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STEVEN J. SONNENBERG,
 Appellant,

v.
 Executive Director, LOTTERY
 BOARD,
 Respondent.

Case Nos. 89-0036-PC
 89-0069-PC

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FINAL
DECISION
AND
ORDER

This matter is before the Commission following the promulgation of a proposed decision and order by the hearing examiner. The Commission has consulted with the examiner and makes certain modifications in the proposed decision and order, a copy of which is attached hereto deletes the words "or resumes" from finding of fact 13 to make the finding consistent with the information that was provided to Ms. McCoy during the course of the interviews.

The Commission adds the following language to the opinion section prior to the first full paragraph on page 10.

The appellant did not specifically allege that he was better qualified than Ms. Ellman for the vacant position. Even if he had made such an allegation, the evidence indicates that Ms. Ellman was in fact better qualified as indicated by Ms. McCoy's un rebutted testimony that Ms. Ellman had substantial prior experience in marketing as compared to the appellant's limited experience in sales and that Ms. Ellman had superior communication skills and presence during the interview.

The Commission adds the following language to the opinion section at the end of the first full paragraph on page 11:

Even if Ms. McCoy had, in making the second selection decision relied on an impression of the appellant gained during the first interview, the Commission would not overturn the second decision on that basis.

The Commission adds the following language to the opinion section before the first full sentence found on page 12:

The evidence clearly indicates that the instructions were, at a minimum, read to the appellant. There is a dispute as to whether appellant was provided with a copy of the instructions. However, written analysis of

the two game tickets shows that he was made fully aware of the instructions. Otherwise he would not have been able to generate such an analysis.


The Commission adds the following language to the opinion section immediately before the first full paragraph on page 12:

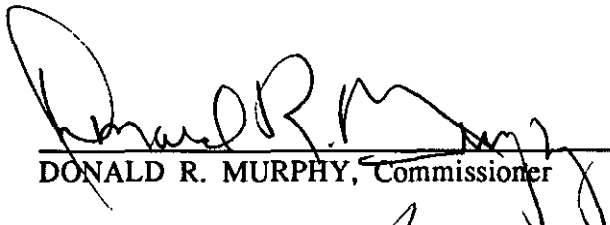
As to both of the selection decisions being reviewed here, there is an insufficient basis on which the Commission might conclude that the selection criteria were unreasonable, were not uniformly applied, were not the actual criteria utilized or that Ms. McCoy's assessments of the candidates were unreasonable in view of the candidates' presentations during the interviews and in view of the selection criteria. See Larson v. DILHR, 86-0019-PC-ER, 86-0013-PC, 1/12/89.


ORDER

Except to the extent of those modifications indicated above, the Commission adopts the proposed decision and order as the final decision and order in these matters, affirms the respondent's decisions and dismisses the appeals.

Dated: April 19, 1990 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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STEVEN J. SONNENBERG,
 Appellant,

v.
 Executive Director, LOTTERY BOARD,
 Respondent.

Case Nos. 89-0036-PC & 89-0069-PC

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PROPOSED
 DECISION
 AND
 ORDER

This matter is before the Commission on appeals by appellant that respondent in two separate hiring decisions committed an illegal act or abused its discretion when it failed to hire him to an Administrative Assistant 5 position. A hearing was held on appellant's charges, testimony was given, exhibits were received into evidence and the parties submitted post-hearing briefs. The following findings of fact, conclusions of law, opinion and order are based on the record of that hearing.

FINDINGS OF FACT

1. Appellant, Steven J. Sonnenberg, has been a state employe for three and a half years.
2. Respondent is a state agency responsible for implementing state lottery laws.
3. Since August 1988, appellant has been employed with respondent as a field sales representative.
4. In January 1989, appellant applied for an Administrative Assistant 5 (A.A. 5) - Instant Game Coordinator position, which was posted by respondent.

5. The A.A. 5 Instant Game Coordinator position job description was: Plan and market instant scratch and pull-tab lottery games to achieve a \$190+ million annual sales goal. Conduct research and analyze data to determine games appropriate for play. Recommend play formats, themes and prize structures. Recommend synergetic approaches to marketing game theme through radio and television spots, point-of-sale materials, ticket graphics and print media. Recommend spending levels for media within budget constraints. Coordinate media execution with advertising agency.

6. The knowledge requirements for the Coordinator position were: Sales and marketing strategies to sell impulse items; program planning and implementation techniques; research techniques; budget preparation and control; communication skills, including the ability to maintain effective working relationships with the public vendors, retailers and Lottery staff members.

7. Appellant applied for the A.A. 5 Coordinator position, as announced and posted by respondent.

8. Respondent decided to recruit from within the agency. After applications were received, it conducted an oral examination.

