

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROBERT C. JUNCEAU, JR., Appellant,

vs.

**Secretary, WISCONSIN DEPARTMENT
OF WORKFORCE DEVELOPMENT**, Respondent

Case 8
No. 64897
PA(sel)-22

Decision No. 32050

Appearances:

Robert C. Junceau, Jr., appearing on his own behalf.

Howard Bernstein, Legal Counsel, Office of the Secretary, Wisconsin Department of Workforce Development, 201 East Washington Avenue, P.O. Box 7946, Madison, Wisconsin 53707-7946, appearing on behalf of the Wisconsin Department of Workforce Development.

DECISION AND ORDER

On June 14, 2005, Appellant Robert C. Junceau (herein Mr. Junceau) filed a timely appeal of Respondent Department of Workforce Development's (herein DWD) decision to not select him for the vacant position of Senior Administrative Law Judge (herein Senior ALJ) in its Bureau of Legal Affairs in the Unemployment Insurance Division (herein UI), invoking the jurisdiction of the Wisconsin Employment Relations Commission (herein Commission) under Sec. 230.44(1)(d), Stats. The basis initially stated for the appeal was that the decision was illegal or an abuse of discretion because: (1) it was in retaliation for his appeal of his non-selection as Director of the Legal Affairs Bureau,¹ (2) DWD discriminated against him on the basis of age, (3) the hiring was impermissibly based on gender, and (4) Mr. Junceau was more qualified than the other candidate. The Commission designated Stanley H. Michelstetter II, a member of its staff, as Hearing Examiner. Mr. Junceau agreed to pursue issues 2 and 3 in another forum. The Examiner held a hearing on June 13 and 26, 2005. The parties stipulated that the issue before the Commission is, in essence:

¹ That matter is pending before the Commission in JUNCEAU V. DWD, Case 6, No. 64645 PA (sel)-17.

Was the decision of DWD to not appoint Mr. Junceau to the position of Senior ALJ within Legal Affairs Bureau of UI of DWD, illegal or an abuse of discretion within the meaning of Sec. 230.44(1)(d), Stats?

The parties completed their briefing schedule on September 12, 2006. The hearing examiner issued a proposed decision on March 16, 2007. Appellant filed objections and requested oral argument which was held on June 4, 2007.

Being fully advised in the premises, the Commission now makes the following

FINDINGS OF FACT

1. Mr. Junceau was an ALJ in the Legal Affairs Bureau for UI from 1975 to 1977. He then became a Review Attorney for the Labor and Industry Review Commission (LIRC) from 1977-8. From 1978 to 1985 he served as an attorney in the Office of Legal Counsel of the Wisconsin Department of Revenue. In 1985, he was appointed by the Governor as a Commissioner of the Wisconsin State Tax Appeals Commission and served in that role until 1992. In 1992, he returned to the Legal Affairs Bureau of UI as an ALJ and served in that position at all relevant times thereafter.

2. DWD is an agency of the State of Wisconsin. It includes the Unemployment Insurance Division which is, in part, federally funded and, in part, funded by unemployment insurance taxes collected from employers of Wisconsin employees. The Legal Affairs Bureau provides adjudicative services including, among others, hearings conducted by Hearing Examiners denominated Administrative Law Judges (herein ALJ's). The Legal Affairs Bureau has three offices, one of which is in Madison, Wisconsin (herein the Madison Hearing Office). The ALJ's in each office report to one Senior ALJ in that office who, in turn, reports to the Director of the Legal Affairs Bureau. The Director of the Legal Affairs Bureau reports to the UI Division Administrator who was Hal Bergen at all relevant times.

3. Shortly before the position vacancy which is the subject of this appeal, the position of Director of the Legal Affairs Bureau became vacant. DWD posted the position. Daniel LaRocque and Mr. Junceau were applicants for the position. Mr. LaRocque had extensive experience as an attorney in private practice. DWD selected Mr. LaRocque. Mr. Junceau filed an appeal of his non-selection with the Commission² and the appeal was pending as of April, 2005.

