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 DEAN KELLEY,
 Appellant,
 v.
 Administrator, DIVISION OF
 MERIT RECRUITMENT & SELECTION,
 Respondent.
 Case No. 88-0151-PC
 * * * * *

DECISION
 AND
 ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(a), Stats., of the removal of appellant's name from the certification for Warden 4 - Environmental Enforcement.

FINDINGS OF FACT

1. On November 17, 1988, Mr. Kelley received 2 copies of a letter (dated November 16, 1988) from Ms. Jean Thomas inviting him to participate in an oral examination on December 6, 1988 for the position of Warden 4 - Environmental Enforcement (Respondent's Exhibit #1). Ms. Thomas is a Personnel Specialist with the Department of Natural Resources (DNR).

2. Mr. Kelley briefly reviewed the letter, checked the space indicating that he would attend the oral examination, signed and dated the letter, returned one copy to DNR and kept one copy for his record. Mr. Kelley dated and returned the letter on November 17, 1988, the same day he received it.

3. The November 16, 1988 letter states in part:

When you arrive at your scheduled interview time, you will be given additional information concerning the

oral exam procedures, followed by a copy of the examination questions. You will have approximately 20 minutes to review these questions and make notes to help you in your response. You will be permitted to take your notes with you and refer to them during the exam process. (NOTE): You are not permitted to bring notes prepared in advance or other outside information with you for the interview process.)....

4. When Mr. Kelley arrived for the oral examination, he was met by Ms. Candace M. Richards, a Personnel Manager for the Southeast District of DNR in Milwaukee, given the oral examination question, and taken to a private office where he reviewed the oral examination questions.

5. Mr. Kelley was carrying a briefcase which he took with him into the private office where he would be reviewing the oral examination questions. The briefcase contained information and material that Mr. Kelley used in his current position in DNR, including a copy of DNR publication -- PUBL-LC-002 87, Wisconsin Natural Resources Law-Environmental Protection.

6. Mr. Kelley referred to the table of contents of the publication to obtain certain statutory references which were used to answer question number 2 during the oral examination.

7. Ms. Thomas was in the room with the oral examination board and noticed that Mr. Kelley brought the briefcase with him into the examination. She listened to his response to the question and noted that he was able to list a series of statutory numbers and titles in response to the second question. The question basically asked the candidate to "Identify by number and/or title other Wisconsin Statute Chapters with which the position an Environmental Warden will become familiar. (Respondent's Exhibit #2).

8. After appellant completed his examination, Ms. Thomas asked Mr. Kelley if he had material in his briefcase that he had used during the review time to assist him in the actual examination. Mr. Kelley indicated

that he had and showed Ms. Thomas the publication identified in finding 5 above. (Respondent's Exhibit #2)

9. Ms. Candace Richards did not notice the briefcase Mr. Kelley was carrying until Ms. Thomas observed it when he entered the oral examination room.

10. On or about December 8, 1988, Ms. Thomas brought this situation to the attention of Ms. Cheryl Anderson, an Executive Personnel Officer with the Division of Merit Recruitment and Selection (DMRS) in the Department of Employment Relations (DER). Ms. Anderson assigned Mr. Gerald Pippin, a Personnel Specialist 5 in DMRS, to investigate the situation.

11. Mr. Pippin talked to both Ms. Thomas and Ms. Richards and asked them for written statements about what they observed and what actions they had taken. Ms. Thomas provided a statement, dated December 8, 1988, (Respondent's Exhibit 2), and Ms. Richards provided a written statement, dated December 13, 1988, (Respondent's Exhibit #3).

12. Mr. Pippin also reviewed the letter (Respondent's Exhibit #1) sent to Mr. Kelley, the scores of the candidates who took the test, how each was rated by the oral examination panel, and how Mr. Kelley had done on the examination.