9. The scores of the oral examination were determined by the Department of Employment Relations (DER). Then, DER issued respondent a certification of five applicants eligible for interview for the vacant position.

10. The names certified by DER for the Coordinator position and sent to respondent on February 28, 1989, were: Julie Jensen, Rhonda Ellman, Julie Coan, Steven Sonnenberg and Katy Stoveken. In March 1989 five candidates were interviewed by respondent.

11. Ms. Nancy McCoy, Director of the Division of Marketing, was designated as the person to interview the five candidates.

12. Ms. McCoy had been the director of marketing since January 9, 1989. Previously she was the Deputy Director of the West Virginia Lottery and had functioned as its director of marketing.

13. Respondent's personnel department provided Ms. McCoy with interview schedules for the five candidates. Ms. McCoy was not given examination scores or resumes of the candidates.

14. The five candidates were scheduled to be interviewed on March 2, 1989, in Respondent's Madison offices. Each interview was scheduled for a period of approximately 45 minutes.

15. Appellant was slated for the first interview at 8:20 a.m. but the interview did not begin until about 9:00 a.m. because Ms. McCoy had car problems and was late.

16. Appellant's interview was interrupted four times, first by the executive director of the agency, who came in to apologize to Ms. McCoy and then, later, by three telephone calls. Ms. McCoy did not answer the third telephone call and apologized to appellant for the interruptions.

17. During one part of appellant's interview, Ms. McCoy thought appellant's responses were very negative. She became agitated with appellant and told him the lottery did not need people with his attitude.

18. Later, that afternoon, appellant telephoned the agency's personnel director and told her about how his interview was conducted.

19. Ms. McCoy completed the interviews of the five candidates that day. Each job candidate was asked the same (five) questions. In some instances a given answer would cause Ms. McCoy to ask follow-up questions. The interviews were of the same approximate length.

20. Ms. McCoy rated each candidate on the basis of planning experience, communication skills, knowledge about the lottery, ability to work

independently and attitude. This rating scheme was based upon her prior work experience in West Virginia as an instant game coordinator.

21. Ms. Rhonda Ellman obtained the highest rating on the oral interview and was selected for the position.

22. On April 7, 1989, appellant timely appealed respondent's decision to hire Ms. Ellman for the A.A. 5 - Instant Game Coordinator position to the Commission. The Commission assigned case number 89-0036-PC to that appeal.

23. Shortly afterwards, the A.A. 5 - Instant Game Coordinator position again became open when Ellman returned to her former Field Sales Representative position in Green Bay, WI.

24. On April 24, 1989, DER provided respondent with a second certification list of five names: Julie Jensen, Julie Coan, Steven Sonnenberg, Carl Hubbard and Sidney Chambers.

25. On May 9, 1989, respondent's personnel office submitted the following interview schedule to Ms. McCoy:

Tuesday, May 9	Julie Coan	3:00 p.m.
Wednesday, May 10	Julie Jensen	1:00 p.m.
Thursday, May 11	Carl Hubbard	3:00 p.m.
Thursday, May 11	Sidney Chambers	4:00 p.m.
Thursday, May 11	Steven Sonnenberg	5:00 p.m.

26. At some point after Julie Coan was interviewed on May 9, 1989, she was hired to a Product Information Coordinator position and her name was removed from the A.A. 5 certification list.

27. Upon the removal of Coan from the certification list, George Campbell became eligible for the position, and he was added to the list of certified candidates.

28. George Campbell was interviewed for the A.A. 5 position by Ms. McCoy on Monday, May 15, 1989, at 5:00 p.m.

29. Prior to interviewing Campbell, Ms. McCoy had sufficient information to deduce Campbell had the lowest certification list examination score of any candidate.

30. As in the March interviews, the candidates were interviewed approximately 45 minutes and asked the same questions, but the interview procedure was changed.

31. These interviews consisted of two parts. The first part required the candidate to compare two lottery games, choose the best game, give a written presentation of the best game, make an oral presentation and be prepared to defend this position. The candidates were given two tickets which represented the two lottery games, paper and pencil and 15 minutes to prepare their written presentation. The written presentation was to be turned in after the oral presentation.

32. One ticket, representing a lottery game, given to Campbell for comparison was different from that given appellant, but it represented the same game format as the ticket given appellant.

33. The second part of the interview consisted of questions focused upon the candidates' work background, job-related attributes and conceptions of the position.

34. There was conflicting testimony on whether appellant was given written instructions for the final part of the interview and whether he knew beforehand that his written comments were to be turned in.

