

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

STEVEN R. POSTLER,

Appellant/Complainant,

v.

Secretary, DEPARTMENT OF
TRANSPORTATION,

Respondent.

Case Nos. 94-0016-PC and
94-0024-PC-ER

* * * * *

FINAL
DECISION
AND
ORDER

A proposed decision and order was mailed to the parties in the above-noted matter on June 9, 1995. Mr. Postler submitted written objections to the proposed decision and requested oral argument. Both parties presented oral arguments to the Commission on September 27, 1995.

The Commission considered the arguments raised by the parties and consulted with the hearing examiner. The concerns raised are discussed below.

Concern raised by DOT

The Department of Transportation (DOT) requested adoption of the proposed decision but suggested modification to the second paragraph on p. 17, to reduce what DOT perceived as too much emphasis on the role Mr. Postler's interpersonal skills played in the selection decision. In short, DOT would like the proposed decision modified to say that the selection decision was based solely on candidates' answers in the second interview. After consulting with the hearing examiner, the Commission concludes such change would be inappropriate. The record is clear that Mr. Cantwell was influenced by his perception of Mr. Postler's interpersonal skills. Mr. Cantwell was involved with the selection process to such extent that it cannot be said with certainty that his opinion did not have any impact on the selection decision.

Concerns raised by Mr. Postler in written objections to the proposed decision.

Mr. Postler raised several concerns in his written objections to the proposed decision. Each concern is discussed below.

1. I object to the fact that I did not receive copies of the respondent's exhibits and witness list three working days prior to the hearing. This prevented me from discussing my position and my guess as to what the respondent's position would be with an attorney prior to the hearing. I had intentionally arranged my schedule, so I could take Wednesday afternoon off prior to the hearing and discuss my case with an attorney who I planned to hire to represent me at the hearing. The witness list and exhibits were not delivered to my house until after 4:00 on Wednesday afternoon. I was totally booked on Thursday and Friday, so I was unable to hire an attorney in time for the hearing.

I made a motion early on at the hearing relative to the admissibility of the respondent's witnesses and exhibits, but Ms. Rogers [the hearing examiner] allowed the respondent's exhibits to be submitted and allowed the respondent's witnesses to testify for reasons I don't understand. Therefore, I don't think the record is correct. It is very important to me that the record be correct in case I have to hire an attorney and take these complaints to the next level. Why have procedural rules if you're not going to go by them? Why not just let everybody show up at the hearing and let the chips fall where they may? That's what happened in this case. I request that I be given the opportunity to orally argue for the inadmissibility of the respondents witnesses and exhibits, because procedural rules were not followed.

Response: The Commission's administrative rule pertinent to Mr.

Postler's concern is PC 4.02, Wis. Adm. Code, which requires the exchange of documents and witness lists "at least 3 working days before the commencement of the hearing." Mr. Postler's hearing started on May 22, 1995, a Monday. Three working days prior to May 22, 1995, was Wednesday, May 17, 1995. Mr. Postler received DOT's exhibits shortly after 4:00 p.m. on May 17, 1995. He claimed entitlement to receipt by 9 a.m. on the same day.

At hearing, the examiner acknowledged that the Commission's code provision could be interpreted to support Mr. Postler's argument. However, the hearing examiner sent the parties a letter dated April 14, 1995, which contained the following information. The emphasis shown below appears in the original document.

Exhibits and witness lists must be exchanged at least 3 working days prior to hearing. This means the opposing party and the Commission must each receive copies of your exhibits (numbered as noted in the prior paragraph) and a list of your witnesses prior to 4:30 p.m. on May 17, 1995. Failure to comply with this deadline could result in a ruling that you cannot present the evidence (or witness) at hearing.

The examiner concluded that if an error occurred in the time DOT tendered exhibits to Mr. Postler, such error would be attributable to the hearing examiner and not to DOT because DOT followed the directions in the examiner's letter. Mr. Postler bears the risk of setting an appointment with an attorney prior to the receipt deadline established in the examiner's letter. The Commission further notes that while Mr. Postler raised the objection at hearing, the examiner does not recall any mention of scheduled consultation with an attorney which was abandoned due to the actual exchange time.

2. I object to the fact that I was not allowed to call my rebuttal witnesses. Ms. Rogers indicated that the reason she wouldn't let me call my rebuttal witnesses was she was booked through the end of July and she didn't want these cases to sit until then. Well, I don't think that's a very good reason for not allowing me to call my rebuttal witnesses. I believe that many of the witnesses would have provided testimony that would have conflicted with the facade that managers testifying on behalf of the respondent created relative to my interpersonal skills at the hearing. I request that I be given the opportunity to orally argue my point of view concerning the relevance of testimony that each and every rebuttal witness would have provided.

Response: On the third day of hearing, Mr. Postler requested permission to present 35 rebuttal witnesses for the purpose of asking them whether they had ever heard him say an offensive remark. The hearing examiner denied the request mainly because she felt such testimony would not be helpful. The relevant inquiry was not whether Mr. Postler actually lacked interpersonal skills, but whether the interviewers who believed he had such problems had an explanation for their belief other than discrimination, illegality or an abuse of discretion. The examiner suspected each party could have brought in an additional 35 witnesses in support of their opposing views. To be even handed, the examiner further limited respondent's evidence on Mr. Postler's alleged interpersonal skills to information known to an interviewer prior to the hiring decision. In other words, the examiner would not let respondent's witnesses testify about rumors, unless the witness discussed the same with one of the interviewers prior to the hiring decision.

At oral argument to the full Commission, Mr. Postler said his rebuttal witnesses (names not given) would have testified that Mr. Bernander never threw things out. Mr. Postler did not offer at hearing any rebuttal witness for the stated purpose of testifying about Mr. Bernander.

3. I object to the fact that I was not allowed to have my witnesses identify my exhibits and make them a part of the record as the respondent was allowed to do. At the beginning of the hearing Ms. Rogers had me go through my exhibits and quickly explain my rationale for submitting each and every exhibit. She then made a split second decision as the admissibility of each exhibit. Then throughout the remainder of the hearing if I tried to have a witness identify an exhibit that she had ruled inadmissible, the respondent's attorney quickly reminded her that she had already ruled that exhibit inadmissible.

