

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JAMES E. PARKER, Appellant,

vs.

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

Case 71
No. 67264
PA(sel)-46

Decision No. 32481

JAMES E. PARKER, Appellant,

vs.

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

Case 72
No. 67265
PA(sel)-47

Decision No. 32482

Appearances:

James E. Parker, Jr., appearing on his own behalf.

H. Elizabeth Kennebeck, Attorney, P. O. Box 7925, Madison, WI 53707-7925, appearing on behalf of the Department of Corrections.

DECISION AND ORDER

These matters are before the Wisconsin Employment Relations as appeals of two decisions relating to the civil service hiring process. The issues for hearing read as follows:

PARKER II¹ (Case 71 No. 67264 PA(sel)-46)

Whether the Respondent's refusal to consider any effort by the Appellant to reinstate into a Correctional Officer [or Correctional Sergeant] position (as reflected in letters dated August 8 and August 30, 2007) was illegal or an abuse of discretion.

¹ In a ruling (No. 32298) issued December 19, 2007, the Commission granted a motion to dismiss an earlier appeal filed by Mr. Parker. In light of this other case, we are identifying Appellant's two remaining cases as PARKER II and III.

Dec. No. 32481

Dec. No. 32482

PARKER III (Case 72 No. 67265 PA(sel)-47)

Whether the Respondent's decision not to select the Appellant (as an open recruitment candidate) for the position of Correctional Officer, as reflected in a letter dated August 31, 2007, was illegal or an abuse of discretion.

A hearing was conducted on January 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, the last of which was received on March 4, 2008. The examiner issued a "provisional proposed decision" on July 18, 2008. Pursuant to the cover letter to that document, the provisional prevailing party was provided 30 days to file a request for fees and costs under Sec. 227.485, Stats. No request was filed within the statutory period, so the provisional decision was re-issued as a proposed decision and order. The hearing examiner issued a proposed decision on August 25, 2008. No objections were filed by the requisite due date of September 24, 2008.

For the reasons that are explained below, the Commission rejects the Respondent's decision in PARKER II and affirms the decision in PARKER III.

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

FINDINGS OF FACT

1. Appellant began his employment with the Department of Corrections (Respondent) in 1999 and resigned on or about September 10, 2006. This period included several years of employment at the Milwaukee Secure Detention Facility (MSDF). Appellant worked within Respondent's Division of Adult Institutions which includes about 20 facilities.

2. As a consequence of his employment with Respondent and his resignation, and pursuant to statute, the Appellant retained five years of eligibility for reinstatement into certain positions with the agency, including Correctional Officer and Correctional Sergeant positions.²

3. For the purposes of these appeals, the skills required for Correctional Officer positions in facilities operated by the Division of Adult Institutions throughout the state are substantially identical and the positions are viewed as interchangeable.

4. For the purposes of these appeals, the skills required for Correctional Sergeant positions in facilities operated by the Division of Adult Institutions throughout the state are substantially identical and the positions are viewed as interchangeable.

5. Appellant requested permissive reinstatement to a Correctional Officer vacancy at Racine Youthful Offender Correctional Facility. The request was denied after considering his "prior work experience, work performance, training background, discipline history, attendance record, unanticipated sick leave use and past employment references." Appellant was informed of the decision by letter dated January 8, 2007. This reinstatement denial is not at issue.

² While it is undisputed that Appellant's reinstatement eligibility *included* positions in the Correctional Officer and Correctional Sergeant classifications, the record does not specify what other positions, if any, would fall within the scope of Appellant's reinstatement eligibility.

6. Appellant also requested permissive reinstatement to a Correctional Sergeant vacancy at Racine Correctional Institution. He participated in the interview process but the institution denied the request to reinstate. Appellant was informed of the decision by letter dated January 19, 2007. The letter indicated the decision was based upon reviews of his personnel file, discipline record and sick leave history. This reinstatement denial is not at issue.

7. In addition to seeking employment with Respondent by virtue of his reinstatement eligibility, Appellant made use of the "open" recruitment process that Respondent has for Correctional Officer position vacancies. Appellant filed an application form for the open recruitment process in early June of 2007, and listed MSDF and Mid-City Plumbing on a list of prior employers. Appellant listed Mr. Kelly Quarles as his supervisor at MSDF.

8. Steve O'Neil is a Human Relations Specialist at the Department who has responsibilities relating to the Correctional Officer open recruitment process. Later in June, O'Neil sent reference questionnaires regarding Appellant to Kelly Quarles and to Mid-City Plumbing.

9. A 3-person panel interviewed Appellant on June 26 as part of the open recruitment process. Each panelist completed a form to measure the candidate's responses in comparison to listed benchmarks for the six interview questions. At the conclusion of the interview the panel scored the responses. The panel awarded Appellant a total score of 29 points, in comparison to a maximum score of 52.

10. On July 3, O'Neil issued another reference questionnaire regarding Appellant to MSDF's Human Resources Director.

11. All three questionnaires were completed and returned to Respondent. They included the following information:

a. Kelly Quarles indicated that Appellant had an adequate record for attendance and punctuality, but he "always has excuse for behavior," had disciplinary problems and poor judgment, and a "problem working with female staff members." Quarles also stated that he would not rehire Appellant because of "too many personnel problems."

b. The response from Mid-City Plumbing was prepared by Appellant's foreman there and reflected Appellant's 3-months of employment in 2006 before being laid off due to a work slowdown. The response indicated there had been no disciplinary problems, Appellant had demonstrated the ability to develop positive relationships with his co-workers, and Appellant was "average" (rather than "poor", "good" or "excellent") in terms of judgment, quality of work, quantity of work, dependability, initiative and learning ability. The foreman indicated Mid-City would rehire Appellant if given the opportunity.

c. The final questionnaire was completed by Colleen Hansen, Human Resources Director at MSDF. She indicated that Appellant had an adequate record regarding attendance and punctuality. However, she responded with a question mark when asked whether Appellant responded positively to constructive criticism and supervision, and noted: "Was not his supervisor, but based on information I know, he did at times." According to Ms. Hansen, he demonstrated the ability to develop positive relationships with some co-workers but not others, and she noted that he "was a victim to his reputation." Hansen also wrote:

Very dedicated to DOC and [its] mission – unfortunately he had a "reputation" at MSDF which hampered his ability to shake that and move past it. He has the skills and experience and would do well as an Officer.