4. In April, 2005, the position of Senior ALJ in the Madison Hearing Office became vacant. DWD announced the opening the same month, and limited the applicants to members of its existing staff of ALJ's. Two ALJ's applied; Mr. Junceau and Ms. Gretchen Mrozinski, both from the Madison Hearing Office. The position reported directly to Legal Affairs Bureau Director LaRocque.

² See, note 1.

5. Ms. Mrozinski served as an associate with a private law firm from 1996 to 1998. Thereafter until the hiring decision that is the subject of this appeal, she served as an ALJ in the Legal Affairs Bureau for UI in which position she remained at all relevant times except for a brief period when she was an ALJ in DWD's Workers Compensation Division.³ She held Petroleum Environmental Cleanup Fund Act (herein PECFA) hearings on occasion on assignment from the Legal Affairs Bureau to the Wisconsin Department of Commerce.

6. Fifty percent of the duties of the Senior ALJ are the same as an ALJ's duties, essentially conducting formal hearings. Thirty percent of the duties involve interviewing and hiring support staff, training, supervising and evaluating ALJ's and support staff, conducting staff meetings, reviewing scheduling to equalize workload, and explaining law, rules and procedures to staff. Twenty percent of the duties of the Senior ALJ involve management of the Madison Hearing Office, which includes implementing departmental policy and procedures, dealing with others to obtain hearing and other space, dealing with personnel in matters relating to witnesses at hearings, working with other Senior ALJ's, and dealing with public concerns about UI.

7. DWD policies provide in relevant part:

When planning and conducting a structured interview, a supervisor must adhere to the following procedures. A checklist (DWD Interview and Hiring Checklist) has been developed to aid supervisors in the interview planning process. Use of the checklist is optional, but highly recommended to make sure all steps are taken. . . .

The hiring supervisor should write interview questions and benchmarks needed to determine what degree candidates possess the necessary qualifications. . . .

Interview questions must be accurate, complete, unambiguous, and clearly job related. Questions should assess only the skills, knowledge and/or abilities which an applicant must possess to perform the job. All questions must be carefully reviewed for possible discriminatory implications and altered to correct such biases or be eliminated. . . .

Interview panels must be balanced for all underutilized, supervisory and banded positions, or whenever possible. A panel is considered balanced if it consists of three individuals, two of whom represent women, minorities or persons with disabilities. For higher level positions, at least one panel member should be from outside the department, such as partners and community members.

. . .

³ The Commission has added the last clause to this sentence in order to more accurately reflect the record.

Interviewers may ask only job-related questions but may vary the follow-up questions to pursue information about job-related skills or abilities that the applicant raises in the interview. . . .

To avoid bias in evaluating each interview question, interview panel members should read the exam responses after the initial evaluation of all the candidates and before giving their final recommendations for hire.

. . .

A final hiring decision is made only after reference checks have been completed. . . .

8. Director LaRocque wrote the interview questions and evaluation standards.

9. The evaluation standards for each question specified the desired responses and the number of responses which were required from each applicant to achieve ratings of various levels. The standards were all job-related and represented a neutral method of evaluating candidates for the position. The questions, evaluation standards, and procedure used to fill the position were similar to those used to fill previous vacancies.⁴ The interview questions were related to: a) leadership characteristics; b) leadership experience and skill; c) managing workload; and d) managing change. The fifth question related to Madison Hearing Office operations and personnel. The questions and evaluation standards used in this case were consistent with DWD hiring policy and practice.

10. Director LaRocque also determined who would serve on the interview panel. The panelists were: Director LaRocque, Senior ALJ James McCulloch, Bureau Director Lufti Shahrani of UI's Bureau of Benefit Operations and Bureau Director Andrea Reid of UI's Bureau of Tax and Accounting.⁵ Andrea Reid is a female. Lufti Shahrani is a male. Both had frequent contacts with the Bureau of Legal Affairs.⁶ The use of a panel to conduct interviews and the composition of the panel were consistent with DWD hiring policy and practice.

⁴ The Commission has modified this sentence to reflect testimony that the interview questions arose from prior Senior ALJ vacancies as well as from the vacancy in the Bureau Director position.

⁵ The Commission has modified this sentence to reflect testimony that the interview questions arose from prior Senior AKJ vacancies as well as from the vacancy in the Bureau Director position.

