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PATRICK BENGTON,

Appellant,

v.

Secretary, DEPARTMENT OF
INDUSTRY, LABOR AND HUMAN
RELATIONS,

Respondent.

Case No. 92-0026-PC

* * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(d), Stats., of respondent's failure to have hired appellant to a Job Service Supervisor 3 (JSS 3) position with the working title of Office Manager of the Black River Falls Job Service office.

FINDINGS OF FACT

1. Prior to the appointment decision that is the subject of this appeal, the Black River Falls Job Service office had been headed by a lead worker who was supervised from the LaCrosse Job Service district office. When the incumbent left this position, management decided to change the position to make it supervisory, in order that there would be an on-site supervisor.

2. The position description (PD) for the position (Respondent's Exhibit 1) contains the following position summary:

Under the general supervision of the La Crosse District Director, plans, develops, coordinates, implements and evaluates the operations of the Monroe County, Independence and Black River Falls office. This includes over-all management, writing of contracts, developing and monitoring budgets, supervision, public relations and coordination with community-based organizations. Other responsibilities include input and analysis for the district's bi-annual Plan of Service. This position also has responsibility for management and control of local facilities. Responsibility for ensuring that affirmative action/equal opportunity goals are carried out is an important function of this position. These activities include developing a plan for the units and ensuring that hiring, training, reclassification, promotion and retention of

unit employees is in accordance with these principles. Equitable provision of service to the public is also a mandate. This position is a highly professional supervisory and managerial position requiring extensive knowledge and application of Job Service programs, rules, policies and procedures. Essential skills include problem solving, the ability to speak and write clearly and concisely, proper exercise of judgment, ability to motivate staff and achieve program objectives.

Attached to the PD is a "supervisory analysis form" which reflects that the position is responsible for supervising eight employees. This form also contains the following breakdown of total time allocation:

- 1) Supervisory functions (i.e., hiring, dismissal, disciplining employees, performance evaluation, settling grievances)? 20%
- 2) Activities relating to supervisory responsibilities (i.e., establishing operating procedures, reviewing work of subordinates, counseling subordinates on performance, training and orienting new employees, performing related administrative functions, etc.)? 60%
- 3) Performance of other work activities similar to those of the employees supervised? 10%
- 4) Performance of other non-supervisory work activities different from those of the employees supervised (including program administration)? 10%

3. Appellant was one of five candidates who were certified from a statewide JSS 3 register and ultimately interviewed for this position

4. The interviews were conducted by a three member panel consisting of Thomas Abing, the District Director of the LaCrosse area Job Service and the supervisor of this position, who made the ultimate hiring decision; Marshall Graff, Director, Jackson County Human Services Program; and Cindy White, Income Maintenance, Monroe County Jobs Program. The latter two persons' counties provided funding for the position.

5. The panel used a structured interview process consisting of 13 previously prepared questions. Each candidate was given a numerical score on each question by each rater. Mr. Abing's intention was to use these scores to nar-

row down the list to the top three candidates from which he would make the appointment.

6. In the numerical scoring, all 13 questions were weighted equally.

7. As a result of the interview and scoring process, appellant obtained the highest overall score (129). The next highest overall score (125) was achieved by the candidate ultimately selected (Gary Ferron).

8. During the course of appellant's interview, Mr. Graff asked appellant what his marital status was. This was not one of the prepared questions and did not figure in the ratings or the ultimate appointment decision. (Mr. Ferron had the same marital status as appellant).

9. Appellant had never been employed in state service and had no experience in state or federal employment and training programs and no experience working with low-income or disadvantaged individuals, which were two of the prepared questions. (These criteria had not been prerequisites for admission to or passing the exam, or for certification) However, appellant had had extensive and significant experience in supervision and management (in the private sector), which was one of the questions asked.

10. Mr. Ferron, the ultimately successful candidate, was a Job Service Specialist 2 who had extensive experience both working with low-income or disadvantaged individuals, working with Native Americans, and in state or federal employment and training programs. He had no supervisory experience, but did have some program management and evaluation experience.

