

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DANIEL E. ADAMS, Appellant,

vs.

Secretary, **DEPARTMENT OF NATURAL RESOURCES**, Respondent.

Case 11
No. 67102
PA(sel)-42

Decision No. 32398-A

Appearances:

Daniel E. Adams, appearing on his own behalf.

Michael D. Scott, Staff Attorney, Department of Natural Resources, P.O. Box 7921, Madison, WI 53707-7921, appearing on behalf of the Department.

DECISION AND ORDER

This matter is before the Wisconsin Employment Relations Commission as an appeal of a failure to hire. The parties stipulated to the following statement of the issue for hearing:

Whether Respondent's decision not to select the Appellant for the position of Service Center Supervisor was either illegal or an abuse of discretion.

A hearing was conducted on April 16, 2008 before Kurt M. Stege, a member of the Commission's staff serving as the designated Hearing Examiner. The parties filed post-hearing briefs and the matter was ready for decision on September 15, 2008. The hearing examiner issued a proposed decision on July 29, 2009. No objections were filed by the due date of August 29, 2009.

For the reasons that are explained below, the Commission affirms the Respondent's decision and dismisses the appeal.

No. 32398-A

Being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Customer service and licensing positions at DNR service centers are responsible for greeting walk-in customers and helping them with licenses and registrations, for answering questions, and for referring customers to other staff where appropriate. Customer service and licensing positions also perform similar responsibilities when fielding telephone calls made to the center.

2. Appellant was hired by DNR in 1997 as the Customer Service Regional Supervisor for DNR's Northern Region, and remained in that position at all times relevant to this proceeding. The Northern Region encompassed 10 separate service centers. Appellant directly supervised the Customer Service Representatives who worked in the Ashland and Superior service centers and, beginning in 2003, the Spooner and Cumberland centers. He was the second level supervisor for the Customer Service Representatives employed in the other service centers in the region.

3. While many customer service centers are housed in leased facilities, the Spooner Service Center is in a building owned by the State of Wisconsin. Beginning in 2003, Appellant served as the facilities manager for the Spooner building/campus.

4. From 2003 until the selection decision in question, the Appellant's regular duties encompassed the duties to be assigned to the position in question except for work at the front counter of the service center.

5. Julie Sauer, Customer and Employees Services Leader for the Northern Region, became Appellant's supervisor in 1999 and continued to fill that position at all relevant times thereafter. Ms. Sauer was serving as DNR's acting human resources director at the time of the hiring decision in question.

6. By a date early in 2007, Respondent had initiated steps to reorganize the Customer Service and Licensing program. The reorganization would include eliminating the regional supervisor positions. As a result, the Appellant was notified that he was "at risk" of layoff.

The vacancy

7. A consequence of the reorganization was to create a "Natural Resources Service Center Supervisor" position for the Spooner Service Center with responsibility to supervise approximately ten permanent or limited term Customer Services and Licensing positions. The position was assigned to the Spooner Service Center but also served as the supervisor for the Cumberland Service Center and the Superior Service Center. The summary of position responsibilities reads:

This position supervises staff that represents a full range of Wisconsin Department of Natural Resources programs in providing information, direct services and technical support to department external and internal customers. Work involves delivery and interpretation of program policies in addressing customer needs, delivery of direct program services, independent decision-making on behalf of professional or administrative staff and seeking/linking professional staff assistance where necessary to complete service delivery.

This position has significant responsibility in directing staff that serve as spokespersons for the Divisions of Land, Water, Air and Waste, Enforcement and Science, Customer and Employee Services, particularly for the Bureaus of Wildlife Management, Enforcement, Parks and Recreation, Fisheries Management, Forestry, Air Management, and Customer Service and Licensing. This work involves the independent application of state statutes, administrative codes and department policies and procedures.

This position serves as the property manager for the Spooner Service Center. The incumbent also serves as a member of the regional CAES management team, and as a member of the St. Croix Basin Management Team. This position is also a member of the regional CS Management Team.

The position description identifies various “competencies” associated with the position, including the following skills and abilities: 1) Customer focus & service orientation; 2) effective communicator; 3) effective problem solving; 4) demonstrates respect for others; 5) conflict management; 6) change management; 7) effective decision making; 8) coaching and mentoring.

