

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**TRACEY L. BAKKEN, CAROLYN BIRR,
LISA HOLLIS, and KAREN JAMES-KLASSY, Appellants,**

vs.

Secretary, DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent.

Case 10
No. 66543
PA(sel)-36

Decision No. 32086-B

Appearances:

Tracey Bakken, spokesperson, appeared on behalf of Appellants.

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, appeared on behalf of the Wisconsin Department of Workforce Development.

FINAL DECISION AND ORDER

On December 15, 2006, Appellants Tracey Bakken, Carolyn Birr, Lisa Hollis, and Karen James-Klassy, (herein collectively “Appellants”) filed a timely appeal of Respondent, Department of Workforce Development’s (herein “DWD” or “Respondent”) decision to not select them for the positions classified as permanent project Unemployment Benefit Specialist 1 - Adjudicator (herein “Adjudicator”) in its Benefit Operations Bureau 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 for the appeal was that the decisions were illegal or an abuse of discretion. The Commission designated Stanley H. Michelstetter II, a member of its staff, as Hearing Examiner. The Examiner held a hearing on May 9, 2006. The parties stipulated that the issue before the Commission is:

Did DWD commit an abuse of discretion or violate the law in the manner it filled the disputed positions?

The parties completed their briefing schedule on July 10, 2007. The hearing examiner issued a proposed decision on October 31, 2007 and no objections were filed by the requisite due date of December 3, 2007.

Dec. No. 32086-B

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

FINDINGS OF FACT

1. Tracey L. Bakken, Carolyn Birr, Lisa Hollis, and Karen James-Klassy, were employed by UI at all material times.

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 Unemployment Benefits Bureau investigates unemployment benefit claims and makes initial unemployment benefit decisions through its employees in the position of Unemployment Benefit Specialist 1 – Adjudicator (herein “Adjudicator”). Adjudicators work under close supervision. The majority of their time is spent investigating disputes pursuant to statute over unemployment insurance claims relating to voluntary leaving, misconduct, able and available for work, and suitable work pursuant to statute. They identify potential issues concerning eligibility for unemployment benefits. They then investigate individual claims for unemployment insurance by examining documents and interviewing employers, claimants, and witnesses. They then prepare a written initial determination consisting of written findings of fact and legal judgments pursuant to statute. They also investigate and prepare written decisions with respect to program integrity issues and assessing a claimant’s continuing eligibility for benefits. Essential elements of the position are being able to communicate effectively both orally and in writing, being able to identify and analyze legal and factual issues, and the ability to work well with supervisors. They must also be able to use computers to find data and to prepare their written work. UI employs approximately 100 Adjudicators in various offices around the State.

3. On May 2, 2006, DWD published a job vacancy announcement for Adjudicator positions in various locations including, but not limited to Madison (herein “original positions”). The announcement provided that the register would be used to fill future vacancies over the next six months. Appellant Birr was sent an individual announcement for the original positions on August 16, 2006.

4. Appellant Birr was on the DWD “at risk” list at this time. Employees who are on the “at risk” list are employees whose positions are being eliminated by DWD and are at risk of being laid off. “At risk” employees are entitled to preferential consideration for filling vacant positions if they are minimally qualified for the position.

5. Appellants Hollis and James-Klassy were listed on the register for the original positions. Bakken was on the permissive transfer register. Amy Banicki, UI Adjudication Manager, supervised the interview process for the original positions.

6. The interview panel consisted of Jeff Becker (Adjudication Supervisor), Craig Sandager (Adjudication Supervisor), Christine Maxwell (Adjudication Supervisor) and Yang Vue (Adjudicator-Unemployment Benefit Specialist 3). The Human Resources division of the Department of Workforce Development (herein "HR") oversees hiring conducted throughout the Department of Workforce Development. HR has training and instructional material on how an interview panel should conduct interviews and how they should evaluate those interviewed. HR provides that information to those performing evaluations only when the interview panel requests that information. HR did not provide any training or training information to those who conducted the subject interviews. No one from HR reviewed the way the interview panel conducted the subject interviews, the procedures used, or the notes of the interview panel.

7. The interview panel conducted over fifty interviews in September and October, 2006 for the original positions. All of the Appellants were interviewed.