⁶ The Commission has modified this sentence to show that Mr. McCulloch had not retired as a Senior ALJ at the time he served on the interview panel and to correctly reflect the positions occupied by Mr. Shahrani and Ms. Reid.

11. The interviews were conducted on May 27, 2005. The interview consisted of five questions which were all presented to each applicant one-half hour before the applicant's interview. The interview of each applicant was approximately thirty minutes long. Each panel member participated in interviewing both applicants. Their notes correctly reflect the questions asked and some of the answers given.

12. The major differences between the applicants included legal skill, communication ability, motivation to perform supervisory duties, and aptitude for providing supervision.

13. Ms. Reid and Mr. Shahrani were unaware that Mr. Junceau had filed an appeal concerning the Legal Affairs Bureau Director position. There is no evidence that Mr. McCulloch was aware of the fact that an appeal had been filed concerning the Legal Affairs Bureau Director position.

14. All four panel members voted to recommend Ms. Mrozinski.⁷

15. Director LaRocque had discussions with ALJ James Sturm who had been the immediate past Senior ALJ supervising both candidates and with Mr. Greg Frigo who had been the immediate past Director of the Bureau of Legal Affairs. These reference checks substantially complied with DWD policy and were sufficient to determine that each candidate was qualified for the disputed position.

16. Thereafter, but prior to June 3, 2005, Director LaRocque made a written recommendation that Ms. Mrozinski be transferred to the position. The recommendation accurately reflected the conclusions of the interview panel. The recommendation read in relevant part:

Addendum to DWD Hiring Recommendation

...

Two candidates applied, Robert Junceau and Gretchen Mrozinski. Each were interviewed on Friday, May 27, 2005.

Both candidates offered a good recitation of several leadership characteristics identified as benchmarks in response to Interview Q1. In response to Q2, concerning experience managing and leading people, the successful candidate, Gretchen, cited experience leading projects and performing special assignments (e.g., Chair of the annual ALJ Conference,

⁷ The Commission has corrected this sentence to accurately reflect the number of panelists.

conducting PECFA hearings, performing Research attorney duties). Gretchen's activities were undertaken often as a volunteer and in recent years. In response to the same questions, Bob cited work in positions as a tax trial attorney and Tax Appeals Commissioner more than 10 years ago.

Gretchen made a very convincing presentation compared to Bob concerning her dedication to, and skills in, organizing her work, delegating to and supervising an office manager, encouraging staff development and performance, supporting the team, following through on assignments, juggling a busy schedule and prioritizing work in a manner that would maintain timeliness – all of which are important in management of the hearing processes in general and the objectives for the hearings office.

Each candidate had some relevant experience serving as an ALJ in the Madison Hearings Office. For purposes of the leadership role in the Senior position, Gretchen has made better use of her experience in this office. Based on the interviews, Gretchen's knowledge is probably superior to Bob's in the critical tasks performed by the support staff she would oversee. In the important question of managing change associated with the EnABLES⁸ [computer] system development, she displayed greater experience and confidence with the new EnABLES system itself, and knowledge of the intake and processing of cases. Bob did not display much direct knowledge of the analyzing and scheduling processes. Gretchen suggested forming small work groups within the office to train on EnABLES and analyze issues or problems with the system, while Bob mentioned "creative" solutions, but did not specify any examples. Bob seemed satisfied to simply rely on others in development of EnABLES and the related change management responsibilities and did not say much about the system itself or even identify it by name. These observations led to the conclusion that he may lack a strong interest or skill in personally impacting its successful implementation. Consequently, Gretchen is better equipped to contribute knowledgeably to process improvements and implementation of the EnABLES system.

Q5 focused on operational and personnel matters in the Madison Hearing Office. Gretchen alluded to recent personnel challenges (an "attendance issue") and displayed a sound process of problem-solving steps, stating a clear goal of "fixing" the problem. Among her steps, she described "informal" use of her interpersonal skills and reliance, to the extent necessary and required, on resources in Legal Affairs Bureau and HR. Bob's response was troubling. His answer to the question and others tended to be given in highly abstract terms, disjointed and meandered somewhat aimlessly (for example, into "meetings to

⁸ The unusual capitalization is part of the acronym.

discuss legal issues” as his primary response to retirements and staff attrition). His answer never clearly alluded to personnel performance or adherence to work rules as issues of actual or hypothetical concern. He talked about “investigating issues” but did not say how he would proceed to solve an operational or personnel problem. He made very little eye contact with any of us throughout the interview. I would be concerned that in some situations he might not be effective addressing serious issues face to face or in groups.

