

STATE OF WISCONSIN

PERSONNEL COMMISSION

**MICHAEL G. SMERZ,**  
*Appellant,*

v.

**President, UNIVERSITY OF WISCONSIN  
SYSTEM,**  
*Respondent.*

DECISION AND ORDER

Case No. 00-0095-PC

#### NATURE OF THE CASE

This is an appeal of a hiring decision. A hearing was conducted on October 24, 2000, before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the schedule for doing so was completed on January 15, 2001.

#### FINDINGS OF FACT

1. On May 8, 1999, appellant took an examination for positions in the Storekeeper classification. Appellant received a score of 74.50 on the exam and a ranking of 89. A register of candidates was established as the result of this examination on June 4, 1999. Appellant's name appeared on this register

2. In the spring of 2000, respondent had a vacancy in a Storekeeper position in its Division of University Housing's Central (Raywood) Warehouse. The goals of this position are as follows:

25% A. Develop, organize, update and manage inventory storage floor plan to store dry food items and food service supplies, materials, equipment and new items in warehouse area.

25% B. Issue food and supplies to seven individual operating food units (including four cafeterias, two convenience store operations and one commissary), and office and maintenance supplies and equipment to seven residence halls desk operations, ten residence halls, three

maintenance/administrative offices and Eagle Heights administrative office.

25% C. Receive daily dry food stores and food service supplies, maintenance and cleaning supplies and materials, and small and large equipment delivered by semi-load, UPS and courier service to the University Housing central warehouse.

15% D. Generate and monitor computer reports for inventory stock levels and storage location codes for all items stored in warehouse.

5% E. Clean and maintain offices, warehouse area, grounds, equipment and dock area.

5% F. Receive and prepare items for shipment and arrange transportation/mailing.

3. The knowledge and skills specified for this position are as follows:

Ability to operate a warehouse forklift and handjack.

Completion of the National Safety Council "Coaching the Lift Truck Operator" course and possession of a certificate of completion within 6 months of appointment.

Knowledge of storage methods, stock identification, locator and stock rotations systems.

Knowledge of inventory methods and procedures and record keeping.

Knowledge of shipping procedures and regulations.

Knowledge of purchasing and requisitioning procedures.

Knowledge of food items, food service equipment, and general maintenance/cleaning supplies.

Ability to make inspections of the quality of foods received or prepared for shipment relating to purchase requisitions, specifications, and postal regulations.

Keyboard skills and familiarity with computer inventory software systems.

Ability to organize and prioritize work.

Good oral and written communication skills.

Good general math skills.

Cooperative, team oriented approach.

Ability to drive trucks with standard and automatic transmissions and operate a trucklift.

4. Only four eligible candidates, including appellant, were available for certification for this Storekeeper vacancy. Each of these four candidates was interviewed in April of 2000 by Denise Neath, Food Service Manager 3 and first-line supervisor of the subject position, and by Margaret Monahan, Assistant Food Director and the second-line supervisor of the subject position.

5. The interview responses of two of the interviewed candidates, Roger Wieser and Jeffrey Newby, indicated that these candidates each had significant work experience taking physical inventories, organizing storerooms and/or warehouses, ordering food and/or general supplies from vendors, performing computer data entry, and organizing and prioritizing daily work assignments. Mr. Wieser also indicated he had experience in the operation of forklifts, pallet jacks, trucks, and lawn mowers/snow plows. Mr. Newby indicated he had experience operating pallet jacks and certain trucks but no experience operating forklifts or riding lawn mowers.

6. Candidate Mohammed Amiri's interview responses indicated that he had very limited experience taking physical inventories, organizing storerooms and/or warehouses, and ordering food and/or general supplies from vendors, and no experience with computer data entry or organizing and prioritizing daily work assignments. Mr. Amiri did indicate that he had experience operating forklifts and pallet jacks, but no experience driving trucks or operating lawn mowers or snow plows.

