

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*

BEATRICE EBERT, \*

Appellant, \*

v. \*

Secretary, DEPARTMENT OF \*

INDUSTRY, LABOR AND HUMAN \*

RELATIONS, \*

Respondent. \*

Case No. 81-64-PC \*

\* \* \* \* \*

DECISION  
AND  
ORDER

NATURE OF THE CASE

This is an appeal of a hiring decision pursuant to §230.44(1)(d), Stats. In an Interim Decision dated September 3, 1981, the Commission ordered that the issue for hearing would be limited to "Whether or not the decision not to hire appellant for the Waukesha position was an illegal act or an abuse of discretion by the appointing authority." A hearing was held on December 13, 1982, and April 4 and 5, 1983, and the parties filed posthearing briefs.

FINDINGS OF FACT

1. At all times relevant to this matter, appellant has been employed in the classified civil service in respondent's Unemployment Compensation (UC) unit. The following is a summary of positions held by appellant at the Waukesha UC Office from 1972 to the date of the subject hiring decision (some time between January 15, 1981 and February 23, 1981) and the primary duties actually performed by appellant in such positions:

<u>Classification</u>	<u>Dates</u>	<u>Duties</u>
Stenographer 2,3	1972-8/3/78	Stenographic and clerical duties.
Job Service Assistant 2,3	8/3/78-11/80	Specialized processing functions associated with determinations on disputed claims--clerical lead worker.
Job Service Specialist 1 Project Position	11/80-9/81	Conduct eligibility review interviews; issue verbal and written determinations on all types of disputed UC claims; provide technical assistance to adjudication clerical staff.

2. In a job opportunities bulletin dated October 9, 1980, respondent advertised a Job Service Specialist 4 (JSS-4)-Lead Worker-Adjudication position opening in the Waukesha UC Office. The portion of the bulletin relating to this JSS-4 position provided in pertinent part: "Job Description: Under the general supervision of the Adjudication unit supervisor, function as the leadworker for the unit, investigate disputed U.C. claims and issue initial determination of eligibility, process appeals and prepare responses to claimant and employer inquiries. Tasks to be Performed Upon Appointment: Monitor and review the work performed by Adjudication Units; provide direction and assistance to unit staff; evaluate weekly workload data and recommend changes in work assignments; provide technical assistance to staff and outside work units or the public; perform U.C. disputed claims investigations and resolve issues by written determinations; prepare appeals arising from determinations and explain rights and responsibilities regarding appeals and explain the effects of legal determinations to claimants and employers."

3. It was also anticipated at that time that this position would serve as the Trade Readjustment Act (TRA) coordinator for the Waukesha UC office. At the time the hiring decision was made, there were employees in the Waukesha UC office with TRA experience and there was a plan to gradually phase out the TRA program.

4. Appellant took the examination for this JSS-4 position in December of 1980 and achieved a score of 96.90. A list of those candidates certified for the position was developed on or around December 16, 1980. The names and scores of the other candidates certified and ultimately interviewed for the JSS-4 position were as follows:

John Mand	91.60
JoAnn Pedersen	83.09
Thomas Mund	82.59
Richard Libert	77.82
Jane Ziegler	74.68

5. The oral interviews for this JSS-4 position were conducted on January 15, 1981, by Rod Bodmer, the adjudication supervisor of the Waukesha UC Office and Bill Richard, the director of the Waukesha Job Service Office of which the Waukesha UC Office is a part. Each of the candidates interviewed were asked the same questions. Appellant acknowledges that the questions were "fair" in view of the nature of the position to be filled.

6. The interviewers ranked Thomas Mund higher than appellant on the oral interview.

7. The following is a summary of UC-related positions held by Thomas Mund from 1977 to the date of the subject hiring decision and the primary duties of such positions as described in relevant position descriptions:

<u>Classification</u>	<u>Dates</u>	<u>Duties</u>
Job Service Specialist 1 - LTE	12/77-6/78 & 4/79-3/80	Adjudicate all types of disputed UC cases. Issue decisions and take appeals when necessary.
Job Service Specialist 1,2	4/80-2/81	Coordinate the Trade Re- adjustment Act (TRA) pro- gram; investigate and resolve, through initial determination, all types of disputed UC claims and TRA eligibility questions; take appeals, explain and interpret TRA program and UC law; serve as leadworker for the unit and in the absence of the supervisor be responsible for manage- ment of the office.