Gretchen’s responses to questions overall did not reveal any reason to doubt her judgment or temperament. Although less experienced overall than Bob, Gretchen displays adequate maturity and is highly sensitive to the need to be positive, supportive and listening to her staff. She has contagious enthusiasm that ought to be received well. While Bob expressed willingness, as a general proposition to hear what others have to say, he repeatedly stressed “self education” and reading as important to managing major change occurring to his team. In response to several questions, including on matters that would call for important interactions with staff, Bob’s emphasis was his lawyering experience, on working rather independently to “study” issues and to serve as an “advocate”. I am not confident he would serve well in leading staff.

17. The recommendation was reviewed and approved by UI Division Administrator Hal Bergen on June 3, 2005 and the DWD Secretary or designee on June 7, 2005. Administrator Bergen approved the recommendation based solely upon his good faith judgment of the applicants' relative character, training, experience, skills or abilities as they relate to the requirements for the Senior ALJ position. Thereafter, Ms. Mrozinski was appointed to the position by Administrator Bergen.

Based on the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

1. The Commission has authority to review non-selection decisions in the State civil service pursuant to Sec. 230.44(1)(d), Stats.
2. Mr. Junceau has the burden to establish that DWD acted illegally or abused its discretion when it decided not to hire him for the Senior ALJ position.
3. DWD did not act illegally or abuse its discretion when it did not select Mr. Junceau for the position of Senior ALJ.

Based on the above and foregoing Findings of Fact, and Conclusions of Law, the Commission issues the following

ORDER⁹

The matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 8th day of August, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

⁹ Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference.

Department of Workforce Development (Junceau)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This case is before the Commission under authority provided in Sec. 230.44(1)(d), Stats., on the basis of Mr. Junceau's allegation that DWD's non-selection of him for a Senior ALJ position violated the law and/or was an abuse of discretion. Section 230.44(1)(d), Stats., provides in relevant part:

A personnel action after certification which is related to the hiring process in the classified civil service and which is alleged to be illegal or an abuse of discretion may be appealed to the Commission.

In DEPARTMENT OF CORRECTIONS (ZEILER), DEC. NO. 31107-A (WERC, 12/04), the Commission applied the following interpretation of "abuse of discretion":

An "abuse of discretion" is "a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." As long as the exercise of discretion is not "clearly against reason and evidence," the commission may not reverse an appointing authority's hiring decision merely because it disagrees with that decision in the sense that it would have made a different decision if it had substituted its judgment for that of the appointing authority. (Citations omitted.)

The instant selection was made between two existing ALJ's and was denominated a "transfer." The Commission has jurisdiction over transfers under Sec. 230.44(1)(d), Stats. See, KELLEY V. DILHR, CASE. NO. 93-0208-PC, (PERS. COMM., 2/23/94).

We are satisfied the reason that Ms. Mrozinski was selected over Mr. Junceau was the fact that she demonstrated a better aptitude for supervision than did Mr. Junceau during the interview process. We conclude that the selection process overall complied with all governing law and that Respondent conducted the selection process in a rational way based upon legitimate criteria.

I. Violation of Law

Mr. Junceau alleged that the hiring process violated Sections 230.19, 230.15(1) and 230.12(2), Stats. Section 230.15(1), Stats., provides in relevant part: ". . . appointments to, and promotions in, the classified service shall be made only according to merit and fitness, which shall be ascertained so far as practicable by competitive examination. . . ." The strict selection criteria designed to predict successful performance on the job and described by Sec. 230.15, Stats., apply only up to the time the certification list of qualified candidates is

developed. *POSTLER V. WIS. PERS. COMM., ET AL, DANE COUNTY CIRCUIT COURT, 93-CV-3874, 10/96; AFF'D POSTLER V. POSTLER V. WIS. PERS. COMM., CASE NO. 96-3350 (CT. APP., 1998)* Both candidates were effectively certified to the interview panel as eligible for appointment. Any requirements imposed by Sec. 230.15, Stats., apply to the examination and not the post-certification decision that is before the Commission pursuant to Sec. 230.44(a)(d), Stats.