8. The normal procedure for the interview process included, but was not limited to, having each candidate complete a writing sample based upon a test question. The ordinary process was for the person who greeted the candidates at the interview to conduct the candidate to a room where they would be alone with a computer. The greeter would then provide the candidate with the sample question, some paper and pencil and outline the time limits. He or she would turn on and log onto the computer with a password not available to the candidates. The greeter would then show the candidate the printer where his or her sample would be printed. The candidates then used the computer to type their answers. The writing sample instructions included the following:

In your own words, how would you explain this law section¹ to a person filing a claim for unemployment benefits? Use the PC to type your response and print it. You have 15 minutes to complete this exercise.

The normal procedure was used for all of the candidates interviewed except Birr. Birr was taken to a room for the written sample portion of the interview. The greeter followed the normal procedure except she did not show her a computer and prepare the computer for her use. She did not tell her to use a computer. Appellant Birr read the instructions after the person left the room. She did not attempt to find out why she did not have a computer to use. She hand-wrote her answer. The interview panel did not know Birr was treated differently

¹ The test question quoted Sec. 108.04(7)(a), Stats, Voluntary Termination of Work.

If an employee terminates work with an employing unit, the employee is ineligible to receive benefits until 4 weeks have elapsed since the end of the week in which the termination occurs and the employee earns wages after the week in which the termination occurs equal to at least 4 times the employee's weekly benefit rate in employment or other work covered by the unemployment insurance law of any state or the federal government.

than all of the other candidates. This difference affected the result of Birr's interview process, but she would have been judged "unqualified" by 3 of the 4 panel members anyway, both with respect to the writing sample and as to other elements of her interview. Birr's handwritten explanation incorrectly explained the statute. No other candidate made as fundamental an error interpreting the statute as did Birr. The failure to type her answer also could have affected her rating as to her computer skills. Two of the panel members rated her as qualified or better with respect to her computer skills (question 2). One rated her as minimally qualified as to her computer skills. One rated her as not qualified as to her computer skills. The failure to type her answer did not affect the ratings of her with respect to the other interview questions. The panel rated her unqualified in all other areas.²

9. The interview panel members used uniform interview questions and review sheets with check boxes for expected types of responses. The following were the interview questions:

1. What specific skills and experiences do you possess that would enable you to succeed in his job?
2. Describe in detail your skills working with a PC at home, school or on the job? How do these skills help you accomplish your task?
3. This job requires organization skills and setting priorities. Describe your organizational skills and techniques. What factors do you consider important in setting priorities?
4. Where do you see yourself in 5 to 10 years? What are your long term career goals?
5. Your supervisor asks you to process a claim in a manner that appears to be against established procedures. What would you do?
6. The employer says, "Bob was given warnings about his job performance." Bob says, "I was never given any warnings about my job performance." How would you investigate this discrepancy?

The questions were all job-related. The interviewers were provided with a list of benchmarks for appropriate answers. The benchmarks were all job-related. The panel received no training concerning how to apply the benchmarks and did not request any training or information from any source concerning the ranking of answers. Each member of the panel considered factors

² Two of the four panel members rated her minimally qualified as to question 3, organizational skills.

other than merely the number of benchmark boxes checked in ranking the candidates' responses to the interview questions. The factors included the depth of the response, how well it was explained, how quickly and succinctly the benchmark was reached, and the degree to which the answer demonstrated job-related experiences or other relevance to the duties of an Adjudicator. These factors were job-related. The panel did not apply any factor which was not job-related. Each panelist consistently followed a single method of analyzing responses throughout the interview process.

10. The panel was assigned to fill three Adjudicator positions in Madison.³ The panel ranked Birr as unqualified. They ranked the six top candidates in order so that if any of the first three top candidates declined to accept one of the positions there would be another candidate already named to take the position. The three top candidates accepted the positions effective October 29 and 30, 2006. None of the Appellants was named as one of the six top candidates.

11. Under Respondent DWD's at-risk policy, it was required to offer Birr the position unless she was deemed unqualified because she was considered "at-risk." The panel deemed that Birr was unqualified. Amy Banicki sent an e-mail seeking advice on how to proceed on October 9, 2006. The e-mail read in substance:

Carolyn Birr did poorly in the interview. She was scored as not qualified by 3 of the four panel members and the fourth scored her just between minimally qualified and not qualified. She simply was not meeting the benchmarks. The panel members felt that several of her answers were not focused on the question and not very clear. As an example, in the first question: 'What specific skills and experiences do you possess that would enable to you to succeed in this job?' she hit only 2 out of the 16 benchmarks and one of those was 'worked on the phone.' Question #6: The employer says , 'Bob was given warnings about his job performance.' Bob says, 'I was never given any warnings about my job performance.' How would you investigate this discrepancy? The candidate said she would question Bob again or ask the employer for any other particulars like who gave the warnings, if Bob signed the warnings, etc.