There is no evidence in the record which shows that such duties were not the primary duties actually performed by Thomas Mund in such positions.

8. The interviewers felt that appellant's oral interview had the following deficiencies and the record shows that appellant's oral interview was characterized by the following:

a. When presented with a hypothetical fact situation requiring the prioritization of certain tasks and a description of how she would perform such tasks, appellant did not offer a sufficiently detailed or complete answer in reference to the procedure to be followed in handling the cases scheduled for an itinerant office in the absence of the staff person assigned to that office and did not assign the proper priority to a legislative inquiry.

b. When presented with a hypothetical fact situation relating to how she, as a lead worker, would deal with an analyst in her unit who had repeatedly cited or applied the wrong statutory provision, appellant

at first indicated that she would consider formally disciplining the analyst. Appellant then asked the interviewers to repeat the question and to strike her first response. Appellant then offered a response which differed from the first response and which the interviewers felt was an appropriate response. It should be noted that a lead worker does not have the authority to impose discipline on the employees in the unit.

c. When asked if she had anything else to offer, appellant indicated that she wanted to go "off the record" and that she was surprised that neither of the interviewers had ever congratulated her on receiving the highest score on the examination and that she took issue with a comment allegedly made by Rod Bodmer prior to the interview regarding appellant's lack of adjudication experience.

d. Each interview was scheduled to last 45 minutes but appellant's lasted 1½ hours. Even though the candidates were not advised that the time allotted to their interview was limited, the interviews with the other candidates lasted 45 minutes or less.

e. During the course of the interview, appellant had to be reminded by the interviewers not to digress.

9. The interviewers felt that Thomas Mund's oral interview had the following deficiency and the record shows that Thomas Mund's oral interview was characterized by the following: an apparent lack of interest in the position.

10. The interviewers had difficulty at the hearing recalling certain details of the interviews. The one inconsistency clearly indicated in the record involves the interview of a candidate (John Mand) who had already accepted another position in the Milwaukee UC Office.

11. It can reasonably be implied from the record that, aside from the above described characteristics, the performance of appellant and Thomas Mund on the oral interviews was comparable.

12. At the time the hiring decision was made, Thomas Mund had more than two years of experience with the UC program, more than two years of experience as a UC adjudicator, 10 months of experience as the lead worker of a UC adjudication unit, and 10 months of experience as a TRA coordinator.

13. At the time the hiring decision was made, appellant had more than 10 years of experience with the UC program, 2 months of experience as a UC adjudicator (appellant's project position as a JSS-1), more than five years of experience as a clerical lead worker but no experience as the lead worker of a UC adjudication unit, and no experience as a TRA coordinator.

14. In making the final hiring decision, Rod Bodmer primarily relied upon a comparison of the candidates' experience with the UC program in general, as UC adjudicators, as lead workers, and with the TRA program; and the candidates' performances on the oral interviews. In view of the duties and responsibilities of the subject position, these were reasonable bases for comparison.

15. Thomas Mund had more experience as a UC adjudicator than appellant did, Thomas Mund had experience as the lead worker of a UC adjudication unit and appellant did not, Thomas Mund had experience as a TRA coordinator and appellant did not, and it was reasonable for the interviewers to conclude that Thomas Mund performed better than appellant on the oral interview. Appellant had more experience with the UC program in general than Thomas Mund did.

16. In a letter dated February 16, 1981, Rod Bodmer requested that an exception be granted to the affirmative action directive then in effect which would make it possible for him to hire other than affirmatively due to the fact that Thomas Mund was better qualified than any of the female candidates for the position. This letter stated that appellant had no adjudication experience. The persons responsible for reviewing the request (Al Jaloviar and Vidal Rodriguez) did not carry out an independent investigation of the statements made in the letter.

