

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**JEROME SWEENEY**, Appellant,

vs.

Secretary, **DEPARTMENT OF CORRECTIONS**, Respondent.

Case 81  
No. 67936  
PA(sel)-53

**Decision No. 32775**

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**Appearances:**

**Jerome Sweeney**, appearing *pro se*.

**Deborah Rychlowski**, Assistant Legal Counsel, Department of Corrections, Office of Legal Counsel, 3099 East Washington Avenue, P.O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the Wisconsin Department of Corrections.

**FINAL DECISION AND ORDER**

On April 14, 2008, Appellant Jerome Sweeney (herein “Appellant”) filed a timely appeal of the decision by Respondent, Department of Corrections (herein “DOC” or “Respondent”) not to select him for a position classified as Supervising Officer 2 at Wisconsin Correctional Center System/Black River Correctional Center (herein “Black River”), invoking the jurisdiction of the Wisconsin Employment Relations Commission (herein Commission) under Sec. 230.44(1)(d), Stats. The Commission designated Coleen A. Burns, a member of its staff, as Hearing Examiner. The Examiner held a hearing in Black River Falls, Wisconsin. The parties stipulated that the issue before the Commission is:

Whether Respondent’s decision not to select the Appellant for a position as Supervising Officer 2 at WCCS/Black River Correctional Center was illegal or an abuse of discretion?

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On June 22, 2009, the Examiner issued a Proposed Decision and Order, concluding that the Appellant had not established that the Respondent's decision not to select the Appellant for the Supervising Officer 2 position at Black River was illegal or an abuse of discretion. No objections to the Proposed Decision were filed by the requisite date of July 22, 2009.

By letter dated August 6, 2009, a Commission agent advised the parties that, during its review of the matter, the Commission noted that the Appellant had "sought to present certain evidence in the current case about the decision of how to fill [the] Supervising Officer 2 position ... and ... that he believed this information related to the decision not to select him." The Examiner had refused to allow this evidence, on the ground that an appeal pursuant to Sec. 227.44 (1)(d), Stats., could not encompass pre-certification conduct. The Commission's letter cited *RANSOM V. UW-MILWAUKEE*, CASE NO. 87-0125-PC (PERS. COMM. 7/13/1988), which held that evidence about an appointing authority's actions prior to certification could be relevant to the appointing authority's post-certification selection decision, if the evidence tended to show that the appointing authority's pre-certification actions were designed to undermine a candidate's chances for selection. The Commission's letter invited the Appellant to submit an offer of proof as to the evidence he would produce, if provided the opportunity, that would be relevant in light of the *RANSOM* holding.

On August 16, 2009, the Appellant submitted an Offer of Proof Regarding Pre-Certification Issues, the content of which is described in the Memorandum that follows this Order. On September 26, 2009, the Respondent submitted a reply to the Appellant's Offer of Proof, taking the position as to the selected candidate's responses that "Mr. Sweeney's argument is really that [the selected candidate] should not have been certified for the position, and should not have been a candidate for the position. This allegation is clearly not a personnel action after certification." On September 27, 2009, the Appellant submitted a Brief in Response to Respondent's Brief on the Offer of Proof, at which time the record was closed.

While the Commission has not changed the conclusion, the proposed decision has been modified in many respects throughout this Final Decision and Order. Except where expressly noted, any modifications to the Findings of Fact are stylistic rather than substantive. The Memorandum portion of the proposed decision had included a discussion relating to the certification of candidates. That portion has been replaced by a section addressing the Appellant's Offer of Proof regarding pre-certification evidence. The new section includes an explanation of the change. The Memorandum has also been substantially reformatted and rewritten, largely to more clearly set forth and respond to the parties' arguments, but also to make stylistic changes and to delete mere recitations of testimony. Other modifications of significance are reflected by footnote.

Being fully advised in the premises, the Commission now makes the following

### **FINDINGS OF FACT**

1. Appellant Jerome Sweeney has been employed by the State of Wisconsin Department of Corrections (DOC) since 1991. Appellant currently occupies the supervisory position of Correctional Unit Supervisor and has been a DOC supervisor since 1998.

2. Respondent DOC is an agency of the State of Wisconsin with statutory authority to manage correctional facilities operated by the State of Wisconsin, including both the Center System and the various adult correctional institutions. The primary difference between a “Center” and an “Institution” is that the latter are fenced while the Centers are not.<sup>1</sup> Black River is one of two State correctional centers that are operated as “boot camps.” A “boot camp” operates differently from other State correctional institutions in that it is an early release program for inmates, providing treatment and education within an environment of military style discipline and physical fitness. Additionally, Black River does not employ any Correctional Officers 1 or Supervising Officer 1 (Lieutenant) positions, and the security staff supervised by its captains all have the rank of sergeant.<sup>2</sup> Warden Mickey McCash manages the entire Center System, and she is the hiring authority for all Centers within the system, including Black River.

3. On or about February 6, 2008, the Center System Human Resources Department posted a Department-Wide Transfer Announcement for the position of Supervising Officer 2 at Black River, which position is commonly referred to as Captain. At or about the time of this announcement, the Center System made the determination that transfer candidates as well as promotional candidates would be interviewed for the position. Sara Martin, Center System Human Resources Assistant, scheduled three candidates to be interviewed for the Captain vacancy. Two of the candidates were permissive transfers, specifically the Appellant and Lt. L. The third candidate, Sgt. M, was a promotional candidate.

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<sup>1</sup> The Commission has added this sentence to the proposed decision in order to explain the distinction between the two classes of facilities.