We give a lot of weight to the written sample in which we ask candidates to explain, in their own words, the law section explaining requalifying after a quit. The instructions clearly state to type the response on the provided PC and print within 15 minutes. This candidate chose not to follow the instructions and hand wrote the response. Her response clearly shows she has no understanding as to what is involved in requalifying after a quit. The question requires reasoning that is essential to the job. This candidate was ranked near the bottom of the candidates by the panel and her written sample was one of the worst out of those interviewed.

³ The panel also filled limited term adjudicator positions which are irrelevant to this appeal.

Attached is the writing sample. I typed the candidate's response to the question verbatim. I'd be more than happy to fax or send her response to you if needed.

I know you appreciate the tough spot we are in and the dire need that we hire candidates that we believe will be successful in the job. In our current situation especially we need candidates that we believe we can train in a minimum amount of time as we need them productive as soon as possible. We have limited training staff, so it is important that they do not have to take an excessive amount of time working one-on-one with a new hire. The panel feels that this candidate would not be successful and would take more time to try to train and thereby potentially cause harm to the other new hires by slowing their training.

I was not on the panel. The above information was provided to me by those that were, so if you need further detail let me know and I can have them get you more information.

[Typed writing sample is omitted.]

The e-mail was answered by Benk of HR. She did not do any further review. She recommended that Birr not be selected based solely upon the representations in the above e-mail. Benk's recommendation was adopted by DWD without further review.

12. On October 16, 2006 or shortly thereafter, each of the Appellants was notified that she would not be offered one of the original Dane County adjudicator positions.

13. Shortly thereafter DWD received permission to fill three permanent project Adjudicator positions in its Dane County offices. These positions are the subject of this appeal. A "project" position is a position authorized only for a temporary period and expires at the project ending date. The reference to "permanent" means that the employee in a "permanent project" position retains permanent civil service status even though the authorization for the position has ended.

14. On October 19, 2006, DWD notified by e-mail those who had previously applied for the Adjudicator position and had not been selected that "UI has been approved 18 project positions for UI Adjudication. The Benefits Operations Bureau will take actions to fill these positions as soon as it is feasible."

15. On November 3, 2006, Hal Bergan, the Administrator of UI, announced that a civil service examination for Adjudicator positions would be given on November 11, 2006. However, the project positions were filled before the examination date.

16. On November 7, 2006, Kathy Whitaker of HR gave Amy Barnicki permission to fill the three vacant Dane County permanent project Adjudicator positions using the candidates who remained on the list of six that were used to fill the original positions. One of the people on that list was Melanie Callison who was then on a detail assignment to the adjudication unit. The three permanent project positions in Dane County were filled by using the results of the interviews that had been held between September 27 and October 6, 2006. No new candidates were certified or considered. DWD offered the three additional Dane County Adjudicator positions on November 13, 2006, to the second group of 3 candidates previously named as back-up candidates in filling the original positions. All 3 accepted. DWD made Ms. Callison's Adjudicator position retroactively effective to November 5, 2007. The other two were effective November 13 and December 3, 2007, for Jillian Smith and Ronda Conner, respectively.⁴

17. DWD did not notify any of the Appellants that it was considering applicants who had already been interviewed for the original positions for the new positions on the basis of their prior interviews. DWD did not notify any of the Appellants that they had been considered for the additional positions but not selected. Appellants learned of their non-selection when they made inquiries of UI about the positions. Appellants mistakenly believed that the results of the November 11, 2006, examination had been used to fill the additional positions.

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. Appellants have the burden to establish that DWD acted illegally or abused its discretion when it decided not to hire them for the permanent project Adjudicator positions.
3. DWD abused its discretion when it did not give Appellant an equal opportunity to compete with respect to the writing sample, but this abuse did not affect her overall rating as unqualified.
4. DWD did not act illegally or abuse its discretion when it did not select Appellants for the permanent project Adjudicator positions.

⁴ The Commission has modified this finding of fact by deleting language that constituted a conclusion of law.