17. Rod Bodmer checked the employment-related references of certain of the candidates. The record does not show that Mr. Bodmer contacted the nonemployment-related references of any of the candidates other than appellant. Mr. Bodmer did not contact the non-employment-related references of appellant.

18. Rod Bodmer was aware that appellant had stated that she would consider appealing the hiring decision if it was not in her favor.

19. In a letter dated March 3, 1981, appellant was advised that she was not selected for the JSS-4 position. Thomas Mund was offered the position and accepted it.

20. In a letter dated March 3, 1981, appellant requested of respondent information as to why Thomas Mund was selected for the JSS-4 position. The respondent did not supply such information in response to this request. There was no showing in the record that respondent failed to respond to any reasonable prehearing discovery request.

21. On March 6, 1981, appellant filed a timely appeal of respondent's hiring decision with the Commission.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(d), Stats.
2. The appellant has the burden of proving that the hiring decision made by respondent was an illegal act or an abuse of discretion.
3. The appellant has failed to sustain her burden of proof.
4. Respondent's decision not to hire appellant was neither illegal nor an abuse of discretion.

OPINION

This is an appeal pursuant to §230.44(1)(d), Stats. Therefore, the standard to be applied is whether the appointing authority's decision was "illegal or an abuse of discretion."

The term "abuse of discretion" has been defined as "... a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." Lundeen v. DOA, No. 79-208-PC (6/3/81). The question before the Commission is not whether it agrees or disagrees with the appointing authority's decision, in the sense of whether the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather, it is a question of whether, on the basis of the facts and evidence presented, the decision of the appointing authority may be said to have been "clearly against reason and evidence." Harbort v. DILHR, No. 81-74-PC (1982).

In making the final hiring decision, Rod Bodmer primarily relied upon a comparison of the candidates' experience with the UC program in general, as UC adjudicators, as lead workers, and with the TRA program, and upon a comparison of the candidates' performances on the oral interviews. In view of the fact that the candidate selected to fill the subject JSS-4 position



would serve as the lead worker and TRA coordinator of a UC adjudication unit, these were certainly reasonable selection criteria. Appellant contends, however, that utilizing experience with the TRA program as a selection criterion was unreasonable in view of the extensive TRA experience of existing employes in the Waukesha UC Office and in view of the planned federal phase-out of the TRA program. However, it is not unreasonable to expect a lead worker to have knowledge of and experience with a program he is expected to lead. Furthermore, the planned phase-out was to be a very gradual one and, therefore, there would be a need for TRA expertise in the Waukesha UC Office for some time after the date of the hiring decision.

The record clearly supports Mr. Bodmer's conclusions that, although appellant had more experience with the UC program in general, the candidate ultimately selected for the position, Thomas Mund, had more experience as a UC adjudicator; had experience as the lead worker of an adjudication unit while appellant's lead work experience was limited to serving as a clerical lead worker in a UC adjudication unit; and had served as a TRA coordinator while appellant had no direct experience with the TRA program. Appellant argues that she performed the duties of an adjudicator while serving in clerical positions within a UC adjudication unit. However, appellant's primary duties while serving in such clerical positions did not include applying the applicable law to the facts of a UC dispute and issuing a determination, which are the primary duties of a UC adjudicator. In addition, appellant places great emphasis on the adjudication duties she performed while serving in a one-year project position as a JSS-1. However, appellant did not commence work on the project assignment until November of 1980 and, therefore, had served in the position only two months

at the time the interviews for the subject position were conducted. As of the date of the interviews, Mr. Mund had served as a UC adjudicator for more than two years. Appellant further argues that her community activities should be regarded as evidence of her leadership abilities and experience. However, it would be unreasonable to conclude that such experience was comparable to Mr. Mund's experience as a lead worker of a UC adjudication unit in view of the duties and responsibilities to be performed by the person selected to fill the JSS-4 position.