Section 230.19(1), Stats., provides in relevant part: "The administrator shall provide employees with reasonable opportunities for career advancement. . . ." Section 230.19(1) is concerned with guaranteeing reasonable opportunities for advancement and does not require that the Commission reject interview criteria which are reasonably related to making relevant distinctions among candidates. Cf. *RANSOM V. UNIVERSITY OF WISCONSIN SYSTEM, CASE NO. 87-0125-PC (PERS. COMM., 7/88); MILLER V. DHSS, 81-137-PC (PERS. COMM., 10/81)*. The essence of Mr. Junceau's argument is that the panel should have placed more weight on the greater length and depth of his legal experience and less emphasis on differences between the personalities of the two candidates. We conclude that the panel viewed both candidates as having adequate legal skill, but distinguished the two on the basis of aptitude for supervision, understanding of the Division's systems, and demonstrated interest in being a leader among ALJ's. These are all rational distinctions based upon the functions of the supervisory position and are reasonably related to the needs of the Department.¹⁰ For the reasons discussed more fully below, we conclude that the panel was not swayed by "interview personality" as alleged by Appellant, but rather by distinctions between the candidates that are reasonably related to the position's supervisory responsibilities. These include, but are not limited to, the panel's view of differences between how the two would interact with subordinate ALJ's and management. These are legitimate considerations and the Department did not violate Sec. 230.19(1), Stats.

Section 230.20(2), Stats., provides in relevant part: "An appointing authority may consider only those recommendations which he or she believes provide objective evaluations of an applicant's character, training, experience, skills or abilities as they relate to the requirements of the position." Director LaRocque made the written recommendation to UI Division Administrator Hal Bergen to promote Ms. Morzinski to the Senior ALJ position. Administrator Bergen adopted the recommendation. There is no evidence Administrator Bergen ever expressed a preference for any candidate prior to receiving the recommendation. There is no evidence of any other communication with any panel member concerning the results of the conduct of the interview other than his conversation with Director LaRocque and Director LaRocque's written recommendation. Administrator Bergen credibly testified that

¹⁰ In oral argument before the Commission, Mr. Junceau referred to the Senior ALJ as a "glorified leadworker." Nothing in the record supports such a characterization. The Senior ALJ directly supervised a group of ALJs, supervised the office manager for the Madison office, and was the second-level supervisor for the office support staff. Many of the arguments that Mr. Junceau has raised in this matter do not reflect this fundamental distinction.

his sole involvement in the interview process was to be aware that it was happening. Otherwise, he was not involved. He also credibly testified that while he was aware of the appeal by Mr. Junceau of his non-selection for the Director position, he based his judgment solely upon an objective evaluation of the candidates' relative "character, training, experience, skills or abilities as they relate to the requirements of the position" within the meaning of Sec. 230.20(2), Stats. Consequently, we find no violation of Sec. 230.20(2), Stats.

II. Abuse of Discretion

A. Bias Allegation

Mr. Junceau contends that both Ms. Reid and Mr. LaRocque were biased against him or were biased in favor of Ms. Mrozinski. He argues that Ms. Reid had a bias based on the sex of the candidates and that she first exhibited this bias when she was a panelist during Junceau's Bureau Director interview. Junceau contends that LaRocque was biased against him because they had competed for the Bureau Director position and because Junceau had filed an appeal of that selection decision. If the bias argument was viable, one would expect to see some significant differences between the observations made (and conclusions reached) by Reid and LaRocque in comparison to Shahrani and McCulloch. We do not believe that those differences have been shown. The four panelists had to recommend hiring one of only two candidates for the vacant Senior ALJ position. All four concluded that Ms. Mrozinski's responses to the interview questions were superior to Mr. Junceau's. Neither candidate had experience as a supervisor. While the panelists were aware of Mr. Junceau's lengthy experience in state service, Ms. Mrozinski was also well qualified in light of her seven years as a UI ALJ. The record simply does not support a finding of bias.