8. Appellant was one of two candidates interviewed for the vacant position on May 31, 2007. The other candidate, Dawn Dodge, was selected. For approximately two years prior to the interview, Dodge had been directly supervised by Appellant while she worked as the Customer Service Supervisor for the Ladysmith and Hayward service centers. During the same period, Dodge was the facility manager for the service centers in Ladysmith and in Hayward. Prior to 2005, Dodge worked for four years as an Environmental Associate with DNR’s Drinking and Groundwater Program. In addition, she had worked up to seven years performing the functions of a Customer Services Representative.

Selection process

9. DNR’s selection system is referred to as “competency-based hiring.” It involves looking at those interpersonal skills of the candidates that align with the position,

rather than solely on the candidates' technical skills, and is described on a webpage of Respondent's Bureau of Human Resources as follows:

In a competency based hiring system . . . the focus of the employment interview shifts from technically oriented, organizational-focused knowledge or hypothetically oriented questions to behavior-focused interviews.

In a behavior focused interview, the underlying philosophy is that past behavior is the best predictor of future performance. This means applicants will describe their employment by way of 'stories' regarding what he or she has done in the past, drawing on actual experiences. The experiences can come from all kinds of settings including work done with service organizations or volunteer work. In this way, the applicant has the opportunity to demonstrate the specific competencies we are seeking. The interview moves away from providing knowledge by reciting what the applicant theoretically might do in a given situation, or what they think the interviewers want to hear. In short, the competency based, behavior-focused interview can not be 'aced' so to speak, because it requires the applicants to reveal more of himself or herself rather than rehearse 'canned' answers. It is less a matter of what they know, and more a matter of who they are and how they approach their work.

10. As the supervisor for the vacant position, Julie Sauer normally would have taken the lead role in organizing the interview process. Because of Sauer's temporary duties, the role was assigned to Tom Jerow who had led the Northern Region Drinking and Groundwater Program for DNR since 2004. Jerow had briefly been a second-level supervisor for Dodge when Dodge worked in the Water program.

11. Jerow, Mike DeBrock and Heidi Buchmann comprised the panel for interviewing the two candidates.

12. For more than ten years, DeBrock had been the Regional Leader for the Customer and Employee Services Division for either the West Central Region or the Northeast Region. His management responsibilities for the respective regions included the Customer Service and Licensing program which brought him into occasional contact with the Appellant. DeBrock had very limited prior contact with Dodge.

13. Buchmann was employed by the Northwest Regional Planning Commission rather than by DNR. She worked as a financial specialist. Buchmann's daughter and Dodge's daughter were in the same high school class of 130, but Buchmann and Dodge were not friends.

14. The panel interviewed both candidates on May 31, 2007.

15. All three panelists had a sheet of paper to be used for rating the candidates on each of eight questions posed in the interview. The panelists took notes relating to the candidate's response for the question. Each sheet included a rating scale, approximately six inches long. The left end of the line was marked "poor," the middle "average", and the right end "excellent." If the line is divided into increments so that "average" is equated to a score of 50%, the panelists' ratings of the two candidates are quantified as follows:

	Adams/Jerow	Adams/DeBrock	Adams/Buchmann	Total	Average	Dodge/Jerow	Dodge/DeBrock	Dodge/Buchmann	Total	Average
1	65	71	60	196	65	73	87	80 ¹	240	80
2	85	72	86	243	81	80	78	33	191	64
3	52	65	60	177	59	94	80	72	246	82
4	50	45	63	158	53	81	82	82	245	82
5	28	50	72	150	50	78	74	63	215	72
6	29	57	47	133	44	56	81	70	207	69
7	57	55	64	176	59	89 ²	87	88	264	88
8	67	53	44	164	55	91	93	94	278	93
Total	433	468	496	1397		642	662	582	1886	
Average	54	59	62		58	80	83	73		79

16. The interview panel had the responsibility to provide Sauer with a recommendation as to which of the two candidates was best qualified, based on the oral interviews.

17. After the conclusion of the second interview, the panelists conferred and reached a consensus to recommend Dodge. The recommendation was based on the interviews.

18. Tom Jerow notified Julie Sauer of the panel's recommendation and indicated it was not a close question and was unanimous. He also provided at least some detail of the responses to the questions and how they related to the competencies.

19. Sauer, who already had substantial knowledge of both candidates from having either directly or indirectly supervised them, decided on June 1 to follow the recommendation of the panel. Sauer's supervisor had indicated prior to the interviews that either candidate would be satisfactory to him.

