

**EDWARD O. FIRLUS**  
*Complainant,*

v.

*Secretary, DEPARTMENT OF*  
**CORRECTIONS,**  
*Respondent.*

**96-0030-PC**



**ORDER**

After having reviewed the Proposed Decision and Order, considered the arguments and objections of the parties, and consulted with the hearing examiner, the Commission adopts the Proposed Decision and Order with the following addition for purposes of clarification:

In his objections, appellant takes issue with the hearing examiner's decision to exclude from the hearing record those documents which appellant did not file prior to hearing. Appellant argues in this regard that he requested these documents from respondent prior to hearing but did not receive them from respondent prior to hearing. However, the record in this matter shows that appellant filed this appeal on April 2, 1996; the prehearing conference, in which appellant participated, took place on April 19, 1996; the prehearing conference report, which was mailed to appellant on April 24, 1996, explained that, ". . . pursuant to §PC 4.02, Wis. Adm. Code, all additional exhibits. . . must be received by the opposing parties and filed with the Commission at least 3 working days before the day established for hearing, or will be subject to exclusion."; at the prehearing conference, the parties, including appellant, agreed to the scheduling of the hearing on September 4, 1996; and that appellant did not request the subject information from respondent until August 23, 1996. The record further shows that, since, according to the discovery requirements relating to Commission proceedings, respondent had 30 days to respond to any discovery request, respondent interpreted appellant's request as a subpoena duces takem and brought the requested documents to the hearing where appellant was

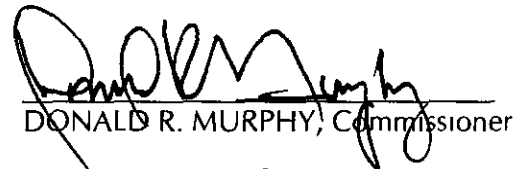
given a chance to review them by the hearing examiner. However, it was clear to the hearing examiner and it is clear to the Commission that the appellant was responsible for the delays which resulted in his failure to timely file the subject documents as potential hearing exhibits; that he failed to provide sufficient justification for this procrastination; and that, as a result, the documents were properly excluded from the hearing record.

Dated: November 14, 1996

STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

Edward O. Firlus  
W10446 Church Road  
Waupun, WI 53963

Michael Sullivan  
Secretary, DOC  
149 East Wilson Street  
Madison, WI 53707-7925

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

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EDWARD O. FIRLUS,  
 Appellant,

v.

Secretary, DEPARTMENT OF  
 CORRECTIONS,  
 Respondent.

Case No. 96-0030-PC

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PROPOSED  
 DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This is an appeal of a hiring decision. A hearing was held on September 4, 1996, before Laurie R. McCallum, Chairperson.

FINDINGS OF FACT

1. Early in 1996, appellant applied for, was certified for, and was interviewed for an Industries Specialist 4 (IS 4) position in the Department of Corrections, Bureau of Correctional Enterprises, Waupun Correctional Institution.
2. The supervisor of this IS 4 position is Clark Foster, Industries Supervisor. Mr. Foster served as one of the three members of the interview panel.
3. Prior to the interview, Mr. Foster gave each candidate a copy of the interview questions, advised them that they had fifteen minutes to review the questions and make notes, and told them that he would be collecting their copy of the questions prior to the start of the interview.
4. Appellant made his notes on the copy of the interview questions he had been given by Mr. Foster. Because this copy of the questions was collected by Mr. Foster prior to the start of the interview, appellant could not rely upon his notes during the interview.
5. Gary Schwochert received a total score of 115 on the interview, was ranked first by the interview panel, and accepted the offer of the subject

position and was appointed to it. Appellant received a total score of 112 on the interview and was ranked second by the interview panel.

6. Mr. Schwochert is a friend of Mr. Foster's and they ride to work together.

7. The subject IS 4 position was posted as a second shift position but Mr. Schwochert worked the second shift in this position for only four days after he was hired. Other than those four days, Mr. Schwochert has worked the same shift as Mr. Foster.

#### CONCLUSIONS OF LAW

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

2. The appellant has the burden to show that respondent's decision not to appoint him to the subject position was illegal or an abuse of discretion.

3. The appellant has failed to sustain this burden.

#### OPINION

The issue to which the parties agreed is as follows:

Whether respondent's decision or failure to appoint appellant to the Industries Specialist 4 position, Bureau of Correctional Enterprises, Section of Prison Industries, in Waupun, WI, was an illegal action or an abuse of discretion.

The only illegality which appellant is apparently alleging relates to the manner in which the interview process was conducted. Although appellant testified that he was told by Mr. Foster prior to the interview that he would not be able to take any notes or other writings into the interview with him, the testimony of appellant's witness William Sweetman and of Mr. Foster is consistent and establishes that the interviewees were each told not that they couldn't take notes into the interview with them but that they had to turn in prior to the start of their interview the copy of the interview questions they had been given. Because appellant had written his notes on his copy of the interview questions, he was unable to consult his notes during the interview because he had to turn in the copy of the interview questions before the interview started. Because Mr. Sweetman had written his notes on a separate piece of paper, he was able to consult his notes during the interview. As a consequence, the different interview circumstances for appellant and for Mr.

Sweetman resulted not from a difference in treatment by Mr. Foster but from appellant's actions in writing his notes on his copy of the interview questions. The record does not show that the interview process failed to satisfy any relevant requirement or was not applied in a consistent fashion to each candidate.

In order to show an abuse of discretion, appellant would have had to show under the circumstances present here that he was better qualified for the subject position than the successful candidate. The record, however, is devoid of evidence relating to the relative relevant qualifications of these two candidates. The record does show that Mr. Schwochert had the highest interview score and was ranked first by the three-member interview panel. There is no evidence in the record relating to the content of the interview questions, interview benchmarks, or responses to the interview questions by the candidates so there is no way to compare the interview performances of the candidates to determine if there was an abuse of discretion in relation to the scoring of the interviews. Since appellant has the burden of proof here, it is clear that he has failed to sustain his burden in this regard.

Appellant's remaining allegations relate to Mr. Schwochert's friendship with Mr. Foster, to the fact that Mr. Schwochert and Mr. Foster ride to work together, and to Mr. Foster's assignment of Mr. Schwochert to the same shift Mr. Foster works soon after his hire. Although this is the type of evidence which could be relevant to an allegation of pre-selection, in the absence of any evidence relating to relative relevant qualifications or to performances on the interview, this evidence is insufficient to support a conclusion of an illegality or an abuse of discretion.

ORDER

The action of respondent is affirmed and this appeal is dismissed.

Dated: \_\_\_\_\_, 1996      STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson

LRM:irm

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DONALD R. MURPHY, Commissioner

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JUDY M. ROGERS, Commissioner

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