

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *
 THOMAS THORNTON,
 Appellant,
 v.
 Secretary, DEPARTMENT OF
 NATURAL RESOURCES,
 Respondent.
 Case No. 88-0012-PC
 * * * * *

FINAL
 DECISION
 AND
 ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(d), Stats. The parties have reached agreement on a stipulation of facts and have submitted this matter for decision on the basis of said stipulation and briefs. The Commission adopts the parties' stipulation of facts as its findings of fact, and will consider the exhibits submitted with the stipulation as part of the factual record.

FINDINGS OF FACT

1. In approximately late September or early October of 1987, Jim Palmer (Chief of the Special Investigation Section of the Department's Bureau of Law Enforcement) visited Ruth Anderson's (Personnel Specialist with the Department's Bureau of Personnel and Human Resources) office to discuss filling the Pat Harkins' vacancy (Conservation Warden 4 - Special Investigator). Mr. Palmer asked if he would be required to use the former

list of applicants, meaning the October 28, 1986 register (Exhibit 1),¹ or if the position would have to be reannounced. Ms. Anderson checked the register date and informed Mr. Palmer of two possible alternative courses of action:

a. Because the register was over six months, but less than a year old, it could be reactivated, or

b. Since the register was expired, the position could be reannounced.

2. Prior to this conversation, Ms. Anderson had received none of the paperwork required to begin the process of filling the vacancy (such as request to fill, internal approval to fill the vacancy, etc.)

3. On October 12, 1987, the request to fill the Pat Harkins' vacancy was received and routed for internal approval. (Exhibit 2). Kathy Curnter granted approval to fill the position on October 20, 1987. (Exhibit 3). Larry Miller (Training Officer with the Bureau of Law Enforcement) was notified of the approval at that time.

4. Larry Miller sent a letter to all wardens announcing the vacancy for contractual transfer on November 10, 1987. (Exhibit 4). Application deadline for contractual transfer was December 7, 1987.

5. On December 10, 1987, Jim Palmer reported to Ruth Anderson that there were no individuals interested in transferring into that position. Mr. Palmer requested to proceed with a promotional announcement.

¹ This register contained the following names:
David C. Klabak
Thomas R. Krsnich
Jeffrey LaBudda (he was listed as having been selected for the prior vacancy)
Susan Miller
Thomas J. Thornton (appellant)
See Exhibit #1.

6. The promotional announcement was published January 14, 1988 (Exhibit 5) with an application deadline of February 3, 1988.

7. At the Warden's conference (January 19-22, 1988), Tom Krsnich, a warden on the previous register, spoke with Susan Miller. Mr. Krsnich indicated to Ms. Miller that he had declined an offer to fill the Pat Harkins' position.

8. Susan Miller, also a warden on the previous register, contacted Ruth Anderson during the recruitment period, approximately one day following the warden's conference. Ms. Miller wanted more information regarding the recruitment process and the offer to warden Krsnich. Ruth Anderson told Susan Miller that there must have been a misunderstanding about the offer because a promotional announcement for the position had been made just a week prior to her call.

9. Ruth Anderson contacted Jim Palmer about the offer. Mr. Palmer stated that he had made an offer to Tom Krsnich before he requested Ms. Anderson to proceed with the promotional announcement. Mr. Palmer believed, based on his earlier conversation with Ms. Anderson, that he could make an offer to anyone on the previous register.

10. Ruth Anderson informed Jim Palmer that he did not have authority to offer employment to anyone at this point in the hiring process. The offer of employment Mr. Palmer made Mr. Krsnich was unauthorized since approval to fill the vacancy had not been granted.

11. Thereafter, a letter was sent to all the candidates on the old register encouraging them to apply. (Exhibit 7).

12. Three employees applied for the position.² They were:

² It is apparent from Exhibit 8 that all three were certified.

- a. Rich Koch
- b. Thomas Thornton
- c. David Klabak.

13. David Klabak's appointment was effective June 5, 1988.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(d), Stats.
2. Appellant has the burden of establishing that respondent's failure or refusal to hire him for the position in question was illegal or an abuse of discretion.
3. Appellant having failed to sustain his burden, it must be concluded that respondent's failure to have appointed appellant to the position in question was neither illegal nor an abuse of discretion.

DISCUSSION

The stipulated issue in this case is:

" ... whether respondent's failure or refusal to hire appellant for the position in question was illegal or an abuse of discretion...." Prehearing Conference Report dated August 30, 1988.

There is no question but that respondent acted illegally when it offered the position in question to someone (Tom Krsnich) who was on the expired register. However, this act does not, in and of itself, make respondent's subsequent failure or refusal to hire appellant for the position in question illegal or an abuse of discretion. In order to prevail on this appeal, appellant must be able to point to something in the facts or the applicable law, rules, or procedures which somehow ties the two matters together in a way that leads to the conclusion that the ultimate failure or refusal to appoint him to the job was illegal or an abuse of discretion.

Appellant makes the following argument in his brief:

The Appellant believes that since Jim Palmer opted to use the 1986 existing register and make an offer of employment to one person on the register, that he, Mr. Palmer, did not have the option to discontinue using the 1986 register to then fill the vacancy.

It is our position that a personnel process had been activated and attempts to fill the vacancy should have continued from that register until the register was exhausted. Since no offer was made to the Appellant or the other person certified on the list (Susan Miller),³ it is our contention that an abuse of the civil service system occurred.