<sup>2</sup> Finding of Fact 2 in the proposed decision had stated that “Black River does not employ any Correctional Officers 1 and 2 . . .” However, under the classification system in effect at all material times, there are no Correctional Officer 1 or Correctional Officer 2 classifications. Rather, the correct classification titles are “Correctional Officer” and “Correctional Sergeant.” Black River does not employ Correctional Officers, but it does employ Correctional Sergeants. Accordingly, we have revised the language of the finding to more correctly reflect the evidence.”

4. The three candidates were interviewed at Black River on February 25, 2008. Prior to this date, each of the three candidates received a form letter from Martin that notified each of the time and location of his interview. This letter included the following paragraph (emphases in original):

Please complete and bring the enclosed Employment Application form with you to the interview. In addition, you may also bring a resume'. (sic) In either case, please include the names and telephone numbers of three (3) supervisory work references. If possible, **please get e-mail addresses for each reference** it is much easier and quicker for contact and to get the responses. Please arrive 15 minutes prior to your scheduled interview time.

5. The interview panel for the Captain vacancy comprised three individuals: Black River Superintendent David Andraska; Oregon Correctional Center Superintendent Jeff Pugh; and St. Croix Correctional Center Superintendent Jo Skalski. Andraska, who had the responsibility to select the panel members, chose Pugh and Skalski based, in part, on the fact that each had experience working in a "boot camp." At the start of each interview, each interviewee was advised that the interview panel would not consider resumes and that interview ratings would be based upon the interviewee's oral responses to the interview questions. Each interviewee was asked the same set of five interview questions: Each interviewer rated each interview question as "More than acceptable," "Acceptable," or "Unacceptable" based upon his/her understanding of the interviewee's oral responses to the interview question. The interview sheets contained distinct definitions for these ratings for each respective interview question. Each of these definitions contained two sentences, with the first sentence referencing benchmarks and the second sentence identifying what the "nature of the answer" should indicate. In each definition, the first sentence of "More than acceptable" stated, "Identifies most if not all the benchmarks noted above;" the first sentence of "Acceptable" stated "Identified some of the benchmarks noted above;" and the first sentence of "Unacceptable" stated "Able to identify only a few or none of the benchmarks noted above." At the completion of each interview, each interviewer prepared an "Interview Scores" sheet for each interviewee by entering a rating for each of the five questions and a total rating. Each interviewer gave Sgt. M an "Acceptable" rating on four interview questions and a "More than acceptable" rating on one interview question. Each interviewer gave Appellant and Lt. L an "Acceptable" rating on three interview questions and a "More than Acceptable" rating on two interview questions. The members of the interview panel, jointly and individually, decided that each interviewee should receive a total rating of "Acceptable," since none had received a majority of "More than acceptable" ratings (i.e., three of five questions).

6. After the interview process was completed, Martin sent an identical reference check form to the references submitted by each of the three interviewees. Each of the references contacted by Martin returned a form. One of the reference questions requested a rating of “Poor,” “Average,” “Good” or “Excellent” in 13 categories. The responses on this question for the Appellant and Sgt. M were distributed as follows:<sup>3</sup>

	Appellant			Sergeant M		
	Ref. 1	Ref. 2	Ref. 3	Ref. 1	Ref. 2	Ref. 3
Excellent	0	5	4	13	13	13
Good	12	8	7	--	--	--
Average	1	--	1	--	--	--

7. Appellant’s “Average” ratings on the first and third references were each in the same category, i.e., “Oral Communication Skills.” One of Sgt. M’s references states: “Communicates well with staff, inmates and supervisors and maintains a calm environment by his demeanor and mature approach to situations;” a second reference states: “He has excellent people skills, and understands how to appropriately communicate with staff, visitors and inmates” and a third reference states: “Very good communication skills. . .” One of Appellant’s references contains the following statements: “Jerry does have a strong willed personality but has always been willing to work toward improving relationships;” “. . . He openly shares input but at times comes across a bit more harsh than necessary. While supervising him in the most recent past, this was identified as an area needing improvement and he was working to change that image to the point the changes made were recognized by other team members;” “. . . he is aware of the need to continue to work on his interpersonal relationships;” and “. . . needs to continue to work on his interpersonal relationships.” Another of Appellant’s references states: “I have been told that if Jerry has a weakness, it would be his people skills at times.”

8. After the references were returned, Andrea Bambrough, Center System Director of Human Resources, reviewed the references and concluded that Lt. L’s references were average; that Sgt. M’s references were excellent; and that the Appellant’s references contained quite a few positives as well as some “red flags” in the areas of interpersonal skills and oral communications. Following her review of the references, Bambrough concluded that Lt. L should be ruled out as a finalist and that the Appellant and Sgt. M should be considered as

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<sup>3</sup> We have modified Finding of Fact 6 in the proposed decision by using a table format, rather than a prose format, to compare the responses contained in the respective references to the question requesting a rating in 13 categories. The modification allows the reader to more easily understand the same information. The subsequent portion of the finding has been placed into a new paragraph and has been renumbered accordingly.

finalists for the Captain vacancy. After Bambrough reviewed the references, she had a brief telephone conversation with Andraska in which she provided Andraska with an overview of the references, advised Andraska that she would not be recommending Lt. L to McCash, but that she would “pass on to the Warden” the Appellant and Sgt. M, and discussed when they (Bambrough and Andraska) would have time to meet with McCash. On May 4, after all the references had been submitted, but before the meeting with McCash to select the successful candidate, Bambrough requested that her assistant, Sara Martin, review Sgt. M’s leave and discipline record. This led Martin to believe that M was the “top” candidate, since, to her knowledge, this step normally is taken with respect to the “top” candidate. Occasionally Bambrough requests such a record check on candidates for promotion, such as Sgt. M in this case, but Bambrough could not recall what her actual reason was for asking Martin to check Sgt. M’s records at this particular juncture in the process.<sup>4</sup>

