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STATE OF WISCONSIN

PERSONNEL COMMISSION

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PETER OCHS and EMIL JENSEN,
 Appellants,
 v.
 Secretary, DEPARTMENT OF
 INDUSTRY, LABOR AND HUMAN
 RELATIONS,
 Respondent.
 Case Nos. 93-0185-PC
 93-0219-PC

* * * * *

DECISION
AND
ORDER

This matter is an appeal pursuant to §230.44(1)(d), Wis. Stats., alleging that respondent's decision not to select either of the appellants to the vacant position of Civil Engineer - Developmental was an illegal act or an abuse of discretion. A hearing was held on this appeal before Donald R. Murphy, Personnel Commission, and briefs were filed after the hearing. The briefing schedule was completed February 23, 1994.

FINDINGS OF FACT

1. In August 1993, the respondent, Department of Industry, Labor and Human Relations (DILHR), Safety and Buildings Division, announced a vacant Civil Engineer - Developmental (plan reviewer) position in its Shawano field office. The job announcement provided: Well qualified applicants will have a four-year degree with a major, or significant coursework in structural engineering or equivalent training and experience.
2. Appellants Peter Ochs and Emil Jensen applied for the position, were certified, invited and accepted an invitation to be interviewed for the position.
3. When Ochs applied for the position, he was in his present Builder Construction Inspector 2 position with DILHR. Ochs had been initially hired in 1985 as a plan reviewer. One year later he transferred to his current inspector position and has been doing plan review work for the last four years. Ochs has a 2-year Associate Degree in Residential and Light Commercial Design, from North Central Technical Institute in Wausau, Wisconsin.

4. Emil Jensen, at the time he applied for the civil engineer position, was, like Ochs, employed by respondent as a Building Construction Inspector 2. He had been in that position since first being hired by DILHR four years ago. Jensen had logged approximately 1300 hours of plan review work. Previously, as a building inspector for the City of Sturgeon Bay and later the Village of Howard, Jensen was responsible for building inspections, plan reviews and building permits. Jensen did not have a 4-year degree, but held state certifications in plumbing, electrical and the commercial code.

5. Fifteen certified candidates were interviewed for the position by a four-member panel.

6. The panel members were: Lawrence Swaziek, plan review supervisor for the field offices; James Smith, a leadworker in the Madison plan review office; Lynne LeCount, plan reviewer for fire sprinkler systems; and Michael Valdovinas, plan examiner in the Madison office.

7. Swaziek wrote the examination questions and proposed the benchmarks for evaluating the candidates' answers to the questions.

8. Just prior to interview, all candidates were given a pre-interview packet, containing a copy of the interview questions, position description and job announcement and allotted 10 minutes to review the material prior to interview.

9. The candidates were allowed to bring their pre-interview packet review notes into the interview.

10. All candidates were asked the same questions by the same panel members.

11. After all interviews were completed, each interviewer submitted suggested rankings of the candidates.

12. The panel consensus of the top five candidates were: Miles Winkler, John Whalen, Moktar Taamallak, Steve Dobratz, and Nicollette Zielkowski.

13. The position was offered and accepted by Moktar Taamallak, after the first two candidates declined.

14. All of the top five candidates held engineering degrees. The top three candidates had degrees which included courses in structural engineering, and had work experience in structural design.

CONCLUSIONS OF LAW

1. This matter is before the Commission pursuant to §230.44(1)(d), Wis. Stats.
2. The appellants have the burden of proof, establishing respondent's failure to select either of them for the engineering position at issue was an illegal act or an abuse of discretion.
3. The appellants have failed to sustain their burden of proof.
4. The decision of respondent to select an individual other than either of the appellants for the position at issue was not an illegal act or an abuse of discretion.

OPINION

The question before the Commission is: Whether the respondent committed an illegal act or an abuse of discretion in not appointing either of the appellants to the vacant position of Civil Engineer - Developmental, announced by respondent in August 1993.

Appellant Jensen argues that this engineer position, with the working title of Plan Examiner, does not require a person with a 4-year engineering degree, that his position compares favorably to the engineer position, and that DILHR policy supported internal promotion. He points to the fact that he has worked in the construction field for 27 years, performed plan reviews as employe of 2 municipalities, and currently as a Building Inspector for respondent.

In his brief, appellant Peter Ochs writes:

This appeal came about not so much because the state did not follow procedure as it is a fact that DER has systematically eliminated the building inspection staff from the range and rank equal to the Plan Review staff and at the same time we had to do their work.

Ochs asserts that for the past 4 years building inspectors have handled the review plan overload and that currently he spends 50 percent of his time reviewing plans, but he is not in the same pay range as plan reviewers.

Based on their briefs, it would appear that appellants are mainly concerned with the fact that building inspectors are not in the same pay range as plan reviewers. Ochs writes:

I would like to see the policies and procedures to be ordered changed to allow inspectors to do this work at the same wage as the Review staff. That would prevent the abuse that is taking place now. I would like DER to be ordered to make a decision on the inspectors' appeal #93-0197-PC before they can hire any new Review staff.

However meritorious this concern, it is not the question before the Commission and therefore the Commission has no authority to entertain it here.

Secondarily, it appears appellants argue that an engineer is not needed for this position, they are qualified to perform this job and could be trained to meet any needs of the position.

In rebuttal, respondent directs the Commission to the testimony of John Eagon, Director of the Bureau of Buildings and Structures, Clyde Bryant, Plan Review Section Chief, and Lawrence Swaziek, field Plan Review Supervisor.


The record shows that Eagon, Bryant and Swaziek testified that about 50 percent of the plan reviewers are engineers, that the particular position is located in a field office in need of an individual with knowledge and skills in structural strength and quality of materials and similar knowledge typical of those with formal engineering training. They also testified that DILHR training programs do not solely provide this knowledge.

The Commission concludes that appellants' primary concerns only peripherally touch the issue presented for hearing, and supporting evidence is insufficient to find in their favor. Appellants do not argue that respondent's method of recruitment and selection violated civil service law, but rather respondent should have restricted recruitment, making candidates with their credentials optimally qualified for the position. However, the record indicates the position dictated an engineering background baseline. Accordingly, the Commission must conclude that respondent did not commit an illegal act or abuse its discretion when it failed to select either of the appellants for the vacant Civil Engineer - Developmental position in late summer and fall of 1993.


ORDER

Respondent's decision is affirmed and this appeal is dismissed.

Dated: September 9, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)