35. All candidates brought resumes or work experience reports to the interviews. It is disputed as to which resume appellant made available to Ms. McCoy prior to his interview.

36. Appellant worked for Clark Oil Company, Milwaukee, WI, from 1972-1981. He started as a service station attendant and worked up to Manager and Sales Representative.

37. In 1981 appellant began working as a Sales and Marketing Representative for the Jefferson Banner newspaper and remained there until 1983.

38. Between April 1986 and August 1988, appellant worked as a counselor for three correctional institutions: Waupun Correctional Institute, Ethan Allan School for Boys, and Thompson Correctional Center.

39. In August 1988, appellant was hired by respondent as a Field Sales Representative in its Milwaukee office and was working in that capacity at the time of his interviews.

40. After the interviews were completed, Ms. McCoy reviewed the candidates' written representations and their resumes before making her selection of George Campbell for the position. Campbell ranked first on the oral exam.

41. George Campbell was first hired by respondent in June 1988 as a District Sales Manager. He supervised 11 Field Sales Representatives for the Madison District Office.

42. In August 1988, Campbell was appointed Acting Sales Director, directing and conducting the activities of 70 employes, including field sales representatives, district sales managers and account executives.

43. In November 1988, Campbell was appointed as Acting Instant Game Product Manager. His responsibilities included planning instant game play formats and prize structures. Campbell was working in that capacity at the time of his interview for the A.A. 5 position.

44. Prior to employment with respondent, Campbell was a child welfare specialist with the Department of Health and Social Services.

45. Subsequent to the selection of George Campbell for the A.A. 5 - Instant Game Coordinator position, appellant timely appealed respondent's hiring decision to the Commission. That appeal was assigned case number 89-0069-PC.

CONCLUSIONS OF LAW

1. This Commission has jurisdiction over these matters pursuant to § 230.44(1)(d), Stats.

2. In case no. 89-0036-PC, appellant has the burden of proving the hiring decision made by respondent was an illegal act or an abuse of discretion.

3. In case no. 89-0069-PC, appellant has the burden of proving the hiring decision made by respondent was an illegal act or an abuse of discretion.

4. In case no. 89-0036-PC, appellant has failed to sustain his burden of proof.

5. In case no. 89-0069-PC, appellant has failed to sustain his burden of proof.

6. In both appeals, case no. 89-0036-PC and case no. 89-0069-PC, respondent's decision not to hire appellant was not an illegal act or an abuse of discretion.

OPINION

These two cases were appealed to this Commission under § 230.44(1)(d), Stats., which provides for an appeal to the Personnel Commission of a personnel action, after certification, which is related to the hiring process in classified civil service and which is alleged to be illegal or an abuse of

discretion. In both appeals the question before the Commission is the same: Whether respondent acted illegally or abused its discretion when it decided not to appoint appellant to an Administrative Assistant 5 - Instant Game Coordinator position.

Appellant asserts, in reference to his first appeal, case no. 89-0036-PC, that respondent could not exercise its right of discretion because it failed to give him a fair interview. More specifically, appellant claims that on March 2, 1989, the date of the first interview, the interviewer, Ms. McCoy, bore an animus toward him because of outside influences and some personality conflict. In support of his position, appellant points to the testimony of Ms. McCoy, who stated she arrived late that morning because of car problems and that she was "upset" about some action taken by the director of the Lottery. Ms. McCoy corroborated appellant's testimony that his interview was interrupted several times, once by the director, who came in to apologize to Ms. McCoy, and three times by telephone calls, two of which Ms. McCoy answered. Ms. McCoy did not recall having a cold, but admitted she told appellant the Lottery did not need people with a negative attitude like his.

Appellant cites Pearson v. UW, case no. 84-0219-PC (1985), as the legal basis for his argument that animus toward a candidate by an appointing authority is cause for finding an abuse of discretion in a hiring decision. In Pearson, the person who had the effective authority to make the hiring decision, bore an animus toward the appellant, was biased against him and steered the hiring process to prevent him from being hired even though he was the best candidate.

In this case before the Commission there is no evidence that Ms. McCoy previously knew appellant or was predisposed not to hire him. To the contrary, Ms. McCoy testified that she was a very recent employe of the agency

and knew little about the candidates except as indicated by their position descriptions and their resumes. Nor is there any evidence of Ms. McCoy manipulating the hiring process to prevent appellant's appointment. Even though appellant argues that Ms. McCoy arrived late for his interview, was upset with the actions of the head of the agency, was interrupted four times during the interview, and had a cold, he presented no evidence that any of these incidents or conditions were contrived in an attempt to manipulate the system and not hire him. In fact, Ms. McCoy testified that she was not ill and that she also answered the phone in the interviews of other candidates because the new office, at that time, did not have a telephone backup system. The Commission is convinced that appellant's interview took place under less than optimal conditions, but is not persuaded that these conditions were contrived to prevent appellant's hire.