Ms. Rogers always stuck with her original ruling even if the evidence I was trying to have my my witnesses identify had probative value. It got to the point that on the last day of hearing [the hearing examiner] realized that she had ruled the position description of the position in question inadmissible. She then asked the respondent's attorney if it would be all right with her if I was allowed to make that a part of the record. Well, I don't think that Ms. Rogers' split second rulings at the beginning of the hearing were accurate. I believe that exhibits that would have had an affect on the proposed decision were erroneously ruled to be inadmissible. I request that I be given the opportunity to orally argue for the admissibility of specific exhibits that are very relevant that were ruled to be inadmissible before I had even called my first witness.

Response: The Commission first notes that at oral arguments, Mr. Postler did not specify any exhibit which he felt the examiner ruled on erroneously.

At hearing, Mr. Postler first presented Wesley Buss as a witness and showed him Exhs. C-33 through C-35, the admissibility of which were ruled upon at that point in time. Complainant's second witness was James Lawrence, to whom complainant showed the following exhibits: C-120 through C-122, and C-124. Mr. Postler presented himself as the third witness. He indicated at the start of his testimony that he wished to proceed by going through his exhibits as a framework for him to provide testimony.

Prior to hearing, Mr. Postler tendered 124 exhibits. As he presented testimony, the examiner relied upon him to be familiar with his exhibits to explain how he felt the subject matter of any particular document related to his cases. Where Mr. Postler was unable to articulate a sufficient connection, the exhibits were excluded. Where there was doubt as to relatedness, the examiner reserved ruling on admissibility to give Mr. Postler the benefit of attempting to bring the document into the record based upon his own later testimony, or testimony from other witnesses.

4. I object to the fact that Ms. Rogers allowed the respondent to make hearsay evidence a part of the record. Item 30 on page 9, of the proposed decision is pure hearsay and shouldn't have been allowed. I objected to the inclusion of hearsay evidence when the respondent began to pursue this line of questioning, but my objection was overruled for reasons I don't understand. I request that I be given the opportunity to orally argue the fact that Ms. Rogers allowed hearsay evidence to be made a part of the record.

Response: The information found in par. 30 of the proposed decision and order, describes the instances cited by the interview panel members as the basis for the opinion that Mr. Postler lacked interpersonal skills. The concept of hearsay is inapplicable to the extent that such testimony was offered to show the basis of an interviewer's belief, as opposed to the truth of the matters asserted. To the extent that this testimony was offered for the truth of the matters asserted, the following analysis would be applicable.

The text of the applicable administrative rule is shown below.

PC 5.03 Conduct of Hearings.

* * *

(5) EVIDENCE. As specified in s. 227.45, Stats., the commission is not bound by common law or statutory rules of evidence. All testimony having reasonable probative value shall be admitted, and immaterial, irrelevant or unduly repetitious testimony shall be excluded. The hearing examiner and the commission shall give effect to the rules of privilege recognized by law. Hearsay evidence may be admitted into the record at the discretion of the hearing examiner or commission and accorded such weight as the hearing examiner or commission deems warranted by the circumstances.

The incidents described in the proposed decision as "a" and "b" in par. 30, were conceded by Mr. Postler. Further, confirming evidence exists in the record such as Ms. Pauls' testimony that the staff had complaints about Mr. Postler, as described in par. 32 of the proposed decision. Also, Tom Rabaglia provided testimony which demonstrated that any concerns which the interviewers may have had about Mr. Postler supervising the Fuel Tax Unit staff were shared by Mr. Rabaglia even prior to the interviews, as described in par. 31 of the proposed decision. In short, no admissibility error occurred.

5. I object to the conclusions reached by Ms. Rogers concerning case number 94-0016-PC. I believe that civil service rules and laws were violated during the hiring process. Martha Gertsch chose to diversify the bureau of vehicle services work force and pursue affirmative action goals and objectives when filling this supervisor position even though this position was not identified as being underutilized by women or minorities by the Department of Employment Relations (DER). This is clearly an abuse of discretion, because DER is responsible for surveying positions and determining if they are underutilized, not Martha Gertsch.

I believe that Malini Sathasivam AKA Malini Pillai was hired because she is a woman and a minority in accordance with Martha Gertsch's stated goals of identifying and eliminating past and present effects of discrimination in employment. The fact that Rudolph Bentley, a minority, was allegedly the respondent's second choice is additional evidence that would lead a prudent person to believe the respondent's affirmative action goals and objectives were relevant. I request that I be given the opportunity to orally argue my point of view concerning Martha Gertsch's penchant for hiring women and minorities for supervisory positions in order to further her stated goals and objectives of culturally diversifying bureau of vehicle services staff.

Response: The Commission's areas of disagreement with the above statement and the reasons therefore are explained in the proposed decision and order and need not be repeated here.

6. I object to the conclusions reached by Ms. Rogers concerning case number 94-0024-PC-ER. Ms. Rogers has not interpreted the evidence properly. She apparently feels that the missing interview notes, the conflicting testimony of the first interview panel, Martha Gertsch's involvement with a sexist organization, Tom Cantwell's history of always striving to be politically correct, Martha Gertsch's hiring history pertaining to supervisory positions, the fact that the number one candidate was a female minority, the fact that the number two candidate was a minority male with no supervisory experience recruited for the position by Martha Gertsch and the fact that she didn't even bother to attend the second interview of the other non-minority candidate, etc., to be coincidental. Well, I don't. I believe that evidence I presented adds up to Discrimination with a capital D. I request that I be given the opportunity to orally argue my point of view concerning the aforementioned facts.

Response: The Commission's reasons for its areas of disagreement with Mr. Postler are noted in the proposed decision and need not be repeated here.

7. I object to the conclusions reached by Ms. Rogers concerning Martha Gertsch's supervisory hires. I request that I be given the opportunity to orally argue my point of view concerning the fact that non-

supervisory hires should not have been included since the position in question is a supervisory position.

Response: Ms. Gertsch's hires are discussed in the proposed decision in pars. 35 and 36. Par. 35 describes the results for supervisory and non-supervisory hires. Par. 36 describes only supervisory hires. The Commission agrees that the information about supervisory hires is more pertinent to Mr. Postler's case. The second paragraph on p. 13 of the Discussion section of the proposed decision explains why the supervisory statistics were insufficient evidence to establish the point Mr. Postler attempts to make. The Commission agrees with the explanation already provided in the proposed decision.