7. Appellant's interview responses indicated that he had very limited experience taking physical inventories or organizing storerooms and/or warehouses, and no experience ordering food and/or general supplies from vendors, performing computer data entry, or organizing and prioritizing daily work assignments. Appellant did indicate that he had experience operating forklifts, pallet jacks, trucks, and lawn mowers/snow plows.

8. Appellant was appointed to a Food Service Laborer position at Gordon Commons, which is part of respondent's Division of University Housing, in April of 1998, and was employed in that position at the time of the subject recruitment. In his application for the subject Storekeeper position, appellant indicated that, in this Food

Service Laborer position, he was responsible for delivering supplies to other units, general cleaning, grounds clean-up, and room set-ups. Also on this application, appellant indicated that, in a previous position as a Custodian 2 at the UW-Madison Physical Plant (8/97 to 4/98), he was responsible for cleaning bathrooms, sweeping, mopping, buffing, waxing floors, emptying trash, and snow removal; in a previous position as a tree trimmer at the UW-Madison Physical Plant (5/97 to 8/97), he was responsible for mulching, watering, planting, and trimming trees; and in a previous position as a Maintenance Worker 1 for the City of Madison (9/86 to 4/97), he was responsible for lawn care, tree/shrub care, bus shelter maintenance, sidewalk maintenance, plowing/sanding, rubbish pick-up, fixture maintenance, and special events.

9. Mr. Wieser and Mr. Newby were offered the subject Storekeeper position but declined the offer.

10. Ms. Neath and Ms. Monahan concluded that neither Mr. Amiri nor appellant was sufficiently qualified for the subject Storekeeper position due to their lack of significant experience in taking physical inventories, organizing storerooms and/or warehouses, ordering food and/or general supplies from vendors, performing computer data entry, or organizing and prioritizing daily work assignments. As a result, Ms. Monahan contacted Cheryl Mekschun, a Human Resources Manager 3 in respondent's personnel unit, to discuss potential options.

11. Ms. Mekschun advised Ms. Monahan that another Storekeeper exam was scheduled to be administered on May 13, 2000, and the register that was generated as the result of that exam could be used to supplement the list of certified candidates for the subject Storekeeper position.

12. Ms. Monahan and Ms. Neath decided, based on the reduced workload at the Raywood warehouse at that time of year and on the size and qualifications of the candidate pool then available to them, that they would wait until the new exam was administered and register generated before proceeding further to fill the position.

13. In a letter dated May 1, 2000, Ms. Mekschun notified appellant as follows, in relevant part:

You interviewed recently for the Storekeeper vacancy at the Division of University Housing's Raywood Warehouse.

We offered the position to another candidate who notified us last Friday that he is no longer interested in accepting the position.

We hope to use the list from May 13, 2000 Storekeeper exam to expand our pool of candidates and are still considering your application for the position as well.

14. Once a certified candidate declines an offer of appointment, the appointing authority may request that an additional candidate be certified from the employment register from which the original certification list was established. If no additional candidates are available from this register, the appointing authority may request that a candidate be certified from an employment register that has been generated since the original certification list was established or from an employment register to be generated in the near future.

15. Once appellant learned that respondent intended to expand the pool of candidates, he contacted Ms. Neath. Ms. Neath suggested appellant contact Janet Hennessey, Payroll and Benefits Specialist 3, if he had questions about the hiring procedure. Appellant telephoned Ms. Hennessey and told her that he felt he had a right to the Storekeeper position, and that he had been told that he wasn't selected because Gordon Commons needed him to remain at his current job and wouldn't release him for promotion until June. Ms. Hennessey advised appellant that the personnel unit didn't get involved in start date determinations, and speculated that she could understand how Gordon Commons could be concerned with his leaving. Ms. Hennessey did not tell appellant that Gordon Commons did not want to let him go from his current position until June 1, or that this was the reason he had not been selected for the subject Storekeeper position.