5. DWD did not act illegally or abuse its discretion when it established Ms. Callison's starting date as November 5, 2007.⁵

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

ORDER⁶

The matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 25th day of January, 2008.

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

⁵ The Commission has added this conclusion of law for reasons explained in the following Memorandum.

⁶ 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

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 Appellant's allegation that DWD's non-selection of them for permanent project Adjudicator positions violated the law and/or was an abuse of discretion. This case involves allegations that DWD abused its discretion and/or violated the law with respect to the interview process of other similar positions because the results of those interviews were used to fill the disputed positions. 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.)

I. Initial Interview

The Appellants argue that the interview process was illegal or an abuse of discretion in three ways. First, they argue that the failure of HR to train the panel on how to score interviews is unlawful and an abuse of discretion. Second, DWD abused its discretion or violated the law by denying Appellant Birr a fair and equal opportunity to compete in the interview process. Third, the panel abused its discretion and/or violated the law by applying the benchmarks in an undocumented, subjective, and inconsistent manner.

Appellants have not identified any law that required DWD to provide more guidance to its interview panelists as to how to rank applicants. To the extent that Appellants may be

arguing at page 20 of their brief that Sec. 230.04(1m), Stats,⁷ implicitly requires that DWD provide more guidance than it did to the panel, we conclude that the argument seeks to have the Commission review an action attributable to, or delegated by, the Director of the Office of State Employment Relations (OSER) which would have required OSER to be a named respondent in this matter and would be contrary to the limited authority of the Commission to review actions taken by OSER.⁸

We find the testimony of Birr credible that she was conducted to the room where she was to perform the writing sample, given the writing sample question, given a piece of paper and pencil, but was not shown to a computer. All other candidates were given a computer to use and, thus, treated differently. The panel was not informed that Birr was treated differently. We find unpersuasive the fact that the instructions stated that she was to type her response, both because she read the instructions only after she was left alone and, also, because no other interviewee was given so fundamental a problem in obtaining the equipment to perform the writing sample. We view the failure to give her the same opportunity to compete as an indication that the writing sample criterion was not uniformly applied and, therefore an abuse of discretion. See, ROSENBAUER V. UNIVERSITY OF WISCONSIN, Case No. 91-0086-PC (Pers. Comm., 9/93).

Nonetheless, we conclude that the failure to provide Birr with the same opportunity to compete did not affect the overall non-selection of Birr. Specifically, the writing sample required that Birr interpret and explain a section of the statutes to a fictional applicant. She, alone of all of the applicants, fundamentally interpreted the statute incorrectly. Every member of the panel rated her unqualified on this sample. Those who made written notes, noted this

⁷ Sec. 230.04(1m), Stats, provides:

(1m) The director may delegate, in writing, any of his or her functions set forth in this chapter to an appointing authority, within prescribed standards if the director finds that the agency has personnel management capabilities to perform such functions effectively and has indicated its approval and willingness to accept such responsibility by written agreement. If the director determines that any agency is not performing such delegated function within prescribed standards, the director shall forthwith withdraw such delegated function. Subject to the approval of the joint committee on finance, the director may order transferred to the office from the agency to which delegation was made such agency staff and other resources as necessary to perform such functions if increased staff was authorized to that agency as a consequence of such delegation or if the office reduced staff or shifted staff to new responsibilities as a result of such delegation. Any delegatory action taken under s. 230.09(2)(a) or (d) or 230.13(1) by an appointing authority may be appealed to the commission under 230.44(1)(b). The director shall be a party in such an appeal.

⁸ The Commission has modified this paragraph of the Proposed Decision to more clearly explain the relevant statutory restrictions to our authority, as well as to eliminate unnecessary language. The Commission's authority to review actions taken by OSER is found in Sec. 230.44(1)(b), Stats. That paragraph only extends to "a personnel decision under Sec. 230.09(2)(a) or (d) or 230.13(1). . . ." The cited statutes relate to classification decisions and personnel records.

error as a reason for rating her unqualified as to the writing sample. The panel rated her unqualified in other areas as well and we are satisfied these ratings were not tainted by the error in not providing Birr with a computer for the writing sample.

Appellants argue at page 4 of their brief that HR did not adequately investigate the request to rate Birr as “unqualified.” We do not agree. First, we find that the panel did not violate law or abuse its discretion in concluding Birr was unqualified. Second, the e-mail sent to HR with respect to rating Birr unqualified accurately summarized the panel’s conclusions. HR did not violate law or commit an abuse of discretion in not making a further investigation.