The facts of the present matter may be distinguished from those in a case cited by Appellant, PEARSON v. UW, CASE NO. 84-0219-PC (PERS. COMM. 9/16/85); AFF'D BY DANE COUNTY CIRCUIT COURT, PEARSON v. UW & PERS. COMM., 85-CV-5312, 6/25/86; AFFIRMED BY COURT OF APPEALS DISTRICT IV, 86-1449, 3/5/87. Pearson was the only internal candidate for a Maintenance Supervisor 1-Locksmith position, but had a poor working relationship with the hiring authority, Mr. Meier. When Pearson submitted his job application for the vacancy, Meier threw it to the side and said he was not interested in it. Meier declined to check Pearson's references "because I wouldn't hire you anyway." Meier arithmetically manipulated the interview results in order to insure that Pearson ended up with a lower total score than another candidate. In contrast, there is no suggestion that LaRocque sought to dissuade Junceau from applying for the Attorney-Supervisor position and no evidence that he was inconsistent in terms of his assessment of Junceau and Mrozinski, both of whom were internal candidates with substantial UI legal experience. LaRocque found himself in a situation where he had to make a hiring decision for a directly subordinate position despite the fact that the

Appellant had filed an appeal of the decision to fill LaRocque's own position. The mere fact that LaRocque found himself in these circumstances does not establish actual bias relative to Appellant's candidacy.¹¹

B. Conflict of Interest Allegations

Mr. Junceau challenged the fact that Director LaRocque acted as a member of the interview panel when he had an alleged conflict of interest.¹² It was not an abuse of discretion for Mr. LaRocque to serve on the panel.

The alleged conflict of interest was the fact that Mr. Junceau was then challenging before us the fact that Director LaRocque was selected for the Director position over ALJ Junceau. We conclude that since Director LaRocque was the immediate supervisor of the position in dispute, he was properly a member of the panel.

In any event, we find no evidence that any purported conflict of interest played any role in Mr. Junceau's non-selection. We note that Mr. Junceau's selection for the Senior ALJ vacancy would not increase, but might have decreased, the likelihood that Mr. Junceau would continue to pursue his appeal of the Director's job. The risk asserted in this case is that Director LaRocque might retaliate against Mr. Junceau for seeking to overturn the selection for the Director's position. We note that Director LaRocque was himself serving in his probationary period during this interview process. Further, we credit Director LaRocque's testimony that he sought to handle this appointment in as professional a manner as possible. We find this conclusion is well buttressed by the questions and standards developed for the interview process, the fact that Director LaRocque chose to have a four member panel (instead of a panel of three members), and that he selected an experienced Senior ALJ, Mr. McCullough, for the panel. The Senior ALJ was about to retire so even though he was a subordinate, LaRocque held little sway.¹³ There was no evidence in this record that LaRocque ever sought to prejudice any panel member against Mr. Junceau. We note that the panelists were unanimous in the opinion that Ms. Morzinski was the better candidate. Panel member McCulloch was independent. Panel members Shahrani and Reid both credibly testified that they did not know Mr. Junceau had appealed his non-selection for the Director's position. The fact that they did not know of the appeal shows that it could not have affected their decision. It

¹¹ The Commission has added the two previous paragraphs to more explicitly address the Appellant's contention of bias.

¹² Mr. Junceau cited no law prohibiting a "conflict of interest."

¹³ The Commission has corrected this language to reflect the fact that Mr. McCullough had not yet retired at the time of the interview. A similar change was made in the last paragraph of the section entitled "Minimum Qualifications of the Interview Panel."

also shows that during the panel's deliberation Director LaRocque did not raise the existence of the appeal as a reason against Mr. Junceau's selection. We conclude for the reasons expressed here and below that it did not have an effect on the non-selection.

C. Minimum Qualifications of the Interview Panel

The panel included retired Senior ALJ James McCulloch, Director LaRocque (who had extensive experience in private legal practice) and supervisors from other UI bureaus. We conclude the panel was structured rationally and lawfully to include people who understood the responsibility of supervisors in DWD. The same is consistent with the policy of DWD.