11. Mr. Abing's rationale for hiring Mr. Ferron rather than appellant was that Mr. Abing placed a great deal of emphasis on experience with the programs being administered, with low-income individuals such as AFDC recipients, working with tribal members, with the Job Service automated matching system program, and with rural applicants. These were all factors that were specific to this particular position and its client base. He also preferred to hire someone who could get involved quickly in the budget planning process for the JOBS program that already was under way. Mr Ferron had the best qualifications based on these criteria. He was the only one of the top candidates who had experience working with AFDC clients, with Native Americans, with the automated matching system, and with the various programs involved. He also had experience in state employment relations. Appellant had none of these qualifications. Appellant had significant and ex-

tensive supervisory experience and Mr. Ferron had none. Mr. Abing would have preferred to have hired someone with supervisory experience if other things were more or less equal. In his opinion it was preferable, in light of the nature of the office, its client base, and his assessment of program priorities, to hire someone with Mr. Ferron's background but without supervisory experience, than to hire someone without Mr. Ferron's background but with supervisory experience.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(d), Stats.
2. Appellant has the burden of proof to establish by a preponderance of the evidence that respondent's failure to have hired him for the position in question was illegal or an abuse of discretion.
3. Appellant has not satisfied his burden of proof.
4. Respondent's failure to have hired appellant for the position in question was neither illegal nor an abuse of discretion.

OPINION

This is an appeal of an appointment decision pursuant to §230.44(1)(d), Stats., which provides:

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.

In order to prevail on this appeal, appellant must establish that the decision to hire Mr. Ferron instead of him was illegal or an abuse of discretion.

During appellant's interview, Mr. Graff asked appellant a question about his marital status. Under the Wisconsin Fair Employment Act it is an unlawful act of employment discrimination "to make any inquiry in connection with prospective employment, which implies or expresses any limitation, specification or discrimination with respect to an individual or any intent to make such limitation, specification or discrimination because of any basis enumerated in §111.321." §111.322(2), Stats. Therefore, it appears this question about appellant's marital status, which is included in the list of prohibited bases of

discrimination set forth in §111.321, Stats., was itself an unlawful act of employment discrimination. However, there is no basis for a finding on this record that this question had any effect on the hiring decision, and the hiring decision per se was not illegal on this basis.¹

Turning to the issue of abuse of discretion, in Ebert v. DILHR, 81-64-PC (11/9/83), the Commission held:

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).

Mr. Abing's decision on selection as between Mr. Ferron and appellant involved two candidates, each of whom had significant strengths and weaknesses. Mr. Ferron had extensive experience with both the programs administered by the Black River Falls office and the type of client it served, but had no supervisory experience. Appellant had very strong supervisory experience but none of the program and client base experience of Mr. Ferron. Mr. Abing decided that given the nature and location of the office and the desirability of having someone who could get involved quickly in the budget planning process, Mr. Ferron was a better choice.

On the face of it, Mr. Abing had a rational basis for his decision. Appellant pointed out that the supervisory analysis form attached to the PD for the position (Respondent's Exhibit 1) reflected an allocation of 20% for supervisory functions and 60% for "activities relating to supervisory responsibilities (i.e., establishing operating procedures, reviewing work of subordinates, counseling subordinates on performance, training and orienting new employees, performing related administrative functions, etc.)," for a total of 80%

¹ It should be noted that even if appellant had maintained this case as a marital status discrimination complaint, it does not appear that he would have been entitled to any substantive remedy with respect to this question because of the absence of a causative link to the hiring decision.

supervisory. However, many of these supervisory functions are obviously intertwined with substantive program issues, and it is impossible to draw the conclusion from this form that an 80% (or some similar number) weighting of this job's high importance job content must be ascribed to general supervisory knowledges, skills and abilities. For example, training is considered a supervisory function, but that does not mean that program experience would have no relationship to someone's ability to establish a training program for dealing with AFDC clients.

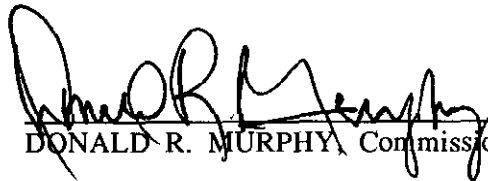
In the Commission's opinion, the evaluation process the panel followed appeared to be less than ideal. For example, if numerical scores are to be used to narrow the applicant pool from five to three, it seems questionable to weight all thirteen questions the same when Mr. Abing was putting so much weight on two of them. However, this did not have a negative impact on appellant, who had the highest interview score based on an equal weighting of the thirteen questions. Also, it is noted that the requirements of §230.16(4), Stats. that examinations be "job-related in compliance with appropriate validation standards," and of §230.16(5), Stats., for the utilization of "appropriate scientific techniques and procedures" do not apply to the post-examination, post-certification stage of the process. Ebert v. DILHR, supra.

Because appellant has not established that the failure to have hired him for this position was illegal or an abuse of discretion, respondent's action must be affirmed and this appeal must be dismissed

ORDER

Respondent's appointment action is affirmed and this appeal is dismissed.

Dated: August 26, 1992 STATE PERSONNEL COMMISSION
AJT/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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**NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION**

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or

within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.