9. In early March of 2008, Bambrough met with McCash and Andraska at the New Lisbon Correctional Institution to finalize the decision on who would be hired into the Captain vacancy. During this meeting, which lasted approximately fifteen minutes, McCash was advised that all three candidates had received an interview rating of “Acceptable,” that Sgt. M had the best references, and that Appellant’s references contained “red flags” in the areas of interpersonal and communications skills. McCash expressed some concern about whether M would have the maturity to undertake supervisory responsibilities over sergeants with whom he had worked as colleagues at the same Center, and Andraska gave his opinion that M would be able to successfully do so.<sup>5</sup> When McCash asked for a recommendation, Bambrough and Andraska recommended Sgt. M. After receiving this recommendation, McCash made the decision to offer the Captain vacancy to Sgt. M. McCash’s decision was based upon information that McCash received from Bambrough and Andraska during their meeting at New Lisbon; with the determining factor being Bambrough’s assessment that Appellant’s reference checks raised “red flags” in the areas of interpersonal and communications skills. By letter dated March 13, 2008, Appellant was notified of not being selected for the position of Supervising Officer 2 at Black River. By letter dated March 13, 2008, Sgt. M received confirmation of his promotion to the Supervising Officer 2 position at Black River.

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

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<sup>4</sup> Finding of fact 8 (Finding of fact 7 in the proposed decision) has been modified by adding the last two sentences, in order to more completely conform to the record and respond more completely to the parties’ arguments.

<sup>5</sup> Finding of fact 8 in the proposed decision was modified by adding this sentence, in order to more completely reflect the record and respond more completely to the parties’ arguments.

**CONCLUSIONS OF LAW**

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

2. Appellant has the burden to establish that DOC acted illegally or abused its discretion when it decided not to select him for the position of Supervising Officer 2 at Wisconsin Correctional Center System/Black River Correctional Center.

3. DOC did not act illegally or abuse its discretion when it did not select Appellant for the position of Supervising Officer 2 at Wisconsin Correctional Center System/Black River Correctional Center.

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

**ORDER**<sup>6</sup>

The matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 3<sup>rd</sup> day of June, 2010.

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>6</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.

Wisconsin Department of Corrections (Sweeney)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This case is before the Commission under authority provided in Sec. 230.44(1)(d), Stats., on the basis of Appellant's allegation that DOC's decision not to select him for the position of Supervising Officer 2 at Black River violated the law and/or was an abuse of discretion. Section 230.44(1)(d), Stats., provides in relevant part:

(d) *Illegal action or abuse of discretion.* A personnel action after certification which is related to the hiring process in the classified civil 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-A (WERC, 12/04), the Commission stated that NELDAUGHTER V. DHFS, CASE NO. 96-0054-PC (PERS. COMM. 2/14/97) summarizes the Commission's interpretation of "abuse of discretion" as follows:

An "abuse of discretion" is "a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." LUNDEEN V. DOA, [CASE NO. 79-0208-PC (PERS. COMM. 6/3/81)]. 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.)

In the present case, Warden Mickey McCash was the hiring authority for the Captain vacancy at Black River. Respondent argues that McCash made the decision to select Sgt. M, rather than the Appellant, for the Captain vacancy and that this selection was based upon interview results and reference checks.

Appellant, contrary to Respondent, argues that McCash's decision not to select the Appellant for the Captain vacancy was illegal and/or involved an abuse of discretion. The Appellant's overarching belief is that, owing to a bias in favor of promoting Center System staff, McCash's hiring decision was tainted and prejudicial to Appellant's candidacy. His arguments can be grouped into two categories: those alleging improprieties prior to the Respondent receiving the list of certified candidates ("pre-certification") and those pertaining to the Respondent's "post-certification" hiring process.

## **I. Pre-certification issues.**

As noted in the introduction to this decision, prior case law permits a non-selected candidate to introduce evidence that the appointing authority engaged in pre-certification conduct for the purpose of undermining that candidate's chances for selection. *RANSOM V. UW-MILWAUKEE*, CASE NO. 87-0125-PC (PERS. COMM. 7/13/1988). Here, as to pre-certification conduct, the Appellant has two basic contentions: first, that the Respondent's decision to open the Captain vacancy to promotional candidates (such as M) as well as to transfer candidates (such as the Appellant) was part of an effort impermissibly designed to promote internal candidates such as M. Second, he argues that M's inclusion on the certified list of promotional candidates was illegal or an abuse of discretion, because M did not respond accurately on numerous questions on the promotional examination. According to the Appellant, but for M's "disingenuous" responses on the exam, he would not have been certified as a candidate.

As to the first issue, the record reflects that Black River Superintendent Andraska recommended and Warden McCash approved opening the Captain vacancy to promotional candidates as well as transfer candidates; that this occurred at the outset of the process, before posting the position for transfers; that the Center System generally prefers as wide a list of candidates as possible and it is not unusual for them to request a certification list that includes both promotional candidates and transfer candidates; that, in this case, only three individuals from the combined certified list were interested in interviewing; and that all of the interested candidates from the combined transfer/promotional certification list were interviewed. In contrast with this evidence as to the regularity of the process, no evidence suggests that Andraska or McCash decided to include promotional candidates in order to enhance M's chances of success or, conversely, damage the Appellant's chances. Nor does the record reflect that the Appellant attempted to adduce such evidence and was thwarted from doing so. Instead it appears that he was allowed to question witnesses freely as to this subject.