Mr. Bodmer also compared the performances of the candidates on the oral interviews. The record clearly indicates that the interviewers felt that there were deficiencies in the interview performances of both appellant and Mr. Mund. The deficiencies in appellant's interview consisted of her inability to deliver an accurate, succinct, well-focused response to certain interview questions as evidenced by the length of time appellant's interview took, by the need for the interviewers to remind appellant not to digress, by appellant's request to have a question repeated after she had given an inappropriate response, and by the interviewers' conclusion that the answer to at least one of the questions was incomplete; and of the negative impression appellant created when she questioned the interviewers' failure to compliment her on her exam score and when she challenged one of the interviewers' previous comments regarding her adjudication experience. Appellant contends that she requested during the course of the interview that her first answer to the repeated question be stricken from the record and that her comments regarding the interviewers be considered "off-the-record." Certainly appellant is not so naive as to believe that an inappropriate response can be erased from the minds of the interviewers or that the totality of her

contact with the interviewers won't influence and shouldn't influence the final hiring decision. It was not unreasonable, on the basis of these "off-the-record" remarks, for the interviewers to question whether appellant had the decisiveness required of the position. It was also not unreasonable for the interviewers to question whether appellant had the professional maturity to handle the position in view of the hurt she expressed at not having her exam accomplishment praised. Certainly, not every good performance in a work setting is acknowledged or rewarded. Finally, it was not unreasonable for the interviewers to question appellant's judgment and ability to deal with people by virtue of the fact that she initiated a confrontation with and questioned the impartiality of persons who would be making the hiring decision. Appellant also questions the credibility of the interviewers since the record shows that they had some difficulty recalling the details of the interviews. This is not difficult to understand in view of the fact that it had been more than two years since the interviews had been conducted. Their testimony, although indicating some degree of uncertainty, does not contain any significant inconsistencies. The one inconsistency clearly indicated in the record involves the interview of a candidate who had already accepted another position in the Milwaukee UC Office (John Mand). However, since this inconsistency does not deal with the relative qualifications of appellant and Mr. Mund for the subject position and since the requisite number of candidates were interviewed, this is not deemed to be a significant inconsistency in view of the ultimate issue to be decided by this appeal. Finally, the one deficiency in Mr. Mund's interview was the impression he created that he may not really be interested in the job. The record does not show that there was anything in his interview which would have or

should have lead the interviewers to conclude that he didn't have the ability to do the job.

Since Mr. Mund's relevant qualifications and his performance on the oral interview were better than appellant's, it was certainly not unreasonable for Mr. Bodmer to select Mr. Mund for the JSS-4 position.

Appellant contends that the oral interviews of the candidates for the subject position did not satisfy the requirements of §230.16, Stats. However, §230.16 specifies the requirements to be met by the pre-certification examination process, not by the process to be followed after a list of certified candidates has been developed and provided to the requesting agency. It is undisputed that the oral interviews under consideration here were part of the post-certification selection process and thus did not have to satisfy the requirements of §230.16. However, such interviews do have to meet the test of fundamental fairness, relevance, and uniformity. In the present case, each interviewee was asked the same questions by the interviewers and even appellant in her testimony acknowledged that such questions were "fair" in view of the nature of the position to be filled. It is inevitable that human beings reviewing the performance and observing the behavior of other human beings will apply subjective as well as objective criteria. This is entirely appropriate in view of the fact that it will be a person, not a machine, filling the position. Thus, the Commission does not adopt appellant's contention that the use of subjective criteria by respondent in and of itself constituted an abuse of discretion. There has been no showing by appellant that the selection criteria used by respondent were not reasonable or not uniformly applied.

Appellant contends that the respondent failed to give proper consideration and weight to the fact that appellant had the highest exam score of all the candidates. However, all of the candidates certified to an appointing authority are deemed to be qualified for the position in question, regardless of their scores on the exam, and stand on an equal footing. (Spink v. DHSS, No. 78-9-PC (1976)).