20. On the day after the interview, Appellant telephoned Heidi Buchmann and intimated that he already knew the interview results. Appellant asked Buchmann how his interview had gone, and she stated that based on her understanding of the duties assigned to the position, he had higher qualifications (i.e. work experience) than what was needed for the position.

¹ Ms. Buchmann did not assign a rating to Dodge's response to Question 1. As a consequence, the Commission has used a score of 80 as a placeholder for purposes of calculating total and average scores. Eighty is the average of the scores awarded by Jerow and DeBrock to Dodge for that question. If, instead of using a placeholder, we eliminate Question 1 from the analysis of Buchmann's scoring of Dodge, Buchman's average score for the remaining seven questions would be 72.

² Mr. Jerow used an arrow with two specific endpoints to reflect his rating of Dodge's response to Question 7. The midpoint on the arrow translates to a score of 89.

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

CONCLUSIONS OF LAW

1. The Commission has the authority to review this matter pursuant to Sec. 230.44(1)(d), Stats.
2. The Appellant has the burden to establish that the decision not to select him was either illegal or an abuse of discretion.
3. Appellant has not sustained his burden.
4. The hiring decision was neither illegal nor an abuse of discretion.

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

ORDER³

Respondent's decision is affirmed and the appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of September, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Judith Neumann, Chair, did not participate in the consideration of the matter.

³ 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 Natural Resources (Adams)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Because this matter arises under Sec. 230.44(1)(d), Stats., the Appellant has the burden to establish that the decision not to select him for the Service Center Supervisor position in Spooner was “illegal or an abuse of discretion.” The Commission has interpreted the “abuse of discretion” standard as follows:

An “abuse of discretion” is “a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.” LUNDEEN V. DOA, CASE NO. 79-0208-PC (PERS. COMM. 6/3/1981). 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.

DOC (DOTSON), DEC. NO. 32527-A (WERC, 11/2008).

I. Contention that decision was an abuse of discretion

Appellant contends his “experience, education and background were uniquely suited to this position” so that a decision to select someone else must constitute an abuse of discretion. There can be no doubt that the Appellant was quite well qualified for the vacancy. He had held the responsibility of supervising the customer service operation in Spooner for four years and had ten years of experience in charge of Customer Service and Licensing for DNR’s entire Northern Region. However the other candidate also possessed experience that made her quite well-qualified for the vacancy. Dawn Dodge had worked for two years in the same civil service classification as the vacant Customer Service Supervisor position and she had significant additional experience working as a Customer Services Representative.

It is not entirely clear whether the Appellant asserts either that the interview questions or the benchmarks were improper, or whether he is simply attacking how the questions were scored by the panel.⁴ Even if the Appellant is asserting the interview questions were not sufficiently related to the position in question, or that the benchmarks the interviewers were to apply to the responses were not sufficiently related to the questions that were asked, the record provides no evidence to support such a view. The questions appear to be directly related to responsibilities assigned to the position and the benchmarks are directly related to the questions.

⁴ The Appellant may simply be advancing the conclusion that because he was not hired, the benchmarks must have been inadequate.

The Commission's role in reviewing this matter is not to decide if Appellant had more supervisory experience or facilities management experience than Dodge.⁵ It would be improper for us to rely entirely on the candidates' resumes in order to decide whether the decision not to select the Appellant had been an abuse of discretion. Our focus must be on whether the Appellant has shown that the *responses to the particular questions posed during the interview* were such that the decision not to select him was an abuse of discretion.⁶

The eight questions posed by the panel asked the candidate to describe his/her relevant experience (including that relating to property/facility management) as well as to describe how the candidate had dealt with angry persons, demonstrated leadership, established trust, dealt with change, worked through a disagreement with another employee, and addressed a situation requiring the communication of complex information.⁷ The interviewers were directed to listen for comments in the response that related to between five and 13 benchmarks, depending on the question.

Appellant contends that: 1) The interviewers were biased so that they inaccurately scored the candidates' responses; and 2) the interviewers' scoring was without any rational basis.⁸ We note that all three interviewers ranked Dodge ahead of the Appellant in terms of total score.⁹

⁵ Appellant makes frequent reference in his written argument to a comment by Buchmann's that Appellant was "overqualified." The day after the interview, Appellant telephoned Buchmann and intimated that he knew the conclusion reached by the panel. Buchmann testified she told Appellant when he called that he was "very" qualified, i.e. that his job experience or employment history exceeded what the job description called for. This comment has to be considered in context of Buchmann's understanding that the call was from an unsuccessful and presumably disappointed candidate. We believe Buchmann was seeking to allay Appellant's disappointment and that it would be unreasonable to interpret the comment to mean that Buchmann, one day after the interviews, actually felt that Appellant should have been hired based upon the interview questions, benchmarks and responses.