While the Appellant argues that Center System tends to favor internal candidates for promotion over candidates from correctional institutions, the evidence is not supportive. Since McCash became Center System Warden in 2000, only nine of 28 Center System captain positions have been filled by promoting a sergeant from within the System, rather than filling the position from outside the System. Even assuming for the sake of argument that it is inherently unreasonable/arbitrary to look favorably upon prior experience within the Center System,<sup>7</sup> this evidence standing alone fails to reflect such a lopsided favoritism toward internal

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<sup>7</sup> We question the assumption inherent in the Appellant's argument on this point, which is that successful experience in the Center System – and particularly in a boot camp setting such as Black River – is in itself an improper or arbitrary consideration when filling a captain position in the Center System. The record indicates that correctional centers are different from correctional institutions in the population they serve and in their function as the last step before release into society. The boot camp programs are unique even within the Center System, both in their quasi-military structure and the exceedingly strict disciplinary expectations imposed upon the inmates. The staff in the Center System, and particularly the boot camps, are generally more involved in hands-on counseling and training sessions with inmates. Given this, it may be a reasonable, job-related, and merit-based criterion to afford some positive inflection to an applicant's prior, highly successful performance as a sergeant within the boot camp or Center settings.

candidates as to justify a conclusion that the Center System is improperly “biased” in that regard. Accordingly, the Appellant has not met his burden to establish that the decision to open the Captain vacancy to promotional candidates reflected an impermissible intention to limit the Appellant’s chances of selection.

As to the second pre-certification issue, i.e., M’s performance on the examination, the Examiner did categorically and expressly limit Appellant’s attempts to introduce evidence challenging the content or results of the promotional examination which resulted in M’s inclusion on the certification list for this position. The Examiner based her ruling on the ground that the Commission’s jurisdiction in this matter rested upon subparagraph (1)(d) of Sec. 230.44, Stats., which specifically refers to actions taken “after certification.” While the Examiner’s ruling is generally correct, it is inconsistent with the RANSOM exception described above. Hence, we provided the Appellant an opportunity to identify evidence of “actions taken by the agency prior to certification [that] were part of an effort to not select the appellant from among those certified.” (Stege letter dated August 6, 2009, emphasis added).

In response, the Appellant requested an opportunity to prove the following:

- (1) that the successful candidate, Sgt. M, supplied “disingenuous” information on the certification examination for the Supervisor 2 position, in particular as to his supervisory and training experience within DOC; that, but for these inaccurate answers, M would not have been included on the certified promotional list for Supervisor 2 and would have been ineligible for selection to the position at issue; and that the Respondent knew or should have known that M responded inaccurately but instead turned “a blind eye” rather than disqualifying him.
- (2) that during discovery, the Appellant had sought records from the Respondent as to Sgt. M’s experience and credentials as a trainer within the Department of Corrections in order to show that M had responded inaccurately about his training experience both on his exam *and during his interview*, with DOC, and that the Examiner had denied the Appellant’s request for this discovery on the ground that it related to pre-certification matters.

The Appellant indicated in his Offer of Proof that he would supply testimony from three individuals to the effect that a candidate who lacks actual supervisory experience in DOC would not be certified as a candidate (i.e., given a passing grade on the examination) for a Supervising Officer 2 position. However, the Appellant has not offered to produce any evidence that DOC officials involved in the interview and hiring process knew or should have known, at the time they selected M for the position, that he had responded inaccurately on significant portions of the examination and/or that he was improperly placed on the certification list.

As to the portions of the foregoing offer of proof that relate to the content or grading of the examination, the basic responsibility for proper administration of the examination process lies with the administrator of the Division of Merit Recruitment and Selection (DMRS). Sec. 230.16, Stats.; Sec. ER-MRS 6.05, Wis. Adm. Code. To the extent Appellant's complaint is that the examination was improperly administered, graded, or answered, a request to investigate and/or disqualify an applicant may be submitted to DMRS. See Sec. ER-MRS 6.10, Wis. Adm. Code. An allegedly improper action in that regard by DMRS presumably would be appealable to this Commission pursuant to Sec. 230.44 (1)(a), Stats.<sup>8</sup> See *DUGAN & FISHER V. DIV. OF MERIT RECRUITMENT AND SELECTION, CASE NOS. 88-0043, 0044-PC (PERS. COMM. 1/13/1989)*.

The instant appeal, however, was brought against the appointing authority under Sec. 230.44(1)(d), Stats., and not against the administrator of DMRS under Sec. 230.44(1)(a), Stats. As to subparagraph (1)(d), RANSOM creates an exception to the general rule that pre-certification conduct is outside that provision, but RANSOM does not relieve the Appellant of his burden to establish that there were actions taken by the appointing authority, rather than DMRS, designed to inhibit his chances for selection. Here, for example, the Appellant has not offered to produce evidence that McCash, Andraska, other members of the interview committee, or any other agents of the appointing authority were aware of the content of the Supervisor 2 examination, the grading rubrics pertaining to that examination, or the content of M's responses to the exam. Nor has the Appellant offered to establish that agents of the appointing authority coached M in responding to the examination or otherwise interfered with the examination process. The Appellant simply has not proffered any evidence linking the improprieties that the Appellant believes occurred in the examination and any action taken by the appointing authority in the subsequent hiring process – as is required for invoking the Commission's jurisdiction under paragraph (1)(d).