Appellant also contends that Ms. McCoy's credibility is questionable. He directs the Commission's attention to a McCoy memo, dated March 7, 1989, announcing the appointment of Ms. Ellman. In this memo, McCoy also praises the unsuccessful candidates, which includes the appellant. Appellant argues that this praise of him contradicts or colors her testimony about him in connection with her subsequent selection of Mr. Campbell, after Ms. Ellman left the position. On this point Ms. McCoy testified that her memo announcing the Ellman appointment and praising the unsuccessful candidates was intended to be conciliatory and not a recommendation of the unsuccessful candidates for other positions. The evidence in fact shows no inconsistency in Ms. McCoy's testimony. Although she gave general praise to appellant and other unsuccessful candidates in a memo, there is no evidence that she wavered in her belief that appellant was not suited for the A.A. 5 coordinator position. Ms. McCoy's conclusion, which she reached during the first

interview, that appellant's attitude was unsuited for the position remained constant, and she did not select him for the position.

In appellant's second appeal, case no. 89-0069-PC, which was filed as a result of respondent's decision to reject appellant and hire George Campbell to the A.A. 5 position previously held by Ellman, appellant argues he was better qualified for the position than Campbell. The evidence shows that, aside from his marketing experience as a Field Sales Representative with the Lottery, appellant scored higher than Campbell in the certification examination and prior to employment with the Lottery was responsible for marketing strategy for Clark Oil. In comparison, Mr. Campbell had no apparent marketing experience prior to employment with respondent, but at the Lottery Board he held higher-level positions than appellant. Campbell's most recent appointment prior to the interview, Acting Instant Game Manager, made him responsible for some marketing duties directly connected with the A.A. 5 position.

In Harbort v. DILHR, case no. 81-74-PC (1982), the Commission said it was not an abuse of discretion for the employer not to appoint the appellant, who had more technical competence than the appointee, when the employer had legitimate concerns about appellant's communication and interpersonal skills. In this case before the Commission, Ms. McCoy testified that Campbell demonstrated better analytical, planning and communication skills than appellant. She also testified that Campbell's marketing experience was more current than appellant's and directly related to the A.A. 5 position. Also as previously noted, she believed appellant's attitude was not suited for the A.A. 5 position. Whether or not appellant's job qualifications were better than the appointee is open to question, but it is clear Ms. McCoy's reasons for selecting the appointee instead of appellant were job-related.

The appellant charges that Ms. McCoy developed animus toward him during the first interview, and it continued and remained through the second interview. As previously noted, Ms. McCoy did not know appellant prior to his interview with her. Under those circumstances it is difficult to attach any particular predisposition of Ms. McCoy toward the appellant. However, there is no reason to believe Ms. McCoy did not retain prior impressions of appellant. The question is whether Ms. McCoy was influenced by appellant's first interview. She testified that Campbell's written and oral presentation was superior to the other candidates, and she based her selection on the interviews and the resumes. Ms. McCoy's remark, during the first interview, that the Lottery did not need people with appellant's negative attitude, however intemperate, does not, on its face, demonstrate animus toward appellant. Instead it indicates, to some degree, her opinion of the type of attitude needed by Lottery employes. It also reflected one of the qualifications Ms. McCoy believed important for performing the Instant Game Coordinator position. However, there is no evidence supporting the conclusion that Ms. McCoy based her non-selection of appellant on information not obtained during the second interview process.

Also, appellant points to alleged differences between his interview and that of other candidates. He testified that he did not receive a copy of the written interview instructions, that he did not understand his written notes, used for oral presentation, would be kept as a part of the interview, and he testified that one of his interview questions was not the same as that of Mr. Campbell.

Appellant's claims about differences in interview instructions were controverted. Ms. McCoy testified that she gave appellant a copy of the written instructions and read them to him. She also testified that she informed

appellant that his written notes would be retained by her and reviewed as part of the interview. Regarding appellant's claim that one of his questions differed from Campbell's, the record shows that the format of the question to each candidate was the same, but the instant games, i.e., lottery tickets, used in the question, while representing the same type of game, were not identical. No evidence was presented showing this difference in the tickets favored either candidate.

It is the belief of the Commission that the record in these matters does not support the allegation of appellant and they should be dismissed.

ORDER

1. The decision of respondent in case no. 89-0036-PC is affirmed and this matter is dismissed.

2. The decision of respondent in case no. 89-0069-PC is affirmed and this matter is dismissed.

Dated: _____, 1990 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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