The core of Mr. Junceau's argument is his assumption that the panel should have been composed in a way that emphasized legal skill, depth of legal experience and length of service over aptitude for supervision. Mr. Junceau's assumption was that a panel composed more of ALJ's, experienced Senior ALJ's, and other attorneys would have recognized his greater experience and past history of higher level legal positions, and would have automatically won him this position. However, the factor which distinguished the Senior ALJ position over its subordinate ALJ positions was the demonstrated aptitude for supervision rather than legal skill. We note that Senior ALJ McCulloch joined the unanimous vote. We believe his vote was independent and clearly based on his understanding of the Senior ALJ position. Director LaRocque was a highly experienced private attorney. That, alone, qualified him to understand the concept of legal credentials. Director LaRocque's work in constituting the panel, in devising the interview questions, and his evaluation itself, all demonstrated that he had the "competence" to evaluate Mr. Junceau's credentials. The choice of the panel was rational and was supported by the differences between the ALJ and Senior ALJ position. It was well within the law and DWD policy.

D. Abuse of Discretion in Final Selection

We turn next to an analysis of Respondent's selection decision to determine whether the non-selection of Mr. Junceau was an abuse of discretion. As a general matter, when determining whether an abuse of discretion occurred in the context of a hiring decision, the Commission considers whether the selection criteria used by the appointing authority were related to the duties and responsibilities of the position, and whether the criteria were uniformly applied. *ROYSTON V. DVA*, CASE NO. 86-0222-PC (PERS. COMM., 5/10/88).

As noted above, the factors which distinguished the Senior ALJ position from its subordinate ALJ's related less to legal skill and more to demonstrated supervisory aptitude and interest. The interview questions and evaluation standards all reasonably relate to the distinguishing factors. The interview questions are consistent with OSER guidance. The

exhibits indicate that Director LaRocque borrowed from questions used in interviews to fill previous Senior ALJ positions and the Bureau director position.¹⁴ We see no evidence in this record suggesting that they were tailored in any way to avoid a specific candidate.

The evidence establishes that all of the questions were asked of both candidates and that all of the panel members listened and, indeed, took very good notes of Mr. Junceau's responses. The testimony of panel members LaRocque, Shahraini and Reid credibly establish that they considered the answers of both applicants. We note that that Mr. Junceau's answers to some questions could be viewed by the panel as confusing and not touching the evaluation standards. For example, Mr. Junceau's answer to question 3, about managing workload, could reasonably have been viewed as not reaching the minimally qualified standard. Similarly, his answer to question 1, inquiring about the important characteristics of leadership, could reasonably be viewed as not having listed as many as 5 evaluation standards. His answer to question 2 also could be viewed as touching on less than 5 evaluation standards. In this context, Mr. Junceau's answers could be viewed as confusing by the panel. There is substantial evidence to support the panel's view that Mr. Junceau failed to demonstrate aptitude for supervision even though he had substantial legal experience.

The assumptions behind Mr. Junceau's arguments that the panel "manifested overt lack of objectivity" toward Mr. Junceau are:

1. His greater legal skill and his history of working in higher responsibility positions automatically made him more qualified for the Senior ALJ position;
2. Because he was already appealing the Director's hiring decision, Director LaRocque was necessarily manipulating the selection process to deny him the Senior ALJ position;
3. The panel was persuaded by passion or prejudice in Ms. Mrozinski's interview performance; and
4. Ms. Mrozinski's dedication should have been determined by a reference check rather than the interview.

The panel's conclusion was adequately and accurately summarized in Director LaRocque's hiring recommendation which was based essentially on the premise that both applicants had enough legal skill to adequately perform the Senior ALJ responsibilities. This judgment was supported by the fact that Senior ALJ McCulloch joined the conclusion of the panel. He was clearly a disinterested panel member who knew intimately about the relationship of legal skill to supervisory duties of the Senior ALJ position.

¹⁴ The Commission has modified this sentence to better reflect the record.

The panel concluded from Mr. Junceau's responses that he was relying on his activities in the past, but was not currently motivated to be a supervisor. Many of his answers emphasized his experience, but failed to satisfy the evaluation standards. The conclusion that he was not motivated to be a supervisor is also supported by the panel's observation that Mr. Junceau did not understand the EnABLES computer system and Ms. Mronzinski had substantially greater knowledge about the "critical tasks performed by the support staff." Thus, there is evidence in the answers of both applicants to support these conclusions.