8. I object to the conclusions reached by Ms. Rogers concerning the relevance of Griggs versus Duke Power Company. Martha Gertsch has openly discriminated against non-minority males in hiring and promotional opportunities in order to further her stated goals of diversifying the bureau of vehicle services work force. I request that I be given the opportunity to orally argue my point of view concerning the fact that Martha Gertsch deems technical skills to be detrimental when non-minority males apply for supervisory positions, but deems technical skills to be advantageous (ie: Vicky Van Deventer and Phil Thomas) when women and minorities compete for supervisory positions. This is a double standard plain and simple which creates a disparate impact on non-minority male employees who wish to promote into supervisory positions in the bureau of vehicle services.

Response: The Commission disagrees with Mr. Postler's perception of his case, as already explained in the proposed decision and order. His mention of Ms. Van Deventers and Mr. Thomas, however, warrant further comment here.

Ms. Van Deventers has never been promoted to a vacant position. In June 1988, she worked as a Consumer Specialist 1 (CS-1) in the Dealer Section. The CS classification is a progression series and resulted in her reclassification in June 1989 to CS-2, and in June 1989 to CS-3. In 1992, her position was reclassified to Motor Vehicle Specialist 4. In March 1993, she took a lateral transfer to a vacant position classified as a Motor Vehicle supervisory position. In July 1994, her position and all similarly classified positions were reallocated to DMV Program Supervisor.

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Mr. Thomas testified that he has been "promoted" once in the last 3 years. However, his testimony indicated this was a reallocation of his position from Motor Vehicle Supervisor to Motor Vehicle Program Supervisor. A position reallocation is not similar to being promoted to a vacant position because all positions with the affected classifications are reallocated and no individual moves from one job to another.

9. I object to the conclusions reached by Ms. Rogers concerning statistics supplied by the respondent relative to other supervisor positions filled by Tom Cantwell. To the best of my knowledge none of the individuals who interviewed for those positions had a technical background in the subject matter of the unit for which they interviewed. Therefore, I believe the statistics are skewed. I request that I be given the opportunity to orally argue my point of view concerning this fact.

Response: The Commission agrees with Mr. Postler that hiring decisions made under the most similar set of circumstances are likely to be most probative. As noted in par. 34 of the proposed decision, all 8 of Mr. Cantwell's hires from 11/88 to 5/92, were White (non-minority) and three-quarters of the hires were men; statistics which do not support Mr. Postler's discrimination allegations. One major problem with breaking the statistics down further is the small size of the group involved. Even the entire group of 8 hires is small in terms of statistical significance.

10. I object to the conclusions reached by Ms. Rogers concerning the effect Martha Gertsch's involvement with the Wisconsin Women's Transportation Seminar had on the hiring decision. I believe that Martha Gertsch's involvement with this organization shows that she had a motive to discriminate against non minority males. The fact that she didn't even bother to show up for the second interview of Christopher Schuldes reinforces this fact. Therefore, I believe it can be indisputably concluded that Martha Gertsch did in fact make a discriminatory hiring decision due to her association with the Wisconsin Women's Transportation Seminar. I request that I be given the opportunity to orally argue my point of view concerning these facts.

Response: The Commission disagrees with Mr. Postler for the reasons already provided in the proposed decision.

11. I object to the conclusions reached by Ms. Rogers concerning Martha Gertsch's involvement in the hiring decision. I believe that Martha Gertsch made the hiring decision. I believe that Tom Cantwell's

involvement in the hiring decision was peripheral. I believe that Martha Gertsch participated in the second round of interviews in order to influence the hiring process. I believe that Martha Gertsch influenced the hiring process in order to further her stated goals and objectives of culturally diversifying bureau of vehicle services staff. I request that I be given the opportunity to orally argue my point of view concerning these facts.

Response: The Commission disagrees with Mr. Postler for the reasons already provided in the proposed decision.

12. I question the conclusions reached by Ms. Rogers concerning the missing interview notes. I believe the missing notes contain significant information that contradicts information presented by the respondent. Furthermore, I was supposedly only invited to the second interview because Paul Bernander allegedly was going to fill a position from the same register. Paul Bernander threw out his notes. Does that make sense? Wouldn't he keep the notes if he was planning to fill a position from the same register? What about the missing Martha Gertsch notes? Just a coincidence. No way. I request that I be given the opportunity to orally argue my point of view concerning these facts.

Response: The Commission agrees with the examiner's discussion of these issues as already contained in the proposed decision and order.

Some concerns were raised for the first time by Mr. Postler at oral argument to the full Commission. The main newly-raised concerns are discussed below.

Mr. Postler's additional concerns raised at oral argument to the Commission.

13. Mr. Postler said at oral arguments that Mr. Cantwell told him someone else had been hired. He further indicated that Mr. Cantwell was very distraught and that he had not seen Mr. Cantwell so distraught since Mr. Cantwell's mother died.

Response: The statement made by Mr. Postler at oral arguments included information which he did not present as testimony at hearing. It is true Mr. Postler indicated Mr. Cantwell appeared uncomfortable, but no mention was made at hearing of the death of Mr. Cantwell's mother. Based on the hearing record, it is more plausible that Mr. Cantwell was uncomfortable breaking disappointing news to a long-term friend and fellow worker. The

Commission cannot consider information which was not presented at the hearing.

14. Mr. Postler contended that Mr. Bentley "was recruited for the position", per Mr. Cantwell's testimony.

Response: Mr. Postler's characterization of Mr. Cantwell's testimony goes too far. Mr. Cantwell indicated he wished to have the widest candidate pool possible. He sent an e-mail message asking whether anyone knew of potential candidates. In reply, Martha Gertsch mentioned Doris Ziegler. In reply, Tarra Ayers mentioned Mr. Bentley. Mr. Cantwell had Betty Jansee (at DOT) send Mr. Bentley a copy of the position description and other information about the job. Mr. Cantwell also went to DOT's personnel office where the names of employees interested in transfer are kept. He looked for anyone at Range 15 and above. All people interested in potential transfer were given an interview, but only Ms. Ziegler and Mr. Bentley requested interviews by transfer opportunity. (See par. 24 of the proposed decision.) Neither the hearing examiner nor the Commission was persuaded that Mr. Cantwell's actions described herein were for an illegal purpose. Rather, Mr. Cantwell's actions were consistent with obtaining the widest candidate pool possible; a legitimate purpose.