The foregoing reasoning applies equally to the Appellant's request that he be provided an opportunity to demonstrate that Sgt. M responded inaccurately to the training-related questions on the examination.<sup>9</sup>

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<sup>8</sup> That paragraph provides: "(1) APPEALABLE ACTIONS AND STEPS. Except as provided in par. (3), the following are actions appealable to the commission under s.230.45(1)(a): (a) *Decision made or delegated by administrator.* Appeal of a personnel decision under this subchapter made by the administrator or by an appointing authority under authority delegated by the administrator under s. 230.05(2)." An appeal would have to be filed within thirty (30) days after the effective date of any action DMRS takes or within thirty (30) days after the appellant is notified of the action, whichever is later. See Sec. 230.45(3), Stats.

<sup>9</sup> As to M's training background and experience, we note that the Appellant also suggests that the Examiner denied him access to M's training credentials/experience insofar as that information related to the accuracy of M's interview responses. Evidence tending to undermine the interview process clearly addresses post-certification matters and could be relevant to the Appellant's instant claim. However, the record does not reflect that the Appellant was denied an opportunity to obtain or introduce this evidence. No such request was made at the hearing itself. Moreover, while the Appellant did seek discovery of this information prior to hearing, it appears that the Examiner ruled favorably upon the request. See Examiner's letter to the parties dated October 2, 2008,

Accordingly, although the Examiner's ruling regarding the admission of pre-certification evidence was overly broad in light of the RANSOM ruling, the Appellant has not demonstrated a basis for reopening this record, and we therefore decline to do so.

## **II. The Selection Process.**

### **A. Applicable standards.**

In ROYSTON v DVA, CASE No. 86-0222-PC (PERS. COMM. 3/10/88), the Commission stated that its role in a challenge to a selection process was not to determine which of an unlimited number of possible selection criteria it would have been best for Respondent to utilize, but rather to determine whether the criteria used by the Respondent were reasonably related to the duties and responsibilities of the position to be filled and were uniformly applied. Thus, the focus of this discussion is not upon the selection criteria that Appellant argues should have been used by the Respondent, but rather, upon the selection criteria that have been used by the Respondent.

The Commission will uphold selection decisions unless there is a sufficient basis upon which to conclude that the selection criteria were unreasonable or not uniformly applied, that the selection criteria were not the actual criteria utilized, or that the interviewer's assessments of the candidates were unreasonable in view of the candidates' presentations during the interviews and in view of the selection criteria. SONNENBERG v LOTTERY BOARD, 89-0036, 0069-PC (PERS. COMM. 4/19/90). As discussed above, Respondent asserts that the selection criteria were the interview ratings and the reference checks. The Appellant contends that, if the interviewing and hiring process had not improperly favored internal Center System/boot camp candidates, such as Sgt. M, the Appellant clearly would have been selected because he had markedly superior qualifications. He also contends that, because McCash delegated so much of the documentation review to subordinates, she based her ultimate decision upon inaccurate, unreliable, and insufficient information, which resulted in an arbitrary selection. He offers various arguments in support of this general position.

### **B. The interview process**

In Appellant's view, Black River captains Steindorf and Miller prepared Sgt. M for the interview in a manner that was inappropriate and prejudicial to Appellant. Steindorf and

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summarizing the prehearing conference of that date and specifically permitting access to training records pertaining to the interview process. Further, the file contains a photocopy of an e-mail from Respondent's counsel to the Appellant, dated October 16, 2008, in which Respondent's counsel stated, "Mr. Sweeney, I don't believe that I ever received information from you regarding training records for Mr. [M] that were referenced during the interview process, which you wanted DOC to provide. If I missed them, let me know." The Appellant responded to that e-mail on October 17, 2008, stating, "I do not foresee a need for them during this process. Thank you for following up." It appears from this exchange that the Appellant has waived any claim for access to/introduction of these materials by expressly declining to pursue them prior to hearing.

Miller were approached by Sgt. M and asked for information about how to prepare for the

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interview for the Captain vacancy. The two captains provided Sgt. M with “scenarios” to think about and/or suggestions on what to study in preparation for the interview, such as policy and procedures.

Steindorf and Miller both had experience with the interview process for a captain vacancy, but neither had knowledge of the specific questions that were asked in the interview at issue here. In relying upon their own experiences to assist Sgt. M in preparing for this interview, the two captains did not act unreasonably, nor did they inappropriately affect the outcome of the interview process.

Appellant also argues that Sgt. M was scheduled to be interviewed first so as to ensure that, once M’s ratings were known, the other candidates would not receive a higher rating than M’s. However, the record provides no reasonable basis to conclude that Sgt. M’s interview was scheduled in order to ensure that the other candidates would not receive a higher rating than Sgt. M. Instead, the record reflects that the Respondent’s practice is to schedule interviews in the order in which a candidate responds to the invitation. There is no evidence to suggest that a different practice was followed here. In addition, all of the interviewers credibly testified that there were no discussions or comments among them about any of the candidates or that one should be favored over the others. While Andraska was familiar with M and his work at Black River, the other two interviewers had little or no acquaintance with any of the candidates, nor does anything in their testimony remotely suggest that they actually or inferentially favored M over the other two. The mere fact that all interviewers were managers in the Center System, as opposed to other institutions, is not in itself arbitrary. The record reasonably supports the Respondent’s view that the Center System has a somewhat different mission than the institutions and that this different mission is properly considered in selecting staff.

A comparison of the interview questions and the position description for the Captain vacancy establishes that the interview questions were well-related to the duties and responsibilities of the Captain vacancy in the Center System. Appellant does not claim otherwise. He does, however, take issue with the interviewers’ conclusion that he should receive the same overall interview score as Sgt. M. He believes that any reasonable comparison of the candidates’ credentials and responses would have resulted in his having been rated higher than M and therefore at an advantage in the subsequent reference check portion of the process.