16. Some time after his conversation with Ms. Hennessey, appellant contacted Robert Fessenden, Associate Director of Student Housing. Mr. Fessenden told appellant that University Housing was looking for the most experienced candidate, i.e., the candidate who would need the least amount of training to do the job; and that it was University Housing's practice to interview additional candidates for a position if they had the opportunity to do so. Mr. Fessenden was not involved in the hiring decision, and was not familiar with appellant's skills and abilities. Mr. Fessenden did not tell appellant that he didn't have the requisite forklift or inventory experience. Mr. Fessenden did not state at any time relevant to this matter that appellant was not hired for the subject Storekeeper position because Gordon Commons did not want to release him from his current position until June.

17. Some time on or around May 1, 2000, Ms. Neath and Ms. Monahan told the three drivers at Raywood, Tom Beck, Todd McCarville, and Dennis Grueneburg, that the subject Storekeeper position would not be filled before the academic year ended, i.e., May 15, so that a larger pool of candidates could be considered; and discussed with them how the duties at Raywood would be covered until the Storekeeper position was filled. During this discussion, Ms. Monahan stated that appellant would need a lot of training to do the job and she and Ms. Neath would wait until they had an opportunity to interview the candidates on the certification list to be established from the new register to determine if any of these new candidates was more qualified than appellant.

18. Ms. Neath and Ms. Monahan decided to fill the subject Storekeeper position with a limited term employee (LTE) until it could be filled permanently. Patrick Hennessey, Janet Hennessey's husband, was appointed to this LTE position. Ms. Hennessey played no part in the decision to appoint Mr. Hennessey to this LTE position. Mr. Hennessey had extensive experience with physical inventories, organizing storerooms and/or warehouses, ordering food or general supplies, and inventory data entry. Mr. Hennessey also had experience operating forklifts and pallet jacks, and driving trucks, lawn mowers, and snow plows. Mr. Hennessey had 30 years'

experience with the Oscar Meyer corporation performing duties and responsibilities very similar to those of the subject Storekeeper position.

19. Mr Hennessey applied for and took the exam for the Storekeeper classification on May 13, 2000. He was certified and interviewed for the subject Storekeeper position, was offered the position, and accepted it. Mr Hennessey has performed very successfully in this position, and has required very little training.

20. The Division of University Housing has never denied a promotion to one of its employees due to the operational needs of the employee's current unit. In those instances where the unit in which the employee is currently working has requested that the employee, due to workload or other operational concerns, remain in the unit for a period of time before moving to the promotional position, the Division of University Housing has effected the promotion on the appropriate earlier date, and the employee has been given the promotional title and the promotional rate of pay immediately even though he or she may not physically relocate for a period of time.

21. In his sworn response to respondent's interrogatories, Mr Beck indicated on October 2, 2000, as follows:

INTERROGATORY NO. 1. Who told you that Mike Smerz could [not] have the storekeeper position because he could not leave Gordon Commons until June?

ANSWER: I did not have a specific conversation with anyone. However, I recall overhearing something to that effect although I do not know who said it; when it was said; or the context in which it was said.

22. Under oath at hearing on October 24, 2000, Mr. Beck testified that Ms. Monahan told him, in a conversation they had at the Raywood warehouse, that she would have hired appellant for the subject Storekeeper position if he would have been available right away. Mr Beck explained the inconsistencies between his interrogatory answer and his hearing testimony by stating that he had talked in the interim with Mr. McCarville, who had been present for the conversation with Ms. Monahan, and this had refreshed his recollection. Mr McCarville did not testify at hearing. His name had been withdrawn by appellant from appellant's witness list at a prehearing

conference at which appellant was represented by counsel, and, as a result, the hearing examiner denied appellant's request to call Mr. McCarville as a hearing witness.

23. The decision not to appoint appellant to the subject Storekeeper position was unrelated to the operational needs of Gordon Commons or to the date appellant would be available to start work at the Raywood warehouse.

### 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 the 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 jurisdictional basis for this proceeding is found in §230.44(1)(d), Stats., which provides:

*Illegal action or abuse of discretion.* 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 *Ebert v. DILHR*, 81-64-PC, 11/9/83, the Commission stated:

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*, 79-208-PC, 6/3/81. The question before the Commission is not 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*, 81-74-PC, 4/2/82.