15. Mr. Postler mentioned at oral argument that he received a performance award for being a supervisor and, accordingly, found respondent's assessment of his strengths and weaknesses to be without credence.

Response: Exh. C-10 is an Exception Performance Award (EPA) certificate dated January 1989. Mr. Cantwell (at the direction of his own supervisor) recommended Mr. Postler for this award to recognize Mr. Postler's service as an acting supervisor for about 7 months in the latter part of 1988. The contested hiring decision occurred in January 1994, about 5 years later and with no further supervisory experience. Accordingly, evidence of this EPA award was not strong enough to enable the Commission to reject the interviewers' analyses of the comparable supervisory potential of the various candidates.

ORDER

The examiner's proposed decision and order is adopted as the Commission's final decision and order, as supplemented herein.

Dated October 16, 1995.

STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Chairperson McCallum did not participate in this decision.

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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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. 2/3/95

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

STEVEN R. POSTLER,

Appellant/Complainant,

v.

Secretary, DEPARTMENT OF
TRANSPORTATION,

Respondent.

Case No. 94-0016-PC and
94-0024-PC-ER

* * * * *

PROPOSED
DECISION
AND
ORDER

A hearing was held in the above-noted cases on May 22-25, 1995. The parties made closing arguments to the examiner on the final day of hearing in lieu of submitting written briefs.

The hearing issues were defined at a prehearing conference as noted below:

Case No. 94-0016-PC: Whether respondent's decision not to hire appellant for the position of Motor Vehicle Supervisor 8 by respondent in January 1994, was illegal or an abuse of discretion.

Case No. 94-0024-PC-ER¹: Whether respondent discriminated against complainant on the basis of sex and/or race when he was not hired for the position of Motor Vehicle Supervisor 8 by respondent in January 1994.

FINDINGS OF FACT

Mr. Postler's Position in DOT's Organization

1. Steven Postler is a White male. In December 1993, he was working at the Department of Transportation (DOT) as a Motor Vehicle Program Specialist 4.

¹ The discrimination issue was heard on the merits by agreement of the parties.

2. DOT has six Divisions, as shown on Exh. C-54. Mr. Postler worked in the Division of Motor Vehicles. This Division had the following 3 bureaus:
a) Driver Services, b) Vehicle Services, and c) Field Services. Mr. Postler worked in the Bureau of Vehicle Services (BVS).
3. BVS had 7 sections as shown in Exh. C-55. Mr. Postler worked in the Motor Carriers Taxes and Permits Section (M/C Taxes & Permits Sec.).
4. In December 1993, Martha Gertsch was the BVS Director and Thomas P. Cantwell headed the M/C Taxes and Permits Sec. (Exh. C-55 and C-56). Ms. Gertsch and Mr. Cantwell are White.
5. Mr. Cantwell's section had the following three work units: a) Permits, b) Fuel Tax, and c) Audit Compliance. Mr. Postler worked in the Audit Compliance Unit using his considerable technical (program) knowledge of the interstate fuel tax program.
6. Mr. Postler has worked for DOT's interstate fuel tax program since 1987. His performance in this area has been recognized as exceptional and has been valued by DOT.²

Vacancy Applied for by Mr. Postler

7. Mr. Postler applied for a vacant position in a different unit of the same section/bureau/division in which he worked. Specifically, he applied for the position which served as the supervisor of the Fuel Tax Unit. The vacancy was classified as a Motor Vehicle Supervisor 8 (MVS-8).
8. Mr. Cantwell (as section head) was responsible for supervision of the vacant position. The hiring authority for the position was the Bureau Director, Ms. Gertsch. Ms. Gertsch also supervised Mr. Cantwell.

² Exh. C-15 through C-20, are formal evaluations of Mr. Postler's performance covering portions of 1988, all of 1989-1993, and a portion of 1994. He was rated as excellent consistently and by a succession of supervisors including Paul Bernander, Mr. Cantwell, Ron Kraft and Tom Rabaglia, all of whom served as supervisor of the Audit Compliance Unit at one time or another. Exh. C-10, C-12 and C-13, show he received an Exceptional Performance Award in 1989 and 1992, as well as a "Performance Plus" award in 1993.

The First Interview Panel

9. Mr. Cantwell decided to have a 2-step interview process. The first step would be an interview panel talking to all candidates to identify the top candidates who would be asked to return for a second interview.
10. The following three individuals served as the first interview panel: Mr. Cantwell, Kathleen Nichols and Paul Bernander. Ms. Nichols was one of Mr. Cantwell's unit supervisors, supervising the Permits Unit. Mr. Bernander was Mr. Cantwell's counterpart (Section Chief) for the Special Handling Section of BVS. All three panelists are White. Mr. Bernander was chosen as a panelist at least in part because a position was vacant in his section and the potential existed for his vacancy to be filled off the same register of candidates. Ultimately, the vacancy in Mr. Bernander's section was assigned a lower classification so he was unable to use the same register.
11. Prior to obtaining a certification list (Cert List) of candidates eligible for interview, Mr. Cantwell drafted the questions to be asked by the first interview panel, shared the draft with other panel members and finalized the same. No formal benchmarks were developed. The first panel asked each candidate the questions shown below:
 1. Describe elements of your background including education and work experience that you feel uniquely qualifies you for this position. (If they haven't mentioned it) What experience do you have with data processing systems and computers?
 2. What did you do in your last/current job to become more effective?
 3. Why are you interested in this particular position? or Why are you interested in working for the Division of Motor Vehicles?
 4. What do you believe are the most important characteristics of good supervision?
 5. The employees you would be supervising have extensive knowledge in their program area. Tell us how you will provide leadership to this team.
 6. An employee approached you and complains that she is being harassed by co-workers because her husband is of a different race. What steps would you take to deal with her concerns?
 7. Describe your experience in project implementation.