13. On or about December 13, 1988, Mr. Pippin met again with Ms. Thomas and Ms. Richards to discuss their statements and to get more information about the publication that Mr. Kelley had referred to. Mr. Pippin did not contact Mr. Kelley, because DNR personnel (Thomas and Richards) had discussed the issue with Mr. Kelley and he had admitted that he looked at a publication (See Finding of Fact #2) in his briefcase during the review period. Since there were no disputes in fact, Mr. Pippin did not feel it was necessary to contact Mr. Kelley.

14. As a result of his investigation, he orally recommended to Ms. Anderson that Mr. Kelley be removed from the register. His recommendation was accepted and he was asked to and did write a letter to Mr. Kelley from Mr. Daniel Wallock, Administrator, Division of Merit Recruitment and Selection (DMRS) stating that he had been removed from the register for the Warden 4 - Environmental Enforcement.

15. Upon receipt of the letter, Mr. Kelley filed a timely appeal.

16. At the prehearing conference, appellant requested that the case be handled on an expedited basis. Both sides offered arguments which were considered by the Commission at an emergency meeting on December 30, 1988. The Commission issued an interim order dated December 30, 1988, granting appellant's motion for an expedited hearing and designated a hearing examiner to conduct the hearing and to issue a final decision for the Commission under §227.46(3)(a), Stats.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(a), Stats.

2. The burden of proof is on the appellant to establish that removal of his name from the register violated §230.17(2), Stats. and/or ER-Pers 6.10, Wis. Adm. Code.

3. The appellant has not sustained that burden.

4. The removal of his name from the register for Conservation Warden 4 - Environmental Enforcement did not violate §230.17(2), Stats. and/or ER-Pers 6.10, Wis. Adm. Code.

DISCUSSION

There is no material dispute of the facts in this case. The issue agreed to by the parties is:

Whether respondent's action removing appellant's name from the subject employment register for Warden 4 - Environmental Enforcement violated §230.17(2), Stats., and/or ER-Pers 6.10, Wis. Adm. Code.

Specifically, §230.17(2), Stats. states in part:

If the administrator refuses to examine an applicant, or after an examination to certify an eligible, as provided in this section, the administrator, if requested by the applicant so rejected within 10 days of the date of receipt of the notice of rejection, shall give the applicant a full and explicit statement of the exact cause of such refusal to examine or to certify. Applicants may appeal to the commission the decision of the administrator to refuse to examine or certify under §230.44(1)(a).

And ER-Pers 6.10, Wis. Adm. Code states in relevant part:

ER-Pers 6.10 Disqualification of applicants. In addition to provisions stated elsewhere in the law or rules, the administrator may refuse to examine or certify an applicant, or may remove an applicant from a certification:

* * *

(7) Who practices, or attempts to practice, any deception or fraud in his or her application, certification, examination, or in securing eligibility or appointment;

The appellant has the burden of proof in this case. The provisions of §230.17(2), Stats., are primarily one of notice to the applicant of the action of the Administrator, DMRS, and the reason the action was taken. In his letter of December 22, 1988, the administrator, (Mr. Daniel Wallock) provided both the action taken and the reason for it. The appellant has argued that his action (reviewing materials during the period immediately prior to the oral examination) was the result of vague instructions, and inadvertent not intentional. There was no evidence introduced into the record to indicate that the notice requirements in §230.17(2) were not met or that the appellant did not get a full and explicit statement of the reasons.

The major issue during the hearing was the interpretation of the appellant's action in light of the provision of ER-Pers. 6.10(7), Wis. Adm. Code. In order to prevail, the appellant would have to demonstrate that he took no action which could be considered fraud (such as falsifying information about his background) or deception (e.g., not providing all relevant information or by answering questions using information that was not available to the other applicants).

The appellant has based his case on the fact that the instructions (Respondent's Exhibit #1) were vague or ambiguous, the investigation conducted by Mr. Pippin was flawed, and that he did not intend to do anything which constituted fraud or deception.

