Ct. App., 1998). . . . Any requirements imposed by Sec. 230.15, Stats., apply to the examination and not the post-certification decision that is before the Commission pursuant to Sec. 230.44(a)(d), Stats.

Thus, all candidates placed on the certification list were deemed qualified for the position and once the list was created, the rank of the applicants on the initial exam became moot. At the point at which the candidates were interviewed by the panel they stood on equal footing with respect to their examination results.

Once all the certified candidates had been deemed competent to hold the position on the strength of their examination results, the interview panel designed a series of interview questions that focused on supervisory, problem solving and relational abilities. It is clear from the questions that, in this context, beyond the basic knowledge of the position that had already been determined, these qualities were deemed by the panel to be essential for the successful candidate. Considering that the position description indicates that 70% of the Meat Safety Supervisor's duties involve either supervision and education of Division staff or direct dealings with the meat industry and general public, this does not seem to us to be an unreasonable viewpoint and we cannot say that the panel's emphasis in this area clearly went against reason and evidence.

The interview panel, made up of Division staff members James Larson, Jackie Owens and Judy Cardin, interviewed eight certified candidates over a period of two days. All eight candidates were given interview questions in advance and were asked the same questions. Each question had benchmarks for determining whether the response was more than acceptable, acceptable, or less than acceptable. The three panel members rated the eight responses of each candidate independently and did not discuss their evaluations of the responses prior to meeting to compare them. The eight candidates received the following scores on their initial interview responses:

	More Than Acceptable	Acceptable	Less Than Acceptable
J.L.	22	2	0
Helen Pernsteiner	18	6	0
G.B.	18	6	0
M.V.D.	11	12	1
C.R.	9	13	2
Steve Elmer	8	14	2
J.C.	7	11	6
P.Z.	2	6	15

Upon discovering that J.L., Helen Pernsteiner and G.B. had a significantly higher number of “more than acceptable” responses than the other candidates, and were the only candidates with no “less than acceptable responses,” the panel determined to invite them for second interviews. The other candidates, including the Appellant, were not offered second interviews. The second interviews were conducted on June 22 and 23, 2006 and, largely on the strength of that interview, as well as excellent recommendations from her references, Ms. Pernsteiner was selected for the position.

Although the Appellant’s contention is that, based on his qualifications, he, rather than Ms. Pernstiener, should have been selected for the position, in reality he did not even make the final cut, with five other candidates having performed better than he on the initial interview. Given our previous determination that the interview questions were appropriate, and given the disparity between the Appellant’s score and those of the candidates who were invited for second interviews, we cannot say that the panel’s decision to exclude the Appellant after the first interview was clearly against reason and evidence. Further, it should be noted that at least one of the candidates who was interviewed a second time, J.L., has a work history similar to the Appellant’s and a commensurate amount of experience in meat safety regulation.<sup>2</sup> Consequently, we find that the Department’s selection of Helen Pernsteiner over the Appellant on the basis of merit was not an abuse of discretion.<sup>3</sup>

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<sup>2</sup> In his reply brief, the Appellant concedes J. L.’s relatively equivalent qualifications and states that, had J.L. been the candidate selected, he would not have deemed that decision an abuse of discretion. Reply Brief at 7.

<sup>3</sup> The Commission has modified this paragraph in the proposed decision to eliminate unnecessary language.



Bias<sup>4</sup>

The Appellant's second argument is that the selection of Ms. Pernsteiner for the position was illegal because it was based on bias against him. In effect, he contends that the selection process was deliberately skewed to assure that he would not be selected for the position. He believes that the Department's motivation for doing so is retaliation against him as a result of a previous dispute between Elmer and the Department in which Elmer filed a whistleblower retaliation complaint against the Department pursuant to Sec. 230.85(1), Stats. That case, *ELMER V. DATCP*, 98-0112-PC-ER, was resolved by a settlement agreement between the parties executed July 14, 2000.<sup>5</sup> The Appellant contends that thereafter the Department has held an unfair bias against him and has purposely acted to prevent him from being rehired to any subsequent position in the Department. He had applied for a position as an Animal Health Investigator Supervisor, for which he was not selected. He filed an appeal against the Department as a result of that non-selection, which was subsequently dismissed by the Commission. *DATCP (ELMER)*, DEC. NO. 31317-A, (WERC, 6/05). We are not persuaded on this record that the Appellant has met his burden as to the existence of impermissible bias in this selection process. In this regard, it is notable that, of the three panelists, Larson was the only one who was aware of the prior settlement between Elmer and the Department, yet the assessments of Elmer's interview performance by all three panelists were similar, lending credence to the view that the settlement played no role in the interview process.