8. Tell us about your experiences in making policy decisions.
Follow up: What is your concept of good policy decision making?
 9. Is there anything you'd like to add that you feel is pertinent to this selection process?
 10. Do you have any questions of the panel?
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12. Thirteen candidates participated in the first interview panel. The panel recommended that the following four candidates should go forward to the second interview: Mr. Postler, Chris Schuldes (White male), Malini (Pallai) Sathasivam (a female and racial minority) and Rudolph Bentley (Black male).
 13. The interviewers from the first and second panel met prior to the second round of interviews. Mr. Cantwell felt he could not recommend Mr. Postler as supervisor of the Fuel Tax Unit due to Mr. Cantwell's perception that conflict existed between Mr. Postler and the staff of the Fuel Tax Unit. It was Mr. Cantwell's further perception that the conflict was due to Mr. Postler's deficient inter-personal skills. Ms. Nichols held a similar opinion. The interviewers decided to forward Mr. Postler's name to the second panel for varied reasons. Mr. Cantwell's intention was to include Mr. Postler solely as a candidate for the potential vacancy in Mr. Bernander's unit. Ms. Nichols' intention was to include his name for either position, leaving it to Ms. Gertsch to determine if Mr. Postler was suitable for either job. Ms. Gertsch was present during the discussion. She concluded that Mr. Postler continued to be a viable candidate for either supervisory position. Mr. Bernander's understanding was that Mr. Postler remained a viable candidate for either position.

The Second Interview Panel

14. Members of the second interview panel were Mr. Cantwell and Ms. Gertsch. Mr. Cantwell developed (with Ms. Gertsch's review and comment) the following list of areas to discuss with each candidate:
 - I. TEAM BUILDING: What does the candidate view as: a) the concept of a team, b) the purpose of a team, c) the team's interaction with other teams and d) the team's interactions within the team.
 - II. POLICY DEVELOPMENT: What does the candidate view as:

- a) the concept of policy development, b) who is involved in policy development and why, c) the effect of policy and d) the importance of policy.
 - III. DECISION MAKING: What does the candidate view as the process for making decisions? Does the candidate like or dislike making decisions. Does the candidate's current boss allow the candidate to make decisions?
 - IV. QUALITY IMPROVEMENT: What is the concept of QI? Give examples of candidate's involvement in QI. How does QI fit into the work environment? What is the candidate's concept of providing good customer service?
15. Ms. Gertsch took the lead at the second interviews utilizing a less formal process than used at the first interviews. All four topic areas were covered with each candidate but not necessarily in the same way. Also, the second panel asked follow-up questions which varied depending on the answers given by a particular candidate.
16. Ms. Gertsch was unable to attend Mr. Schuldes' second interview. Mr. Cantwell served as an interview panelist, along with a substitute for Ms. Gertsch. Mr. Cantwell said Mr. Schuldes did not give a good interview the second time around. Mr. Postler felt Ms. Gertsch's failure to attend Mr. Schuldes' interview provided evidence in his discrimination case that she was not interested in hiring any White males. The most likely explanation, however, is that she was unexpectedly called away to other pressing business.
17. Ms. Gertsch and Mr. Cantwell each independently ranked the top 2 candidates after the second interviews. They agreed that the #1 candidate was Ms. Sathasivam and the #2 candidate was Mr. Bentley, a Black male.
18. Ms. Sathasivam's resume is in the record as Exh. R-6. Her most recent employment was as a Teller Supervisor in a bank, a position she held since November 1992. In 1991-1992, she was the manger of accounting, inventory, filing and marketing functions of an import/export business. She worked for a second bank in various capacities. From 1986-1992, she managed the Item Processing department; from 1985-86, she was the bookkeeping supervisor; and from 1982-1985 she was the Head Teller. She worked as the Head Teller for a third bank, from 1976-1982.
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19. During her second interview, Ms. Sathasivam provided many examples of situations where she worked with teams who dealt with thorny issues and was able to resolve the problems. She gave examples of situations where she dealt with people who were not working as a team and where she was able to change them to a working team. She had "a lot" of supervisory experience, including over a fairly large number of subordinate staff. She had experience leading teams that worked on automating processes. She had prior experience with QI. She was involved with the day to day decision making in the areas she supervised.
20. Mr. Bentley's resume is in the record as Exh. R-7. His most recent employment was as the Affirmative Action/Civil Rights Compliance Officer for the Division of Youth Services in the Dept. of Health and Social Services. He had previously worked in DOT's affirmative action office as an Equal Opportunity Specialist. In 1989-90, he worked as a Management Information Specialist for the University of Wisconsin (Madison) in the Administrative Data Processing unit. He had less supervisory experience than Mr. Postler, but this was offset to a degree by information given at the second interview about his experience leading teams. He had extensive policy experience where he would take input from various people and draft resulting policies which were widely used. Both Mr. Cantwell and Ms. Gertsch were impressed with Mr. Bentley's "presence". Mr. Bentley communicated well and in a manner which lead the listener to be confident in his abilities. Mr. Cantwell and Ms. Gertsch felt he had high potential to succeed in supervisory/management positions.
21. Mr. Cantwell checked Ms. Sathasivam's references. Nothing negative was said about her work. DOT offered the job to her and she accepted.

Six Cert Lists

22. Mr. Postler believed something irregular occurred with the Cert List based upon the fact that six Cert Lists were generated. Exhibit C-123 shows the candidates certified under each of the six lists.
23. DOT was entitled to interview 10% of the number of candidates on the register. The position was not underutilized for women or minorities, so

no additional names were added by expanded certification. Some additional names were added initially by virtue of veterans points.

24. The chart below shows the Cert List on which 11 of the 13 interviewed candidate appeared. The only exceptions were Mr. Bentley and Doris Ziegler who applied via transfer opportunity.