E. Reference Check

We tend to agree with Mr. Junceau that a reference check is appropriate and that the failure to conduct a reference check can be evidence of an abuse of discretion. We reject Mr. Junceau's conclusion that Director LaRocque did not make a reference check. We conclude that Director LaRocque did make a reference check in a manner that was substantially consistent with DWD and OSER's policy. Any deficiencies in the reference check do not affect the result of this case.

Both OSER and DWD policy is to check at least two references after the panel has made its recommendations. The purpose of the reference checks is to determine whether the applicants performed their prior jobs appropriately and otherwise had appropriate business relationships. DWD policy recommends obtaining reference checks from the immediate supervisors of the candidates.

Director LaRocque had experience interviewing potential candidates in his prior employment and his testimony reflected his extensive knowledge of hiring practices. He testified that he talked to Mr. Greg Frigo, the person who preceded him in the Director's position, and talked to ALJ James Sturm, who had vacated the Senior ALJ position creating the instant vacancy. ALJ Sturm was the latest immediate supervisor of both candidates and Mr. Frigo had been ALJ Sturm's last immediate supervisor. Director LaRocque testified that the two understood he was seeking a reference. He used a mental checklist of questions in talking to them and did not use the DWD policy's recommended questions. Director LaRocque could not recall specifically what each said. Mr. Junceau incorrectly assumes from that memory lapse that no such reference check occurred. Director LaRocque testified that he concluded Mr. Frigo and Mr. Sturm each believed both candidates were good employees, were likable, and got along well with other employees, but that they had different personalities. The fact that the reference check may have failed to reveal every negative aspect of Ms. Morzinski's career does not mean that it was not an adequate reference check. Director LaRocque concluded from those discussions that there was nothing in either candidate's background that was negative. We are satisfied from Director LaRocque's testimony that he conducted a reference check with the two former supervisors and that the reference check substantially complied with the policy of DWD.

Director LaRocque had about two month's service at the time of the interview. We are satisfied that he would have had some knowledge were there questions about the ability of either candidate to meet minimum standards for his or her job. Director LaRocque also was

familiar with Ms. Morzinski because she performed research attorney work in an area near his own office while he was there. Therefore, he had some personal knowledge about her legal ability and her ability to work with others.

We also conclude that any deficiency in the reference check did not result in an abuse of discretion. The panel recommended unanimously that Ms. Morzinski be selected. Under DWD policy, the reference check occurred after their recommendation. Therefore, any deficiency in the reference check would not necessarily support a conclusion that the other panel members acted improperly. Ms. Morzinski had satisfactory service with Unemployment Insurance. Mr. Junceau has not pointed to anything in her background which we would view as having any likelihood of changing the result of the selection which was made. Specifically, the only fact which Mr. Junceau pointed out in his brief was the fact that Ms. Morzinski had transferred from Unemployment Insurance and worked briefly for Workers' Compensation. She returned and continued to work for Unemployment Insurance. We don't believe there is anything in this record which reasonably could have affected her selection for this position.

We are satisfied that the decision made herein was not illegal or an abuse of discretion. For all the reasons above, we conclude that the appeal filed herein is without merit.¹⁵ We have accordingly dismissed the appeal.

Dated at Madison, Wisconsin, this 8th day of August, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

¹⁵ In materials filed after the proposed decision had been issued, the Appellant stated that immediately after the close of the evidentiary portion of the hearing and before setting a briefing schedule, the Hearing Examiner commented to the effect that the Appellant did not have much of a case. Appellant's statement is consistent with the following remark by the Examiner at that point in the record: "We've had a brief discussion off the record. I indicated my reaction to the evidence at this point and nothing more. It's not final, obviously, I'll read the briefs and review the case on its merits." We are quite satisfied that the Examiner thoroughly reviewed the exhibits and the written arguments of the parties, as well as the testimony of all witnesses, before preparing his proposed decision in this matter. Our review indicates that he conducted a very fair and impartial hearing and that he did not prejudice the case. Further, we have completed our own independent review of the record and come to the same conclusions expressed by the Examiner in his proposed decision.