Appellants also argue that the interview process was illegal or an abuse of discretion. The assumption underlying their position is that the analysis of the interviews by panel members was arbitrary and, therefore, an abuse of discretion and/or illegal. We do not agree. The interview panel included people who were familiar with the duties of the Adjudicator position, even if some were new at their jobs. The interview questions, writing sample, and benchmarks were all related to the job qualifications and job duties. Each interviewer ranked each candidate separately. They rarely discussed candidates after the interviews. Maxwell stated that she made rating judgments based not only upon the number of benchmarks reached by the interviewee, but also upon her subjective judgment based primarily upon whether the interviewee explained his or her answers more completely or used persuasive examples. She noted that she may have given those who reached the same number of benchmarks as others a lower rating than those who achieved the same or fewer benchmarks based upon subjective judgments made in this manner. Yang Vue is an experienced Adjudicator. She also testified that she received no training in making judgments about interviewees, but she gave an explanation similar to that of Maxwell. Becker testified that he used a different approach. He viewed some benchmarks as more important than others. He, therefore, did not rely solely upon the number of benchmarks, but also relied on the importance of the benchmarks. He also gave higher rankings to interviewees who explained their answers quickly and concisely. We note that an essential element of the Adjudicator position is the ability to identify issues, analyze them accurately, quickly reach a decision, and concisely explain that decision to others. The subjective judgments described were related to the nature of the Adjudicator position. Although each panelist approached the rankings process differently, each used his or her own method of doing so consistently. We agree with Appellants that it is troubling that the interviewers did not document their subjective conclusions, particularly in the light of the fact that they interviewed such a large number of applicants. Nonetheless, we are strongly persuaded by the fact that the rankings which the panelist gave were relatively consistent with each other (without much discussion among the panelists) that the system which they used was rational and job-related. We conclude that DWD did not abuse its discretion in the way in which the interview was conducted other than as to the finding relating to Birr. Appellants have not shown that Respondents violated any law in the way in which the interviews were scored.

***II. Alleged Abuse/Violation of Law Relating to
Failure to Notify of Selection Process or Non-selection***

The appellants have argued that DWD violated the law or committed an abuse of discretion when it failed to notify the Appellants that they were being considered on the basis of their prior interviews for the additional permanent project positions and/or that they had not been selected. They rely on the procedures for reuse of interview results specified in Wisconsin Human Resources Handbook, Sec. 212.160, for their illegality argument. Section 212.160 is only policy and is not law. In any event, Sec. 212.160 does state that interviewees should be notified if they are not selected. Expert testimony established Sec. 212.60 is only applicable when an agency reuses interview results in situations involving subsequent positions in which it interviews additional candidates not considered for the original positions. Respondent did not interview additional candidates for the added permanent project Adjudicator positions beyond those interviewed for the original positions. This interpretation is well supported by the language of Sec. 212.60. Appellants have not cited any other law which requires that they be notified that they are being considered for the new positions based on their former interviews or that they be given notice of their non-selection. Accordingly, Respondent did not violate any law when it failed to give such notice.

We agree with Appellants that it would be a better practice to provide adequate notice of their non-selection under these circumstances. However, we conclude under the specific facts of this case that no abuse of discretion occurred under these circumstances. There is no evidence of a practice of DWD Human Resources to do so. There is no evidence of improper motivation. Appellants were notified at the outset of their applications that the examination might be used for future vacancies. Appellants were notified that the new positions became available even though they were not told their former interview results would be used to fill the position. The selections which were made were rationally based on the decision made after the interviews were concluded that the three candidates were among the six best qualified for the original positions. Accordingly, while better practice would be to give appropriate notice, no abuse of discretion in not giving appropriate notice occurred under the facts of this case.

Appellants next argue that DWD violated Sec. 230.25(2)(b), Stats, by not making the appointments for the supplemental positions within sixty days. Section 230.25, Stats, provides in relevant part:

230.25 Certification, appointments and registers. (1) Appointing authorities shall give written notice to the administrator of any vacancy to be filled in any position in the classified service. The administrator shall certify, under this subchapter and the rules of the administrator, from the register of eligibles appropriate for the kind and type of employment, the grade and class in which the position is classified, any number of names at the head thereof.

. . .