Cert dated <u>11/5/93</u> <u>16 names, total</u> Billger, James Coltharp, Harold Host, Robert Postler, Steven Reger, Dennis Wanless, Lyle Zirngibl, Mark	Cert dated <u>11/18/93</u> <u>15 names, total</u> Thibodeau, Mary	Cert dated <u>12/21/93</u> <u>12 names, total</u> No new interviewed candidates
Cert dated <u>12/22/93</u> <u>12 names, total</u> No new interviewed candidates	Cert dated <u>12/29/93</u> <u>13 names, total</u> Groshek, Ronald Sathasivam, Malini Schuldes, Chris	Cert dated <u>01/04/94</u> <u>11 names, total</u> No new candidates

25. No irregularities existed in relation to DOT's request for six Cert Lists. Rather, Mr. Cantwell wanted the largest group of candidates possible and, accordingly, exercised DOT's right to receive additional names when candidates on the most-recent list indicated they were uninterested in the position or failed to attend a scheduled interview. The record does not suggest that it was a deviation for DOT to request additional Cert Lists to obtain a full roster of candidates. DOT did not know ahead of time which names would be included on any Cert List.

DOT Valued Supervisory Skills More than Technical Expertise as Desired Skills for the Position Supervising the Fuel Tax Unit

26. Mr. Postler felt something improper occurred in the hiring process because he had more technical (program) expertise related to the vacancy than any of the other candidates. DOT concedes that Mr. Postler had the most technical expertise of the 13 interviewed candidates.

27. Mr. Cantwell determined what qualifications he desired for the person hired prior to receiving any Cert List. Specifically, he was looking for a candidate who could develop a team-work environment, i.e. someone who could make a team of the staff in the Fuel Tax Unit and who could make that team work well with teams from other sections. He was looking for someone with policy and research skills. He hoped to find someone with a financial background because the unit's computerized financial system (VISTA), differed from the system used for all other DOT programs and was outdated. He hoped the VISTA system would be changed in the near future to either the same system used by the rest of DOT or to an updated version of VISTA. All of these factors were related to the duties expected of the supervisory position. Ms. Sathasivam was more qualified than Mr. Postler on these criteria. She was less qualified than Mr. Postler in terms of technical (program) knowledge.
28. A candidate's prior possession of technical knowledge was not valued highly by Mr. Cantwell as a pre-requisite for the supervisory vacancy because the unit was staffed by technical experts already. What Mr. Cantwell felt he needed was a supervisor, not another technical expert. Further, it has been DOT's experience that candidates with supervisory/management skills have been successful in supervisory positions even if the person hired lacked technical expertise in the related program area. It was not improper for Mr. Cantwell to place value on the factors noted in this paragraph, over the value placed on technical expertise.

Mr. Postler's Inter-Personal Skills

29. Mr. Postler was unaware that a negative perception existed regarding his interpersonal skills or that tension existed between him and the staff of the Fuel Tax Unit. In particular, his performance was evaluated at least yearly with resulting praise of his work and he also was awarded exceptional performance awards. Never had he been told that management perceived he lacked interpersonal skills. To the contrary, he has been assigned to host or participate directly with various conferences and professional staff from other states' transportation offices. The hearing witnesses who assigned Mr. Postler to these

functions conceded they did so without fear that he would embarrass the DOT due to any perceived lack of inter-personal skills.

30. The following are the only specific instances cited by the interview panel members as support of Mr. Postler's lack of inter-personal skills.
- a. In or around May 1990, Mr. Postler and "Cindy" (a DOT employee in the IRP unit) were talking at a copy machine. Mr. Postler had lost a lot of weight and Cindy commented on his body. Cindy was wearing a lavender-colored dress which Mr. Postler noted was the same color used at his wedding. He told Cindy she looked "good enough to eat" in the dress. Ron Kraft was Mr. Postler's supervisor at the time and questioned him about the comment. Mr. Postler apologized to Cindy. No disciplinary action was taken. Mr. Cantwell was aware of this situation prior to his participation in the first interview panel.
 - b. In or around February 1992, Mr. Postler was assigned to an audit in Janesville. "Susie" and "Linda", two females from the Fuel Tax Unit, accompanied him to provide support services. Mr. Postler and Susie arrived on time for breakfast one morning, but Linda was late. When Linda arrived, Mr. Postler made some comment about her having been out "carousing around" on the prior evening. Susie reported the comment to her supervisor and the matter was investigated. Ultimately, Linda indicated she knew Mr. Postler was kidding. No disciplinary action was taken. Mr. Cantwell and Ms. Nichols were aware of this situation prior to their participation in the first interview panel.
 - c. Mr. Cantwell said that supervisors (unidentified by name) also told him their observations of Mr. Postler "talking down" to staff of the Fuel Tax Unit. The only example he could recall occurred around the summer of 1992, and related to computer software Mr. Postler developed for the Fuel Tax Unit. The staff of the unit were required to check with Mr. Postler before making any changes in the computer disc. Unit staff felt this requirement was demeaning or indicative of Mr. Postler's lack of confidence in their abilities.
31. Mr. Tom Rabaglia supervised Mr. Postler for 3 years starting in or around June 1992, which was when a question was raised regarding Mr. Postler's comment to Linda in February 1992, (as described in the prior paragraph). Mr. Rabaglia perceived hostility between the Fuel Tax Unit and Mr. Postler after the comment made to Linda and determined it would be better for Mr. Postler to stay away from the unit for a time because his presence agitated some staff. Some of the staff told Mr.

Rabaglia that Mr. Postler was a "pompous ass". In fact, when Mr. Rabaglia heard Mr. Postler applied for the position, he asked Mr. Postler if Mr. Postler could handle the job as supervisor.

32. Susan Ann Pauls has been the lead worker in the Fuel Tax Unit since about May 1990. She has never observed first-hand any problem Mr. Postler might have with inter-personal skills. She was aware of his comment to Linda in February 1992, and of the computer disc problems in the summer of 1992 (described in par. 26 above). She described the "general attitude" of the Fuel Tax Unit staff as feeling that Mr. Postler treated them as inferiors.
33. The examiner concluded from the record as a whole, that some of the staff in the Fuel Tax Unit were saying prior to November 1993, that Mr. Postler treated them in a demeaning manner. These individuals voiced their perceptions to several DOT employees, but not to Mr. Postler. The only concerns management brought to Mr. Postler's attention were the reactions to his statements to Cindy and Linda.

Mr. Cantwell's Supervisory Hires

34. Mr. Cantwell has hired unit supervisors as part of his duties as Section Chief of the M/C Tax and Permit Sec., as shown in Exh. R-11. Specifically, from November 1988 through May 1992, Mr. Cantwell has hired eight supervisors, all of whom were White (non-minority). Three quarters of the hires were men.