The Appellant asserts that there is a Department policy of "red-flagging" his applications to warn persons in the hiring process that he is a candidate. As evidence of this, he submitted a copy of an email from June 9, 2004 from Edward Porter to Michelle Wachter and Alison Scherer, all DATCP staff members, concerning the process for filling a Food Scientist – Advanced position open at the time, which stated:

Regarding the nomination of individuals to serve on the rating panel and interview panel for the Food Scientist – Advanced, DFS should be advised that these decisions will receive more scrutiny than routine recruitments at this time. We have 13 applicants for the vacancy, one of which is a former DATCP DFS employee who has challenged DATCP recruitment hire procedures in the past. For DFS, it will be critical to have at least 3 members for the rating panel and it is strongly advised that the panels members have limited to no previous contact with Stephen Elmer, formerly of DFS Meat Bureau. The same care will need to be applied with the selection on the interview panel if Mr. Elmer is certified. It is strongly recommended that DFS plan to look outside of the Division/Agency for panel members to help insure impartiality. I will be advising Georgia and Alison on the membership of the panels since they will need to be informed and could possibly disapprove of any hire selection steps that are taken which might leave the process vulnerable to challenge.

Please feel free to seek out me, Alison or Georgia to discuss this if desired.

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<sup>4</sup> While the issue of illegality was not mentioned in the agreed-upon issue for hearing, inasmuch as the Appellant offered evidence and argument on this contention without objection from the Department, we will address it.

<sup>5</sup> Whistleblower retaliation complaints arising under Sec. 230.85(1), Stats. fall under the jurisdiction of the Equal Rights Division of the Department of Workforce Development, not that of the WERC.

With respect to this memo, we note that it concerned an entirely different selection process and was written two years prior to the events which are at issue herein. Further, there is no evidence that any of the staff members involved with the selection process here were privy to that communication or that any such information was circulated in this case. Georgia Pedracine, the Department Human Resources Director, who apparently was informed about the memo at the time, testified that she was not involved in the selection of the Meat Safety Supervisor beyond signing off on the Hiring Justification Worksheet for Helen Pernsteiner after it had been approved by the Division Administrator. Further, the content of the memo suggests that, if anything, the purpose of noting Mr. Elmer's application was to insure that steps were taken to insure impartiality in the selection process and to prevent any possibility of exposing the process to charges of bias, apparently due to complaints by Mr. Elmer in the past. There is no evidence that any of the members of the interview panel for the Meat Safety Supervisor position were given any special information or instructions regarding Mr. Elmer or treated his application differently than those of the other certified candidates.

Mr. Elmer further contends that the questions developed for the interview panel were designed to exclude him as a candidate and that the ratings given to his answers by the interview panel were deliberately and inordinately low. Again, there is no evidence that any of the members of the interview panel were given any special instructions regarding Mr. Elmer or had any reason to be biased against him. Further, and as noted above, while the criteria for selection used by the interview panel here may have differed from those used by the panel which did not select Mr. Elmer for the Animal Health Investigator Supervisor position, which was the subject of his prior appeal, we have found that the criteria used here were reasonably related to the skills desired for the Meat Safety Supervisor position. Moreover, there is no evidence that the adopted criteria were chosen in any way with Mr. Elmer in mind. In short, while Mr. Elmer may believe that his lack of success in his recent efforts to obtain employment in the Department are due to bias against him, there is no evidence in this record that bias was the cause of his non-selection here.

The appeal is dismissed.

Dated at Madison, Wisconsin, this 14<sup>th</sup> day of February, 2008.

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