In the first instance, the appellant has not provided any testimony or other factual material (either from other employes on this examination or on other examinations) which demonstrates that the instructions were vague or ambiguous and have been a problem for other applicants. Additionally, in Ms. Richards' written statement (Respondent's Exhibit #3) she indicates that Mr. Kelley said he had re-read the letter inviting him to the oral examination and admitted he had found it did make reference to the policy of not bringing in outside materials and that would apply to the review (briefing) period. The facts about what happened are basically undisputed in this case. On this particular point, Mr. Kelley said he didn't intend to do anything illegal, but he did not introduce any information to refute the above referenced assertion made in Ms. Richards' letter.

The issue of the investigation and how it was conducted was a significant part of Mr. Kelley's cross-examination of Mr. Pippin. Mr. Kelley questioned Mr. Pippin's training and background in conducting investigations, particularly as it relates to the number of investigations conducted

in the last year (2), the taking of depositions versus how the written statements were taken, the lack of formal report of the results of the investigation, and the fact that Mr. Pippin did not talk to Mr. Kelley during the investigation. The Commission finds nothing in the relevant Statutes or Administrative Code that requires a particular type of investigative procedure on personnel. If the investigation was flawed in its result, these arguments might prevail. However, the facts as derived from the investigation were undisputed during the hearing. It can be argued that talking to Mr. Kelley before issuing the letter would have been preferable. However, there is nothing in the record to indicate that this omission prejudiced Mr. Kelley in any way.

The last major point raised by Mr. Kelley is that he didn't intend to do anything illegal. He contended during the hearing that the respondent had to show that he intended to practice deception or fraud. The Commission does not read the requirement to prove intent within the provisions of §230.17(2), Stats. or ER-Pers 6.10 (7), Wis. Adm. Code, only that some act was committed to warrant the action of the administrator. The two specific terms used are fraud or deception. In this particular case, deception is the operative word. In Ms. Thomas' written statement (Respondent's Exhibit #2), she indicates that Mr. Kelley provided a number of statutory references to the answer to question #2. His answer prompted follow up by one of the oral board members, presumably because he could provide so many references so quickly. These references were obtained in part by Mr. Kelley during the review period when he referred to a specific DNR publication on environmental protection laws. This additional knowledge, expressed at the oral board, could give the impression that Mr. Kelley knew these statutory provisions better than anyone else taking the examination.

This certainly would work to deceive the board about appellant's knowledge compared to other candidates who did not review or have access to the DNR publication.

The testimony of Mr. Pippin indicates that he reviewed the scores of all candidates, but no information was brought forth by the respondent or appellant indicating how Mr. Kelley did on question #2 or whether this gave him an advantage. Appellant indicated that if this did give him an advantage, his test should be rescored without considering question #2. Mr. Pippin testified that this would affect the overall validity of the examination. Additionally, the Commission would find the practice of scoring examinations differently for different applicants taking the same examination questionable.

Mr. Kelley states several times that he had no intent to do anything illegal or deceptive. As part of his proof of non-intent, he states that if he was trying to deceive anyone, he wouldn't have admitted reviewing the materials. Although proof of intent is not required in this case, his openness in admitting having reviewed the publication does not eliminate the actual act. Carried to an extreme, this theory could justify a deceptive act if the person openly admits to having done it. While misunderstanding may occur on the part of candidates, lack of knowledge or admission of an act does not necessarily mean that deception hasn't occurred. In the instant case, that deception occurred when Mr. Kelley gave his answer to question #2 to the oral board.

While the deception in this case may have been unintended, the act of reviewing the publication during the review period did occur. The word deception may be harsh, but it is not intended to reflect on the appellant's character but only on his specific action. Based on the information

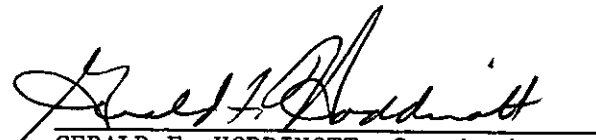
in the record, the action of the administrator was reasonably founded in fact.

ORDER

The action of the administrator is affirmed and this appeal is dismissed.

Dated: January 31, 1989 STATE PERSONNEL COMMISSION

GFH:jmf
JMF05/2


GERALD F. HODDINOTT, Commissioner

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