⁶ The Commission has the advantage of being able to rely on a transcribed recording of the Appellant's interview, allowing us to compare the statements he made with the ratings assigned by the interviewers. The recording, made by Appellant surreptitiously, was admitted into the record over Respondent's objection and for the reasons described in a letter ruling by the examiner. However, without a recording of the Dodge interview, we are without information that would allow a reliable comparison of the two candidates, other than the interview scores. If we were to rely on the panelists' notes to determine the full extent of what Dodge said during her interview, it would be a fundamentally flawed comparison of the candidates' performance during the interviews.

⁷ The interview questions and identified benchmarks appear to be consistent with the Respondent's "competency-based" hiring practice which is discussed at some length in one of our findings. The record indicates that DNR had applied competency-based hiring beginning long before the particular hiring decision at issue here. There has been no showing that the practice was either illegal or an abuse of discretion. As a consequence, we must consider the goals of competency-based hiring when reviewing the selection decision for the Customer Service Supervisor vacancy.

⁸ See quote from STARCK v. DOC, CASE NO. 98-0056-PC (PERS. COMM. 4/21/1991) set forth below.

⁹ Jerow awarded Dodge 209 points more than Appellant and DeBrock awarded her 194 more points. Buchmann did not assign Appellant a score for the first question, but she awarded Dodge 66 more points than Appellant for the final seven questions.

A. Bias allegations

Not one of the alleged reasons for a panelist to have been biased either in favor of Dodge or against Appellant rings true.

Appellant suggests that DeBrock, who worked for years in the same classification as Appellant but for a different DNR region, was jealous of Appellant's exceptional work in the Northern region so DeBrock's scoring of Appellant's responses reflected that jealousy. Appellant provided no supporting evidence that DeBrock was jealous or that the Northern region substantially outperformed DeBrock's region during relevant time periods.

Appellant contends the scores also reflected Jerow's desire to curry favor with Northern Regional Director John Gozdziwski who had apparently served on a committee with Dodge. If Appellant was an exceptional employee in his position as Customer Service Regional Supervisor for the Northern region, one would expect Gozdziwski to have favored hiring Appellant to fill the vacancy, not Dodge. This suggests that it would have been more reasonable for Jerow to rate Appellant higher than Dodge if he wanted to gain favor with Gozdziwski.

Buchmann's alleged source of bias was a significant friendship with Dodge. According to Appellant, the friendship arose because Buchmann and Dodge attended the same church and because their daughters were supposed to be close friends. The evidence established that Dodge and Buchmann did not attend the same church and were not friends.

Appellant also contends that his allegation of bias is supported by a change in the interview schedule in order to accommodate Dodge's previously planned vacation. However Appellant never established that the interview schedule had been changed from one date to another. We agree the record shows Jerow considered Dodge's vacation plan when he calendared the interviews. Jerow testified that he set the interview date primarily based on the schedules of the panelists but that Dodge had also already informed him of her vacation schedule. Appellant failed to show that it was contrary to DNR policy to schedule interviews so they do not conflict with a candidate's existing plans. If one of the only two candidates on the list to be interviewed for a vacancy makes the agency aware, before the interviews have been scheduled, of one or more calendar limitations, it would be good practice to try to accommodate the candidate's limitation.

B. Allegation that there was no rational basis for the scores

Prior cases before the Commission have addressed the argument that interviewers have abused their discretion when scoring the candidates:

In evaluating this claim, it must be kept in mind that the question before the Commission is not whether the panelists' scores were correct in some absolute sense, or whether the Commission would have rated appellant higher than [the successful applicant] if it had been doing the scoring. Rather, the question is whether appellant has demonstrated that the ratings assigned by the panelists were without any rational basis. In the Commission's opinion, while appellant raised some questions about ratings, he did not show an abuse of discretion in this matter.

STARCK V. DOC, CASE NO. 98-0056-PC (Pers. Comm. 4/21/1991).