The immediate difficulty with this argument is that the offer of employment was invalid because it had not been preceded by a reactivation of the register and a certification, as is necessary pursuant to §230.25(2), Stats. Therefore, it is difficult to see how this offer can be characterized as the "activation of a personnel process." Appellant makes the further argument that if Mr. Krsnich had accepted the offer, respondent undoubtedly would have completed the paperwork necessary for the technically proper completion of the transaction -- i.e., reactivation of the register and certification. Assuming for the moment that this is an appropriate presumption and that the offer to Krsnich can be viewed as valid, it does not follow that respondent had an obligation then to have offered the position to each person on that register before asking for an additional certification.

In order to analyze appellant's contention, it is necessary to focus on Exhibit 1, which the parties have referred to as a "register," in their briefs and in the stipulation. This document on its face appears to be a certification. The distinction between a register and a certification under the civil service code is that a register is a list of persons eligible for appointment to a particular position or positions, while a

³ There was another person on the list besides appellant and Miller -- David Klabak. See footnote 1, above.

certification is a list of a certain number of names at the top of the register in terms of their exam score ranking from which the appointing authority can make his or her appointment. §230.25, Stats.

The specific distinction between a register and a certification is significant in this case in connection with §ER-Pers 6.04, Wis. Adm. Code, which provides in part as follows:

"An existing appropriate register for a class shall be used to fill all vacancies in the class...."

In other words, with the exception of certain circumstances not material here, if there is an existing appropriate register for a classification, that register has to be used to fill any vacancy in that classification, and the appointing authority is not going to be able to get a new register under these circumstances. However, this general rule is subject to and must be considered in conjunction with other provisions in the civil service code which permit an appointing authority to get an additional certification, which could include the development of a new register, if necessary, if an existing register has been depleted to the point where the appointing authority has a full certification from which to choose. That is, the civil service code specifically provides at §ER-Pers 12.04(1), Wis. Adm. Code, that when the appointing authority lacks a complete certification,⁴ he or she can request additional names. Furthermore, as respondent points out in his brief, Section 232.053(I) of the Department of Employment Relations (DER) Staffing Manual provides:

"When practical and feasible, appointing authorities should have a minimum of five candidates to consider for each vacancy. Supple-

⁴ Pursuant to §230.25(1), Stats., a certification is normally at least five names.

mental certification is used when the number of interested and available candidates from an original certification is decreased to fewer than five."

Also, see Toigo v. UW & DP, No. 80-206-PC (6/3/81). Finally on this point, §ER-Pers 11.03(2), Wis. Adm. Code, "REACTIVATION OF REGISTER," which is the provision which would have had to have been followed if the appointing authority had sought to reactivate the original register, specifically provides that "[n]ames on the reactivated register may be integrated with those on a subsequently established register." This is somewhat consistent with the appointing authority's right to request an additional certification when faced with less than a full certification from the original register, since if a certification must be exhausted completely before a further certification can be requested, presumably there would be no names left on the original register to be integrated into the subsequently established register.

Now, the significance of this in this case is that if Exhibit 1 were only a certification from a register containing more names, the appointing authority (respondent) presumably could not have obtained a new certification for the second vacancy, but would have had to have obtained certification from whatever names were available on that register before seeking the creation of a new register. However, if there were no names remaining on the original register, and respondent had only the three names on the certification that remained after the original appointment and after Mr. Krsnich declined the offer to him, then respondent could have requested an additional certification. Therefore, appellant's theory that respondent was somehow required to "exhaust the register" before requesting the second certification has some vitality, but only if there were some names on the initial register beyond those listed on Exhibit 1. If, however, there were

no additional names on the register to certify, respondent, having less than a full certification and no names on the register from which to draw, presumably could have obtained another certification from a new register. The facts in this case do not suggest there were any names remaining on the original register. Furthermore, the Commission infers from the fact that both parties referred to Exhibit 1 as a register, rather than a certification, that it was in effect both a register and a certification -- i.e., that there were only 5 names on the original register so all five were placed on the certification.

Finally, the Commission notes that even if it ruled in favor of appellant on this point and accepted his theory that respondent as a matter of law should have exhausted the original certification by offering the job to the remaining candidates, it still does not follow that he should have been offered the job, since the ultimate appointee (Klabak), like appellant, was on both certifications and presumably would have been chosen over appellant had respondent had to have made a choice from among the three remaining names on the original certification.

Accordingly, there was no illegality in respondent's decision not to appoint appellant to the position in question. As far as abuse of discretion is concerned, none has been shown on this record. It was discretionary with the appointing authority whether to have requested that the original register be reactivated, to have requested a new certification, or to have done both. Obviously, the appointing authority wanted Mr. Krsnich in the job. Once he declined, the record does not reflect why respondent did not make any further offers to persons on the old register.⁵ There are no


⁵ Again, this would have required reactivation of the register at some point.

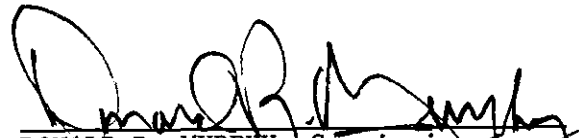
facts or evidence in the stipulation or exhibits that tends to show that the appointing authority's decision in this regard was an abuse of discretion, and therefore the Commission is constrained to conclude it was not. Similarly, with respect to the decision further along in the process to appoint Mr. Klabak as opposed to the appellant, there is nothing to show an abuse of discretion, and therefore it must be concluded there was none.

ORDER

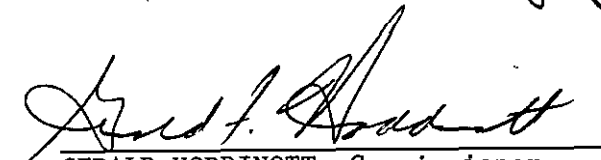
Respondent's failure or refusal to appoint appellant to the position in question is affirmed and this appeal is dismissed.

Dated: January 12, 1989 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner

AJT:rcr
RCR01/3


GERALD HODDINOTT, Commissioner

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