As noted, each of the interviewers held the position of superintendent in a center within the Center System. Human Resources Director Bambrough credibly testified that, when she trains superintendents, she does not give specific instructions on how to apply interview criteria and she does not identify a set number of benchmarks that equates to a rating of “More than acceptable,” (MTA), “Acceptable,” (A), and “Less than acceptable” (LTA). According to Bambrough, she expects the superintendents to use their professional judgment in determining

benchmarks identified in connection with each interview question are guidelines, and interviewers may take into account responses that are not necessarily covered by the identified benchmarks when scoring a response. The evidence also shows that interviewers tended to vary in the degree to which their notations correspond either to the benchmarks they check or to the answers given by the candidates. The testimony reflected that these variations are related, among other things, to how quickly the candidates speak in responding to questions. While none of the interviewers were able to remember, during their testimony, much about the specific answers from any of the candidates or specific reasons that they did or did not check off various benchmarks, this is understandable in view of the time elapsed between the interviews and the hearing and the number of selection committees in which each interviewer has participated during this time frame. Nonetheless, each credibly testified as to the methodology they followed at the time and the consistency of that methodology with both their instructions in this case and their customary approach to scoring interviews.

That methodology was to judge the overall response of each candidate to the question, being guided by (but not controlled by) the identified benchmarks, and giving credit for other elements in the responses if they pertained to the question, even if they were not specifically identified as a benchmark. The language of the definitions of what would yield an MTA, an A, or an LTA, reasonably indicates that the number of benchmarks is not the only factor to be considered when scoring an answer. Notwithstanding Appellant's arguments to the contrary, the absence or presence of interviewer notes is not a reliable basis upon which to judge the reasonableness of an interviewer's decision to check, or to not check, a benchmark. Nothing in the record suggested any bias for or against the Appellant or any other candidates. In fact, all three interviewers rated the Appellant higher on more questions (he received two MTAs while M received one). However, they reasonably employed a methodology such that an overall rating of MTA would have required at least three MTAs on the five questions.

The Appellant places particular emphasis on Question 1 and its benchmarks, because, in his view, the ratings did not reasonably contrast his considerable supervisory experience within a corrections setting to M's supervisory experience, which had largely been in a non-corrections setting. Question 1 read as follows:

Supervising Officers in the Center System have unique responsibilities which differ from the larger institutions. What specific training, education, and work experience do you have which would prepare you to assume the duties in the Center System?

The guidelines for Question 1 indicated that a More-than-acceptable response would "Identif[y] most if not all the benchmarks noted above. Nature of the answer indicates the candidate has training and/or education in a correctional setting, experience in programming, and experience supervising subordinate staff." Each of the interviewers checked off that the Appellant had touched upon a majority of the 20 benchmarks noted, yet none of the three

marked him as MTA. This, however, is also true of the interviewers' scoring of Sgt. M's

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answers – a majority of the benchmarks were checked, but he was rated “A” rather than MTA. Each interviewer credibly testified that, to the extent Question 1 sought to elicit information about supervisory experience, they did not view that experience as restricted to a correctional setting, nor did they necessarily view the term “supervisory” even within a correctional setting as restricted to experience as a lieutenant or higher. Given the phrasing of the question (specifically identifying the uniqueness of the Center System), the interviewers' interpretation was reasonable. Sgt. M had experience as a sergeant or “lead worker” at another institution prior to joining the staff at Black River, which the interviewers reasonably could consider as relevant to Question 1. In addition, he had run his own business with several employees for several years, which the interviewers could reasonably consider as relevant to Question 1. Despite the Appellant's efforts at the hearing to elicit testimony to the contrary, none of the interviewers believed that M had misrepresented his prior supervisory experience. Given the specific focus of Question 1 on experience related to a Center as opposed to other correction settings, it was not unreasonable for the interview committee to conclude that the Appellant's supervisory experience did not require a “More than acceptable” rating on Question 1.

Also as to Question 1, the Appellant focuses upon the fact that two of the three interviewers failed to check the benchmark for “treatment programs” when scoring his response to that question. The record reflects, however, that treatment programs have a special prominence at Centers, as compared with institutions, and especially in the boot camp setting. Hands-on conducting of group counseling sessions and other hands-on work with inmates in implementing treatment programs compose a relatively high portion of the staff's work in Centers as compared with institutions. Thus, Andraska explained in his testimony that he may not have given Appellant credit because Andraska had been looking for information that Appellant had provided or facilitated the treatment programs themselves, directly with the inmates, as compared with the Appellant's experience with treatment programs, which was related more to the supervision of other staff. It would not be an unreasonable use of professional judgment for Andraska to consider the nature of Appellant's experience with treatment programs when deciding to check, or to not check, the “treatment program” benchmark. Contrary to the argument of Appellant, the references to treatment programs that are contained in Andraska's notes of his interview with Appellant do not indicate that Andraska was unreasonable in failing to credit the Appellant with that benchmark, as the notes merely reflect the Appellant's responses, not that those responses met the criteria Andraska was using to determine whether the benchmark was met. Andraska's and the other interviewers' explanation that they were looking for experience like that in the Centers as opposed to the institutions is not only reasonable, but is consistent on its face with the purpose of Question 1. As discussed earlier, it was not unreasonable or arbitrary for the Respondent to give greater emphasis to work experiences that related specifically to the Centers, as opposed to the other institutions.

The Appellant places great emphasis on the fact that, at the time of the interview, Andraska may have known that employees at Black River, including the captains, were

“rooting” for their colleague, Sgt M. There is no evidence that the other two interviewers

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were aware of this. More importantly, the record fails to establish that any of the interviewers, including Andraska, based his/her interview ratings upon any factor other than his/her good faith professional judgment about the candidate’s oral responses to the interview questions. Nor does the record establish that the members of the interview panel acted unreasonably in deciding, individually and jointly, that each of the candidates should have a total interview rating of “Acceptable.” While it may also have been reasonable for the Appellant’s extensive supervisory experience to have resulted in a “More than Acceptable” overall rating, it is not within our authority to overturn the views of the Respondent’s interview panel, so long as they are reasonable.