Ms. Gertsch's Supervisory Hires

35. Ms. Gertsch's 23 hires (supervisory and non-supervisory) from May 18, 1992 through May 30, 1994, are shown on Exhs. C-7 and R-13. She hired 12 men (including 4 who were minorities), and 11 women (including 2 who were minorities).
36. Ms. Gertsch's 23 hires included 6 supervisory positions filled prior to January 21, 1994 (when Ms. Sathasivam was hired). These 6 supervisory positions were filled by a White male, 4 by White females and 1 by a minority female.

Later Charges Brought Against Ms. Sathasivam

37. Ms. Sathasivam's employment with DOT ended on May 12, 1994 (Exh. C-32), after DOT learned that criminal charges were being brought against her in relation to allegations of embezzling from her prior position in a bank.
38. DOT had no knowledge prior to offering Ms. Sathasivam the supervisory position of the Fuel Tax Unit, that she was suspected of embezzlement or that a criminal investigation was under way or that criminal charges would be brought against her.

CONCLUSIONS OF LAW

Case No. 94-0016-PC:

1. Mr. Postler has the burden to prove that respondent's decision not to hire him for the position of Motor Vehicle Supervisor 8 in January 1994, was illegal or an abuse of discretion.
2. Mr. Postler has not met his burden in regard to allegations of illegality.
3. Mr. Postler has not met his burden in regard to allegations of an abuse of discretion.

Case No. 94-0024-PC-ER:

4. Mr. Postler is protected under the FEA by virtue of his sex and race.
5. Mr. Postler has the burden to show by a preponderance of the evidence that he was not hired due to his sex and race.
6. Mr. Postler failed to met his burden regarding the alleged sex and race discrimination.

DISCUSSION³

Analysis of Mr. Postler's Discrimination Claim (Case #94-0024-PC-ER)

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on Mr. Postler to show a prima facie case of discrimination. If he meets this burden, DOT has the burden of articulating a non-discriminatory reason for the actions taken which Mr. Postler may, in turn, attempt to show was a pretext for discrimination. McDonnell-Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

The record must show the following for Mr. Postler to establish a prima facie case: 1) he is a member of a class protected by the FEA, 2) he applied for and was qualified for an available position, and 3) he was rejected under circumstances which give rise to an inference of unlawful discrimination. The record shows he is protected under the FEA by virtue of his sex (male) and race (White). He applied for and was qualified for the position as Supervisor of the Fuel Tax Unit, as evidenced by inclusion of his name on the Cert List. The requisite inference of discrimination is raised because a female minority candidate was hired and she had less pertinent technical (program) knowledge than Mr. Postler.

DOT articulated a legitimate, non-discriminatory reason for the hire. Specifically, the person selected possessed a greater amount of non-technical skills, such skills were related to the supervisory position and DOT determined to seek a candidate with these non-technical skills prior to knowing who the candidates were.

Mr. Postler attempted to show pretext in numerous ways, some of which are addressed in the Findings of Fact. Additional arguments raised by Mr. Postler in closing arguments are addressed in the following paragraphs.

Mr. Postler felt even after hearing that he was either the first or second candidate after the first round of interviews and that Ms. Gertsch did not want

³ Any facts recited in the Discussion section of this decision which were not specifically enumerated in the Findings of Fact, are intended as additional findings of the Commission.

to hire him because he is a White male. He failed to prove this allegation. For example, he cited Ms. Gertsch's membership (and past-president standing) in a local chapter of a non-profit organization as evidence. The record shows, however, that men belong to the organization as well as women and that the organization's purpose is to provide a forum for exchange of knowledge and ideas among professionals in the transportation field whether they work in the private or public sector. He failed to establish his allegation that her membership in the organization presented a conflict with her position as BVS Bureau Director at DOT.

The history of hires by Ms. Gertsch (pars. 35 & 36 above), also did not support Mr. Postler's theory that she did not wish to hire White males. It is true that her supervisory hires include few White males, but the record lacks any evidence regarding the applicant pool for those hires. Accordingly, the record is insufficient to conclude that she rejected more qualified White males for the supervisory positions involving female and/or minority hires.

Mr. Postler argued that Ms. Gertsch had no intention to hire a White male as shown by her failure to attend the second interview of the other White male candidate, Mr. Schuldes. (See par. 16 above.) However, Ms. Gertsch testified she was unable to attend Mr. Schuldes' interview due to a scheduling conflict which likely arose unexpectedly, but the exact nature of which she could not recall. Mr. Postler's contrary speculation of a discriminatory motive for her failure to participate in Mr. Schuldes' interview was insufficient to refute her testimony.

In his closing arguments, Mr. Postler asserted he had proven that the underutilization statistics in the computer at the Department of Employment Relations (DER) were incorrect. He continued to believe Ms. Sathasivam was hired to meet some type of female or minority hiring quota at DOT. A contrary conclusion is established by the great weight of credible evidence in the hearing record. The supervisory position for the Fuel Tax Unit was not an underutilized classification under DOT's Affirmative Action (AA) plan in effect for the hire disputed here. The classification was included in DOT's subsequent AA plan as underutilized, but such underutilization identification was not used in connection with the disputed hire because it was not yet in effect.

The DOT AA Plan in effect for the disputed hire expired on January 30, 1994. Mr. Postler suspected an earlier expiration date because a DER computer

"run date" of the new underutilization statistics occurred on December 13, 1993. (See p. 3 of Exh. C-122.) However, no witness was able to provide details about the early "run". Further, DER and DOT staff testified that DER's underutilization computerized data base at the time of the disputed hire did not identify the position Mr. Postler sought as underutilized. According to DER testimony, the underutilization designation for supervisors of the same classification was placed in DER's computer effective with initial certifications requested on or after January 31, 1994, which was after the various certifications for the subject position.

Mr. Postler also felt pretext had been shown by the second panel's ranking of Mr. Bentley as the #2 candidate. Mr. Bentley lacked prior supervisory experience as well as pertinent technical knowledge. Mr. Postler, on the other hand had been an acting supervisor for about 8 months and possessed the pertinent technical knowledge. The interview panel testified they placed Mr. Bentley at #2 due to his interviewing presence and communication skills, in addition to information he provided at the interview which lead them to believe he had what it takes to become a successful supervisor at DOT. While it is more difficult to assess decisions made on subjective factors, the examiner had no reason to disbelieve the interview panel's testimony.