The first interview question required the candidates to describe their previous work experience, training, and life experience most relevant to the vacant position and to identify what might set them apart from other candidates. Jerow and DeBrock gave higher scores for Dodge's response than for Appellant's. Buchmann did not place a checkmark on the rating scale for Dodge on this question. Appellant contends that he fully described his background, experience, and education, that this description far exceeded Dodge's credentials, and that he should have been scored higher than Dodge on the question. He also argues that the larger volume of notes taken by the panelists on their score sheets for his answers indicates he should have scored higher than Dodge. Finally, he states Jerow's notation that Dodge's response was a "concise answer" penalized him for having more experience which generated his lengthier answer. These arguments do not allow for the possibility that Dodge was more effective in clearly conveying her own extensive experience relating to the duties of the vacancy and that this was the reason she received higher scores. Dodge had two years of experience performing substantially identical duties in the Customer Service Supervisor position for two other service centers. She also had years of experience "in the trenches" directly providing customer service. Given these circumstances, we cannot say that there was no rational basis for scoring the initial question.

The second question asked the candidates to describe experiences specifically related to facility management and maintenance. Jerow and Buchmann rated the Appellant higher on this question while DeBrock's scores favored Dodge. Appellant argues that Buchmann should have rated him higher on this question than 86 because she failed to make any notations about his experience "using resources" and "seeking assistance," which were two of the benchmarks. This argument unrealistically assumes that the written notes on the scoring sheet reflect the only comments by Appellant that Buchmann deemed relevant when determining an overall score for the question. He argues that Jerow should have scored him higher than 85 because Jerow checked all of the benchmarks. The Commission does not agree that the Jerow checked every benchmark, and even if he had, it would not require the interviewer to conclude that the answer fully satisfied all aspects of every benchmark. Finally, Appellant suggests that DeBrock had changed his score for Appellant from 86 to 72 so that he could end up ranking

Dodge ahead of him on the question with her score of 78. The suggestion ignores the fact that DeBrock had crossed off a third mark at 70 on the rating scale, and there is no way to determine that the changes occurred after both candidates had been interviewed.

The remaining questions and benchmarks for rating the candidates are quite closely aligned with the policy behind competency-based hiring. For example, question four reads: “Please tell us what leadership means to you and give us a couple of examples of how you have demonstrated leadership in your current or past positions.” Appellant received an average score of 53 from the three interviewers. Dodge averaged 82. Notes by the interviewers show that Dodge specifically referenced attending DNR’s 2005-06 Leadership Academy. It is very reasonable to believe that the benchmarks for question four would closely resemble the topics covered in the agency’s own leadership training program *and* that Dodge was able to recount what she learned in the program, thereby including many of the benchmarks in her response. Appellant focused less on how he had demonstrated leadership and more on what he believes to be the key attributes of a good supervisor. Appellant’s responses to the other questions indicate that Dodge did a better job than Appellant targeting the competency-based perspective of the interview.¹⁰

II. Appellant’s allegation of “illegality”

Appellant posits that once the two interviews had been completed, DNR was required to select him relative to the other candidate interviewed because of his “at risk” status and because he was “minimally qualified” for the position as determined by the information he provided at the interview. He premises his view on the suggestion that the *absence* of any *contrary* provision in either the statutes or the rules compels hiring an “at risk” candidate under these circumstances.¹¹ However a right is not granted by the absence of a rule saying that the right is *not* granted. The argument fails and we reject Appellant’s allegation that the hiring decision was illegal.

¹⁰ On a later question asking the candidate to describe how s/he responded to a dramatic change and helped others deal with change, DeBrock made the following notation: “While able to describe situation had a difficult time at least for me sorting out the critical aspects of dealing w/ change.” Jerow noted on the same question: “Didn’t answer the questions.”

¹¹ Appellant asserts that the right to be hired is identified in Appellant’s Exhibit 5 which is titled “Frequently Asked Questions and Answers for the ‘At-Risk’ Employee.” The following sentence in that document is inconsistent with his suggestion that the minimally qualified at-risk employee must be hired: “After a vacancy clears and mandatory union posting and recall/restoration and transfer as accommodation steps, any ‘at-risk’ employees who have expressed an interesting the classification will be referred for *permissive* consideration.” (Emphasis supplied.)

For all the above reasons, the Appellant has failed to satisfy his burden of proof in this matter.

Dated at Madison, Wisconsin, this 17th day of September, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Judith Neumann, Chair, did not participate in the consideration of this matter.