(2) (a) When certifying names to appointing authorities under this section, the administrator shall specify whether the certification includes qualifying veterans or persons the hiring of whom would serve affirmative

action purposes, without divulging the names of those individuals. The administrator shall not disclose any applicant's test score, with or without the addition of veterans preference points under 230.16(7), to the appointing authority.

(b) Unless otherwise provided in this subchapter or the rules of the administrator, appointments shall be made by appointing authorities to all positions in the classified service from among those certified to them in accordance with this section. Appointments shall be made within 60 days after the date of certification unless an exception is made by the administrator. If an appointing authority does not make an appointment within 60 days after certification, he or she shall immediately report in writing to the administrator the reasons therefore. If the administrator determines that the failure to make an appointment is not justified under the merit system, the administrator shall issue an order directing that an appointment be made.

(3) (a) Subject to par. (b), the term of eligibility on original entrance and promotional registers is 6 months and thereafter the register expires but may be reactivated by the administrator for up to 3 years from the date of the establishment of the register. Except as provided in ss. 230.28 and 230.34, the eligibility of individuals for reinstatement is 5 years and the eligibility of individuals for restoration is 3 years.

(b) The administrator may allow a register to expire after 3 months, but only after considering the impact of such an action on the policy of this state to provide for equal employment opportunity and to take affirmative action, as specified in s. 230.01(2).

(4) (a) The administrator may establish a new and separate register for a specific position or class only when in the administrator's judgment there is no appropriate existing register from which appointments may be made.

(b) The administrator may establish separate registers for various geographic areas of the state if the needs of the service so require, provided proper publicity has been given of the intent to establish such registers

. . .

A reading of the statute as a whole demonstrates from Sec. 230.25(4)(a), Stats, that it is the policy of the state to continue to use an existing register for subsequent appointments "only when in the administrator's judgment there is no existing register from which appointments may be made." Section 230.25(3)(a), Stats, provides for the expiration of specified registers in six months which period can be extended. The sixty day limit for making appointments provided in Sec. 230.25(2)(b), Stats, can only be read to date from the date the appointing authority receives permission to fill additional positions. In this case, the appointing authority received permission on, or after, October 16, 2006. The appointments for the disputed positions occurred on approximately November 7, 2006. The appointments were made within sixty days of the receipt of the permission to fill the new positions.

Appellant next argues that DWD violated law or abused its discretion by back-dating the starting date of Appointee Callison to a date before the offer of appointment was made to her. On November 7, 2006, Kathy Whitaker of HR gave Amy Barnicki permission to fill the disputed three positions using the three candidates who remained on the list of six that was used to fill the original positions. One of the people on that list was Melanie Callison who was then on a detail assignment to the adjudication unit. All three accepted. DWD made Ms. Callison's Adjudicator hire retroactively effective to November 5, 2006, two days before permission was given to fill the vacancy. Under some circumstances, the hire of a candidate allegedly pre-assigned to a position and the back-dating of the effective date might be evidence of an abuse of discretion. In this case, Callison was selected by the panel to be among the six leading candidates well before her assignment to the adjudication unit. The record shows that once the interviews ended on October 6, Callison was identified as the sixth-ranked candidate. By November 7, she was already working in the adjudication unit while on assignment from her Employment Security Assistant 3 position in UI. Otherwise, the record is, for the most part, undeveloped in terms of Respondent's decisions to set the effective dates for the three project position hires. Appellants have not identified a statute or rule that is contrary to a November 5 effective date for hiring Callison. As to the question of whether the November 5 date was an abuse of discretion, we interpret the limited evidence to mean that Callison had begun the Adjudicator training no later than November 5 and that Respondent chose to recognize the fact that Callison was performing Adjudicator duties by then. We do not believe it can be said to have been "clearly against reason and evidence" for the agency to establish an effective date that reflected Callison's de facto work assignment.⁹

Accordingly, we are satisfied that DWD did not violate law or commit an abuse of discretion in the manner in which it filled the Madison permanent project position. We have accordingly dismissed the appeal.

Dated at Madison, Wisconsin, this 25th day of January, 2008.

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 The Commission has removed that language in the Proposed Decision suggesting that the effective date decision was unrelated to the selection process, and consequently outside the scope of Sec. 230.44(1)(d), Stats. In addition, we reject Respondent's argument that the effective date topic is outside the scope of the hearing issue. The issue was framed quite broadly to encompass "the manner [Respondent] filled the disputed positions."