Appellant contends that Mr. Bodmer could not be impartial because of his close working relationship with appellant. If this line of reasoning were accepted, it would mean that co-employees of persons who were candidates for a position would not be able to participate in hiring decisions despite the fact that this co-employee was the person most familiar with the program and the position to be filled. Since employees frequently seek other positions within their units, such a ruling would lead to an absurd result. The record contains no direct evidence of Mr. Bodmer's lack of impartiality.

Appellant further contends that respondent violated its affirmative action directive by the appointment of Mr. Mund. Specifically, respondent contends that the February 16 letter from Mr. Bodmer requesting permission to hire other than affirmatively misrepresents the adjudication experience of the female candidates for the position. This is true in a literal sense because it must be inferred from the language of the letter that appellant was one of the female candidates who the letter represents as having "no adjudication experience" while in fact she actually had about three months of experience as an adjudicator as of the date of the letter. However, this three months of experience as an adjudicator was certainly not comparable to Mr. Mund's two years of experience as an adjudicator. Since the purpose of the February 16 letter was to explain how the qualifications

of the female candidates could not compare to those of Mr. Mund and therefore justified hiring other than affirmatively, acknowledgment of appellant's three months of experience as an adjudicator would certainly not have altered the substance of the request or the positive response to the request. There is no evidence in the record that the procedure followed in reviewing the request deviated from the usual procedure followed in reviewing similar requests or that the procedure followed did not satisfy any relevant requirements.

Appellant contends that respondent had a duty to supply the appellant with its specific reasons for selecting Mr. Mund for the subject position. Appellant cites no specific authority in support of this contention and does not allege that respondent failed in any way to respond to reasonable pre-hearing discovery requests.

Appellant argues that Mr. Bodmer's knowledge that appellant was considering appealing the hiring decision if it was not in her favor improperly influenced the selection. However, it is not possible to conclude from the record that such knowledge on Mr. Bodmer's part actually influenced his decision and speculation as to the likely result of such knowledge on Mr. Bodmer's part is equally inconclusive in view of the fact that such knowledge could have acted as an incentive to hire appellant as well as a reason not to hire her.

The record reveals that Mr. Bodmer checked the references of certain of the interviewees but did not check the references supplied by appellant. In view of the fact that appellant had worked at the Waukesha UC Office for many years and was then working under Mr. Bodmer's supervision, it is certainly not surprising and not an abuse of discretion for Mr. Bodmer to rely upon his knowledge of appellant's employment history and performance.

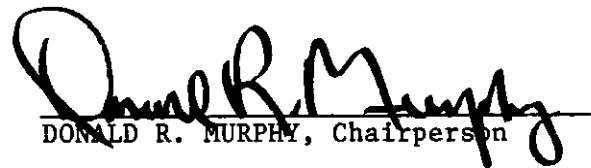
There was no showing that Mr. Bodmer checked the non-employment-related references of any of the other candidates and therefore no showing that Mr. Bodmer's failure to check appellant's non-employment-related references constituted unequal treatment of the candidates.

Finally, a great deal of discussion both at the hearing and in the parties' briefs centered on how respondent's perception that appellant had difficulty "dealing with people" in an office setting impacted upon respondent's hiring decision. However, the record clearly indicates that this was not one of the primary criteria relied upon by respondent in making its final hiring decision and it is not possible to infer from the record that this perception influenced in any way respondent's comparison of the candidates' experience or interview performances. Since respondent's hiring decision is sustainable without regard to this perception, further consideration of it by the Commission would serve no useful purpose.

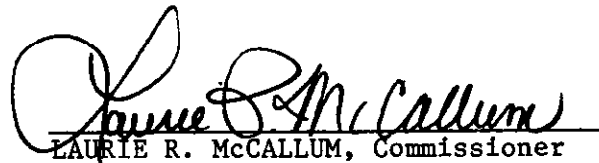
ORDER

The decision by respondent not to hire appellant is affirmed and this appeal is dismissed.

Dated: November 9, 1983 STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Chairperson

LRM:jmf

  
LAURIE R. McCALLUM, Commissioner

  
DENNIS P. MCGILLIGAN, Commissioner

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