### C. The reference process

Because all three candidates received an overall rating of “Acceptable” on the interview, all three names were forwarded to the Human Resources office (specifically, Bambrough) for reference checks. The Appellant would have us infer from certain aspects of this process that the Respondent manipulated the process so as to ensure that Sgt. M’s references would be superior to the Appellant’s.

First, the Appellant points to Andraska’s acknowledgement that, shortly after the interviews, he told Captains Miller and Steindorf that all of the candidates did well and that references were being checked on all three candidates. At that time, Andraska would have been aware that Sgt. M had identified Steindorf and Miller as references and that both captains were “rooting for M.” According to the Appellant, Andraska’s comments would have conveyed to Steindorf and Miller that the content of their references would be crucial in the outcome. Even if we were willing to draw that inference, however, it would not be a sufficient basis on which to conclude that Andraska had manipulated the outcome of the reference process. We think it unremarkable that M’s coworkers would be rooting for him or that he would have chosen as references individuals who were rooting for him. Presumably, both Miller and Steindorf would have assumed that their references would have some significance in the process and, having committed to providing M a reference, would have intended to provide a positive reference regardless of M’s ranking by the interview committee. The record simply provides no reasonable basis to conclude that either Steindorf’s or Miller’s reference for Sgt. M, was based upon any factor other than a good faith opinion.

Second, the Appellant also finds it suggestive that his designated references and those of candidate L were contacted one or two work days before the Respondent contacted M’s references. Appellant contends this sequence meant that Respondent had reviewed Appellant’s reference results in order to identify areas where Sgt. M’s references could be drafted so as to be more favorable. The Appellant points out that M’s references were particularly positive in the very areas – communications skills and interpersonal relations – on which the Appellant’s references were somewhat negative. Both Bambrough and her assistant, Martin, however, credibly testified that they had no communications with anyone relating to the timing of the

reference checks. They also testified that owing to the passage of time and the numerous

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reference checks they routinely conduct, they had no specific memory about the brief delay that occurred here, but that it was related most likely to Martin's work duties and/or schedule. The record provides no reasonable basis to conclude that any of Sgt. M's references were prepared with the knowledge of, or in response to, Appellant's references.

The Appellant also suggests that M had been identified as the "top candidate" even before Bambrough and Andraska met with McCash, and that references were not the deciding factor. Prior to meeting with McCash, Bambrough asked Martin to check Sgt. M's sick leave and discipline records, but not those of the other two candidates. Martin testified that such a request was customary only with "the top candidate." It is clear she inferred from Bambrough's request that M was the top candidate. However, Bambrough testified that she did not recall the reason for requesting M's records in this particular instance, but that she sometimes makes that request for candidates who have not yet been identified as the top candidate and generally does not request such records regarding candidates who are already supervisors. Given the timing and Bambrough's conclusions about the relative ranking of the references, it is certainly possible that Bambrough had concluded that McCash would view M as the top candidate and possibly Bambrough wanted to have a full set of information available on M for purposes of the upcoming meeting with McCash. In any case, the record provides no basis for concluding that Bambrough had any improper reason for checking M's personnel records or even for tentatively concluding that he was the top candidate (if she actually reached that conclusion) at that time. Therefore the Appellant has not met his burden to show that Bambrough acted arbitrarily or improperly by checking M's references at that point in time.<sup>10</sup>

The Appellant also challenges the accuracy of Bambrough's review of the references. According to Bambrough, the information contained in the reference forms caused her to conclude that: (1) Lt. L should be ruled out on the basis that his reference checks were average; (2) Sgt. M had excellent references; and (3) Appellant's references contained "red flags" in the areas of interpersonal skills and oral communications. The Appellant argues that his references were predominantly positive, that the negatives on which the Respondent

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<sup>10</sup> The proposed decision had stated that, "According to Bambrough, Martin was mistaken and that Bambrough requested the additional checks on Sgt. M because he was a non-supervisory employee and, rightly or wrongly, Bambrough assumes that supervisory employees, such as the Appellant, would not have problems in these areas." The proposed decision also stated, "At the time that Martin made the additional checks, she had been in her position at WCCS for less than one year. It is not improbable that, given her relatively short tenure, Martin would be unaware that Bambrough could have more than one reason for requesting the additional checks on Sgt. M." Bambrough's testimony was that, while she did not recall why she asked Martin to check M's leave and discipline records in this case, it *could have been* because M was in a non-supervisory position while the other two candidates were already supervisors. Also, by the time of the hearing in this matter, Martin had been in her job considerably longer than at the time of the events giving rise to this case; hence, if indeed Bambrough had a routine practice of checking the records of nonsupervisory candidates even if they were not yet the top candidate, Martin may indeed have been expected to have encountered that situation by the time she testified. Accordingly, we have chosen to dispose of this issue on the basis set forth in the text, above, rather than the analysis set forth in the proposed decision.

eventually focused could be seen as relatively minor, and that some of the negative comments

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on him were provided by a very new supervisor with little personal knowledge of the Appellant's work. On that particular reference form, the individual acknowledged that he had been Appellant's supervisor for only three weeks and states, "I have been told that if Jerry has a weakness, it would be his people skills at times." Appellant questions the reasonableness of relying upon hearsay reports, as well as on the statements of a supervisor with such limited experience supervising an employee. The Appellant's points are not illogical, but the underlying question is whether the Respondent's assessment of the overall references was reasonable, rather than whether we agree with that assessment of the references. Here, the Appellant's references, while generally good, reflected significantly fewer "excellent" ratings than did those of Sgt. M. In that context, it was not unreasonable for the Respondent to focus upon the negative comments on the Appellant's references, even if few in number and modest in degree, as a basis for distinguishing his references from M's, especially since the moderately negative remarks were in areas (communications and interpersonal skills) that were of particular importance in the Center System.

