

3. Following the passage of Chapter 29, Laws of 1977, positions in the various county Public Defender offices around the state were filled through the Wisconsin Civil Service system. All staff attorney positions were filled through the Wisconsin Civil Service system during 1978-79.

4. Recruitment to fill the positions of Assistant State Public Defender at various offices throughout the state began in December, 1977 when job announcements were posted indicating that the positions would be filled after July 1, 1978 (Respondent's Ex. 1-2).

5. Each applicant was required to submit a job application specifying interest in a staff or senior attorney position, or both, and also indicating which areas of the state he or she was interested in working.

6. Each applicant was required to complete an achievement history questionnaire. Completed questionnaires were screened by a panel of attorneys.

7. The best qualified candidates were invited to participate in oral examinations. The oral exams for staff attorney positions were held on May 15, 16 and 17, 1978 and the exams for the senior attorney positions took place on May 26-27, 1978.

8. A passing score on the examination was 70 or above. All candidates with a passing score were placed on a register in rank order based on their score. Separate registers were compiled for the staff position and senior position.

9. The register for staff positions, which was dated June 21, 1978, contained 50 names, including the appellant. Nelson scored 78.34 and ranked 44th on the register (Respondent's Ex. 8).

10. A total of 23 candidates expressed an interest in the Outagamie County staff attorney position, including Nelson. Appellant ranked 21 out of those 23.

11. White applied for the senior staff attorney position in the Outagamie County office. He was notified of his appointment to the position in August or September, 1978 (Tr. 67).

12. A total of 14 persons were appointed to attorney staff positions from the original staff attorney register before it expired on December 21, 1978 (Tr. 33).

13. Because the original staff attorney register was due to expire in December and a substantial number of positions were yet to be filled, a second recruitment began in October, 1978 with November 24, 1978 established as the deadline for application (Respondent's Ex. 11).

14. Candidates not hired from the original register were sent an announcement by Ms. Barbara Showers, a personnel specialist from the Division of Personnel, informing them that the register was going to expire in December and that they should contact Mark Braunhut, administrative officer in the State Public Defender's office, if they wished to participate in the new recruitment. Braunhut's telephone number was listed to call (Respondent's Ex. 14).

15. Appellant telephoned the number on the announcement at 12:55 p.m. on November 14, 1978 and spoke to a woman whose name he did not obtain, indicating that he was calling in response to the announcement regarding the new recruitment (Appellant's Ex. 6). He expressed his

interest in participating in the new recruitment.

16. Neither Braunhut or his assistant, Cheryl Anderson, were informed about Nelson's telephone call.

17. Sometime prior to December 19, 1978, appellant telephoned Braunhut and inquired about the Outagamie County staff attorney position. He was told by Braunhut that no decision had been made. They did not discuss the second recruitment.

18. By letter dated December 19, 1978, appellant was informed by Braunhut that he would not be offered a position in the Outagamie County Public Defender's office. The letter did not mention the second recruitment (Appellant's Ex. 7). Appellant's last day of work in the Appleton office was December 31, 1978.

19. Ronald D. Haacke was appointed to the Outagamie County staff attorney position from the new register in January, 1979 (Respondent's Ex. 13).

20. Appellant subsequently applied for a position as an assistant State Public Defender in the spring of 1979. He was certified and offered a staff attorney position in the Milwaukee office, but declined the position.

21. No civil service statutes or administrative rules were violated in the filling of the Outagamie County staff attorney's position.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.44 (1) (a), Wisconsin Statutes.
2. The burden of proof is on appellant to show that the filling of the Outagamie County Public Defender's office staff attorney position was an illegal personnel action or constituted an abuse of discretion.
3. Appellant failed to sustain his burden of proof.
4. The action of the respondents in filling the position at issue was not an illegal action or an abuse of discretion.

OPINION

The issue agreed to by the parties in this case is as follows:

"Were any applicable civil service statutes or rules violated in the appointment process leading to the filling of the Outagamie office staff attorney position with an individual other than the appellant?"

Appellant asserts that the respondents violated §230.44(1)(d), Wis. Stats., and §230.43(1)(a), Wis. Stats. which read respectively:

"230.44(1)(d) 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.

230.43(1)(a) Any person who willfully, alone or in cooperation with one or more persons, defeats, deceives or obstructs any person in respect of the rights of examination or registration under this subchapter or any rules prescribed pursuant thereto . . . shall for each offense be guilty of a misdemeanor."

There can be no violation of §230.44(1)(d) here because appellant was never certified for the position of staff attorney. He initially ranked 44th on the register of 50 names. There were 23 persons on the register

who expressed an interest in the Outagamie County position. Nelson ranked 21st of the 23.

Only 7 of the candidates who ranked ahead of appellant accepted positions in other offices before the original register expired. This advanced Nelson to only 14th on the list of those remaining and he would have had to have ranked in the top 5 to have been certified from the original register. Therefore, he was never certified and there was no "personnel action after certification" taken against Nelson.

In reference to §230.43(1)(a), appellant is not challenging the validity of the examination process. He was placed on the first register and was eligible to be certified during the first recruitment. The only remaining question to be answered is whether appellant was "defeated, deceived or obstructed" in his efforts to take part in the second recruitment.

The respondents offered legitimate reasons for establishing a second register rather than extending the first one. There was an on going need to fill a great many staff attorney positions around the state and the original register had been extensively used, eliminating some of the top candidates from that register. Since the appointing authority was entitled to five certified candidates for each position, the old register would not have provided a full certification to all positions remaining to be filled.

After the decision was made to begin a new recruitment, appellant was sent an announcement to contact Braunhut if he wished to participate.

Nelson did telephone Brauhn's office as the announcement instructed him to, but both Brauhn and his assistant deny being told about his call. The hearing examiner has no reason to doubt their testimony.

Brauhn said that White made derogatory remarks about Nelson to him several times after White had been named senior attorney in the Outagamie County office. Brauhn admitted that, knowing White's attitude concerning Nelson, it would not have been in the best interest to all concerned and the program to appoint appellant to work under White in Appleton.

Appellant alleges that Brauhn conspired with White to prevent Nelson from further consideration for the staff position. There was no evidence offered by appellant to support this theory. Brauhn testified that he found Nelson "pleasant" and "charming" the one time that he met him personally.

Brauhn could not have appointed appellant from the first register even if he had wanted to since Nelson was never certified. He obviously ignored White's remarks about appellant when he did not attempt to prevent Nelson from being offered a position in the Milwaukee Public Defender's office in the spring of 1979.

The person in Brauhn's office who took appellant's telephone call apparently did not relay the information to Brauhn or his assistant. There was no evidence offered, however, that this person "wilfully" attempted to "defeat, deceive or obstruct" appellant from participating in the second recruitment.

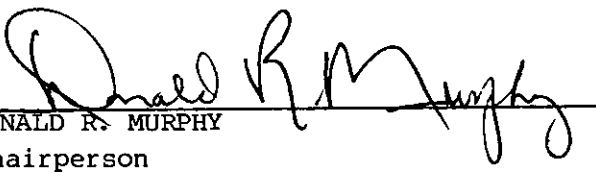
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ORDER

The action of the respondents in filling the position of staff attorney in the Outagamie County Public Defender's office is affirmed and this appeal is dismissed.

Dated: Nov. 19, 1981.

STATE PERSONNEL COMMISSION


DONALD R. MURPHY
Chairperson

GHB:jmg

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