Two members of the interview panels failed to retain the notes they took during the interviews. Mr. Bernander kept his notes only for a short time after the interviews and then threw his notes away per his usual procedure. Ms. Gertsch thought she retained her interview notes per her usual procedure, but was unable to locate them when asked to produce a copy of the same for investigation of Mr. Postler's complaint.

It is the better practice to retain records created as part of a hiring process, but no legal mandate for retention exists. Failure to retain notes in some circumstances may tend to suggest that information favorable to complainant's case existed in the notes. However, such inference is inappropriate here where the explanations for the missing notes were credible and the record does not otherwise support a finding of discrimination.

Mr. Postler also believed discrimination occurred based on the following beliefs which he held prior to hearing: a) DOT usually does a criminal-record check before hiring supervisors, b) no such check was done here, and c) DOT

would have known about suspected embezzlement if DOT had done such a background check. He failed to establish these beliefs as true at hearing. Accordingly, the conclusion he drew from his incorrect beliefs (to wit: that a background check was not done for Ms. Sathasivam to facilitate Ms. Gertsch's desire to hire a female/minority over a White male) also was not shown at hearing.

Mr. Postler felt he should prevail on his discrimination claim under the reasoning expressed in the case of Griggs v. Duke Power Co., 401 US 424, 91 SCt 849, 3 FEP Cases 175 (1971). Griggs involved a case brought under Title VII of the federal Civil Rights Act of 1964. The employer had openly discriminated against Blacks in hiring and promotional opportunities by creating a separate operating department for Black employees with lower-paying jobs than existed for White employees. In 1965, the employer abolished the separate employing unit for Blacks but instituted requirements for a high school degree and successful performance on two aptitude tests. The new requirements effectively maintained the status quo (discrimination) due to the disparate impact which the new requirements had on Black employees. The court found the new requirements discriminatory because they measured the person in the abstract rather than the person's potential for success in the position sought.

DOT contended in closing arguments that the Griggs standard in Wisconsin's civil service system is met by the initial exam which determines the successful candidates on the Cert List. Mr. Postler did not dispute that the initial exam served this purpose, but contended that the Griggs standard applies equally to the post-certification interview process. He is mistaken. There is no legal requirement for the interview process to duplicate the purpose of the initial exam. However, interview questions must elicit information related to the job duties if relied upon as selection criteria. DOT's interview questions were job related.

Mr. Postler's Civil Service Appeal - Case #94-0016-PC

The issue in the present appeal is whether respondent's decision to hire Ms. Sathasivam was "illegal or an abuse of discretion", within the meaning of s. 230.44(1)(d), Stats. Illegality alleged on the basis of discrimination already has been discussed and will not be repeated here.

Mr. Postler claimed illegality relating to the interview process. Specifically, he contended the interviews should be regarded as part of the competitive examination process for hiring the supervisor of the Fuel Tax Unit and, accordingly, the interview questions should have been designed to predict successful performance on the job. Respondent's witnesses indicated the questions were job-related, but conceded they were not designed as a scientific measure of success. Mr. Postler is mistaken.

The competitive examination process described in s. 230.15 and 230.16, Stats., refers to the process which must be followed to develop the Cert List. Once the appointing authority receives the list, he/she is required to exercise discretion to appoint a certified candidate who, in the opinion of the appointing authority, is the best candidate for the subject position. Romaker v. DHSS, 86-0015-PC (9/17/86), Ebert v. DILHR, 81-64-PC (1983) Such determination may be made based upon selection criteria which are reasonably related to the responsibilities of the position. Thus, a more flexible standard applies to post-certification selection criteria than applies to the competitive exam process.

The term "abuse of discretion" was discussed in Wali v. PSC, Case Nos. 87-0081-PC, 87-0080-PC-ER (4/7/89), on p. 23, as shown below.

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, Case No. 79-208-PC (6/3/81).⁴ 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, Case No. 81-74-PC (1982).

Mr. Postler argued that DOT should have emphasized technical expertise as a selection criteria, rather than the criteria developed by Mr. Cantwell (as listed in findings of fact #11 & 14). The Commission's review of these cases, however, does not include a determination of which criteria would have been

⁴ Also, see Murray v. Buell, 74 Wis 14, 19 (1889).

best for respondent to use. Rather, the Commission's scope of review for post-certification hires is to determine whether the criteria used by respondent were reasonably related to the duties and responsibilities of the position to be filled and were uniformly applied. (See Royston v. DVA, Case 86-0222-PC (3/10/88), citing Strichert v. UW-Oshkosh, 86-0197-PC (1987).) The selection criteria used by DOT met this relatedness standard.

One aspect of this case is troublesome. Specifically, it seems potentially incongruous for DOT to consistently praise Mr. Postler's performance and then claim he had problems relating with the staff of the Fuel Tax Unit to such degree that Mr. Cantwell would not consider him for the supervisory position after the first interviews. (See finding of fact #13.) Furthermore, Mr. Cantwell could remember only 2 incidents involving staff from the Fuel Tax Unit (as noted in "b." and "c." of finding of fact #27) and was unable to say who told him about one of those incidents. Also, the most recent incident cited by Mr. Cantwell occurred sometime in the summer of 1992, which was about 1.5 years prior to the first interviews.

The Commission, however, cannot conclude that Mr. Cantwell's use of the cited incidents to eliminate Mr. Postler from further consideration for the Supervisor of the Fuel Tax Unit was an abuse of discretion. He arguably had a reasonable basis to believe some degree of conflict existed between Mr. Postler and the staff of the Fuel Tax Unit. Such conflict did not affect Mr. Postler's performance as an auditor, but certainly would be relevant to the supervisory position. While other people in Mr. Cantwell's position may have reached a different conclusion than Mr. Cantwell based on the same set of facts, the Commission cannot say that Mr. Cantwell's actions were "clearly against reason and evidence" which is the standard applicable to the issue of an abuse of discretion.

ORDER

That Mr. Postler's discrimination case (94-0024-PC-ER) and appeal case (94-0016-PC) are dismissed.

Dated _____, 1995.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, 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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.

2/3/95