The Appellant points out that, in her testimony, Bambrough expressed her opinion that the Center System had sacrificed many positions for the purpose of retaining the "unit supervisor" system of managing the institutions. The Appellant was a unit supervisor and hence suggests that we draw the inference that Bambrough was biased against him. However, neither the expression of this opinion, nor any other record evidence, provides a reasonable basis to conclude that Bambrough's assessment of the references was influenced by personal bias either for or against any of the three candidates for the Captain vacancy. Nor does the record provide a reasonable basis to conclude that Bambrough's assessment of the references was based upon any factor other than her good faith professional judgment of the content of these references.

Finally, the Appellant questions the propriety of McCash's reliance upon Bambrough for reviewing and summarizing the references rather than McCash conducting her own review of the underlying materials. McCash testified that she makes dozens of hiring decisions every year and of necessity has delegated to Bambrough, a trained personnel specialist, the responsibility for reviewing and accurately summarizing and evaluating references. We see nothing unreasonable in this delegation, especially since it is consistent with the Respondent's regular hiring process.

It is understandable that the Appellant would take a dim view of the weight assigned to references in the overall selection process, so that the hiring decision could be viewed as hinging upon a few modestly negative comments in his references as compared with M's. It would have been reasonable for the Respondent to have used a process that more thoroughly integrated resumes, interviews, and references in reaching the ultimate selection decision. However, what the Respondent did here was also reasonable and merit-driven, i.e., to take the composite results of the interview process (all three candidates being "Acceptable") as a leveling of the playing field and the references results as the game-winning play. The record

does not reflect that Respondent utilized this process knowing in advance that it would favor M

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over the Appellant. The evidence is that this process was consistent with the Respondent's normal hiring practices, not designed to thwart the Appellant's candidacy, and not unreasonable.

D. Selection decision

McCash made the final decision to hire M rather than the Appellant for the Captain vacancy at Black River. McCash testified that, based upon information provided to her by Andraska and Bambrough, she knew that all of the candidates had received a rating of "Acceptable" in the interview; that Lt. L was not among the top two candidates; that Sgt. M. had excellent references; and that that Appellant's references contained "red flags" in the areas of interpersonal and communications skills. McCash recalls that, in response to her request, Andraska and Bambrough made a hiring recommendation; that this recommendation was to hire Sgt. M; and that, given the fact that Appellant and Sgt. M had each received an interview rating of "Acceptable," the determining factor in McCash's decision to select Sgt M, rather than the Appellant, was Bambrough's assessment of the references. According to McCash, her reason for not selecting the Appellant was Bambrough's assessment that Appellant's references contained "red flags" in the areas of interpersonal and communications skills.

McCash testified that she has the ability to train an individual in the processes of being a supervisor, but that it is not easy to train an individual to be a good communicator or to have interpersonal skills. McCash testified that a captain in a boot camp setting, such as Black River, is considered to be an Assistant Superintendent and needs good interpersonal and communication skills to pass on information from the central office, as well as to train staff. McCash further testified that, in the boot camp environment, sergeants toe a fine line between being assertive and being abusive, that captains need to understand this line, and that captains have to regularly train and instruct sergeants in how not to cross that line. McCash's testimony, as well as the testimony of other witnesses, establishes that interpersonal and communications skills are reasonably related to the duties and responsibilities of the Captain vacancy.

The record does not reflect that McCash reached a decision without any serious reflection on her part about the relative strengths and weaknesses of the candidates. Contrary to the Appellant's view that McCash tries to promote only from "within" the Center System, McCash questioned Andraska closely about the viability of promoting a candidate to a position at Black River, where he would end up supervising his former colleagues. She required and received assurances that M would have the requisite maturity to handle that situation.

As Appellant argues, the record indicates that it is rare to promote from sergeant to captain in institutions as compared with Centers. However, it is still a minority of captain vacancies in the Centers (nine out of 28) that McCash has filled with sergeants from inside that System. Contrary to the argument of the Appellant, the record does not provide a reasonable basis to conclude that McCash has made a concerted effort to promote "her own," regardless

of qualifications.

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Appellant argues that, in the “Written Hiring Reason for Classified and Project Appointment” prepared by Bambrough, she did not check the box indicating that “The selected person received more favorable recommendations.” Bambrough credibly explained that, while the Appellant’s relatively less favorable references were properly cited on the portion of the form asking for the reason that the Appellant and L were not selected, positive references were not the full explanation for selecting Sgt. M. Rather, as she checked on the form, “The selected person demonstrates superior ability to perform the key tasks required in this position.” Neither the manner in which Bambrough prepared this document, nor any other record evidence, provides a reasonable basis to discredit McCash’s testimony that the determinative factor in her decision not to select Appellant for the Captain vacancy was Bambrough’s assessment that the Appellant’s reference checks contained “red flags” in the areas of interpersonal and communications skills.

**Conclusion**

Appellant has the burden of establishing that the decision not to select him for the Captain vacancy was an abuse of discretion or illegal. The Appellant has not met this burden. We have accordingly dismissed the appeal.

Dated at Madison, Wisconsin, this 3<sup>rd</sup> day of June, 2010.

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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