Appellant is not arguing here that he was better qualified for the subject Storekeeper position than the two candidates who were originally offered the position, i.e.,



Mr. Wieser and Mr. Newby (See Findings 5 and 9, above) or the candidate who ultimately was offered and accepted the position, i.e., Mr. Hennessey (See Findings 18 and 19, above), but instead that respondent was required to offer him the position after Mr. Wieser and Mr. Newby declined it because appellant had been certified for the position and he was the next ranked candidate.<sup>1</sup> Appellant cites no authority for this argument other than, apparently, his own feelings of what constitutes fair play. As a result, it is concluded that appellant has not posited nor proved any theory of illegality here.

Appellant further argues, at least by implication, that it was an abuse of discretion for respondent to fail to promote him based on the hiring authority's understanding that appellant would not be "released" from Gordon Commons until June. However, the circumstances present here do not support appellant's argument or version of the facts for the following reasons:

(a) The record establishes that it has not been respondent's practice to deny a promotion based on operational needs; and that, if workload or other operational needs make it desirable for a successful candidate for promotion to remain in his or her former unit for a period of time, it has been respondent's practice to effect the promotion immediately but to delay for a period of time the physical relocation of the employee.

(b) Appellant's contention that he was denied promotion because the hiring authority believed that Gordon Commons would not "release" him until June is not plausible. Specifically, respondent would not eliminate the delay they were allegedly concerned about by awaiting the results of a new examination/certification/interview process.

(c) Mr. Beck testified under oath at hearing that Ms. Monahan told him, in a conversation they had at Raywood warehouse, that she would have hired appellant for the subject Storekeeper position if he would have been available right away. This testimony is not credible. Mr. Beck, on October 2, 2000, indicated, in a sworn statement, that he recalled overhearing something to the effect that appellant could not have the Storekeeper position because he could not leave Gordon Commons

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<sup>1</sup> The record does not establish that appellant was ranked third after the original interviews for the subject position, but it will be assumed solely for purposes of analysis here that this was the case.

until June, but that he did not have a specific conversation with anyone to this effect, and he could not remember who made the statement he overheard, when the statement was made, or what the context of the statement had been. (See Finding of Fact 21, above). Three weeks later, Mr. Beck testified at hearing as specified above. This hearing testimony is directly at odds with Mr. Beck's earlier sworn statement.

(d) The record establishes that it has been the practice of the Division of University Housing, when certified candidates for a position remove themselves from consideration or decline an offer of appointment, to interview additional candidates if they have the opportunity to do so. Here, such an opportunity existed due to the impending administration of an exam for the Storekeeper classification.

(e) The record establishes that appellant's qualifications and those of Mr. Amiri were significantly inferior to those of Mr. Weiser and Mr. Newby, and that both appellant and Mr. Amiri had little relevant experience in regard to several key components of the subject position. It was not unreasonable as a result for respondent to conclude that it was desirable to enlarge the pool of certified candidates if possible.

The record does not show that it was clearly against reason and evidence for respondent not to offer the subject position to appellant after Mr. Weiser and Mr. Newby declined it but instead to enlarge the pool of eligible candidates.

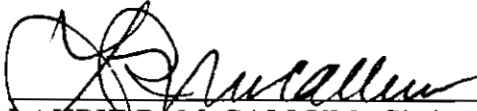
Appellant has failed to show that respondent acted illegally or abused its discretion when he was not selected for the subject Storekeeper position.

ORDER

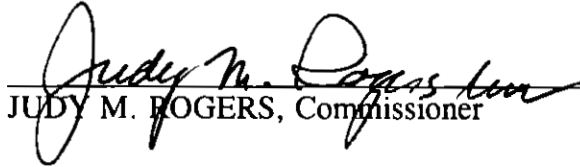
The action of respondent is affirmed and this appeal is dismissed.

Dated: March 21, 2001

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM:000095Adec1

  
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 (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