She attached a record of Appellant's disciplinary actions that reflected 18 entries over the period between January 2002 and July 2006. The list included 5 written reprimands and 3 separate suspensions:

March 2002	Written reprimand for "insubordination, intimidating behavior"
December 2003	Written reprimand for "verbal altercation with another staff"
December 2003	1-day suspension for "verbal altercation with another staff"
November 2004	Written reprimand for "1 hr late"
June 2005	Written reprimand for "unauthorized use of phone – used phone in SW's office"
November 2005	1-day suspension for "using former employee's email to send email"
June 2006	Written reprimand for "1 hr late"
July 2006	5-day suspension for being 20, 20 and 45 minutes late on 3 different days

The remaining 10 entries on the list were for verbal reprimands and counseling.

12. On or about July 10, a selection panel consisting of three managers met in Madison for a file review of the applicant materials for the Correctional Officer open recruitment. The panel considered all the information obtained to date relating to each applicant. For Appellant, that included his application, the results of his criminal background check, his interview results, and the three reference questionnaires that had been returned. The selection panel decided not to hire him.

13. By letter dated July 11, 2007, O'Neil notified Appellant that he had not been selected. This decision is not at issue in these appeals.

14. Respondent normally conducts six Correctional Officer recruitments each year. After Appellant learned he had not been selected during the first recruitment, he reapplied. Consistent with existing DOC policy, the agency conducted another criminal background check but otherwise relied upon the materials that had been generated for Appellant during the prior application cycle. Consequently, Appellant was not interviewed by another panel.

15. During this same general time period, Appellant contacted a number of persons in State government complaining that he was not being reinstated and raising a number of claims that he had been improperly treated by Respondent. One of his contacts was with the Office of the Secretary of the Department of Corrections. Stacy Rolston, the Classification and Compensation Section Chief for Respondent's human relations program, was assigned to look into Mr. Parker's claims.

16. In an e-mail dated July 26, 2007 to O'Neil, John Husz, the MSDF warden, stated that he concurred with the decision of the July 10 selection panel and offered the following explanation:

In his tenure at MSDF, [Appellant] had violated the work rules on multiple occasions and had demonstrated an inability to establish satisfactory interpersonal relationships with supervisors and co-workers. Based on past discipline, performance issues and the information provided by his supervisor, we would not consider reinstating Mr. Parker to MSDF.

17. Before becoming aware of Appellant's efforts to reinstate to the Department, Rolston had been aware of a situation where a former DOC employee with a poor employment record at a DAI institution had been denied reinstatement in one instance but hired at a different institution upon a later reinstatement request when that institution had failed to follow the proper procedures for reviewing the request. The employee had subsequently transferred to the institution where s/he had generated the problematic employment record. Respondent's human relations staff had discussed ways to insure that this situation did not recur.

18. Upon investigating Appellant's claims of improper treatment, Rolston concluded that any DAI institution properly analyzing a reinstatement request from Appellant would deny the request. She concluded that DAI should make a division-wide decision not to reinstate Appellant into either a Correctional Officer or Correctional Sergeant position. Rolston recommended that DAI Administrator John Bett issue a written decision to that effect.

19. Bett adopted Rolston's recommendation and in doing so, considered the reinstatement denials by RYOC and RCI, the three written responses to O'Neil's reference questionnaires, and the July 26 e-mail from Husz.

20. In a letter dated August 8 letter, Bett informed Appellant that he would not be reinstated within the Division of Adult Institutions as either a Correctional Officer or Correctional Sergeant:

It is my understanding that you have requested permissive reinstatement to Correctional Sergeant vacancies at multiple correctional facilities throughout the Division of Adult Institutions. Pursuant to the [sic] ER-MRS 16.01 of the Wisconsin Administrative Code, reinstatement is permissive and at the discretion of the appointing authority.

After careful consideration of your possible reinstatement to the classification [of] either Correctional Officer or Correctional Sergeant, I am writing to advise you that you will not be reinstated to either classification within the Division of Adult Institutions. This decision does not impact your reinstatement eligibility to other classifications within the Division of Adult Institutions, other divisions within the Department of Corrections, or other agencies.

If you wish to be considered further as a Correctional Officer [or] Correctional Sergeant, you will need to apply through the regular selection process.

It was the first time in Bett's brief tenure as DAI Administrator that the division had issued an indefinite, division-wide refusal to reinstate. Bett's action serves as the basis for the PARKER II appeal.

21. Respondent later corrected the statement in the August 8 letter that there "is no appeal process related to [the] decision." Parker had already filed a letter of appeal with the Commission by the time Respondent had issued a written correction on August 30.

22. Appellant's letter of appeal in (PARKER II) read, in part:

This letter is to formally request to appeal a decision that was made, to prohibit me from further reinstatement as a Correctional Officer or Sergeant, with the Wisconsin Department of Corrections Division of Adult Institutions.

23. The three-person selection panel for the second open recruitment cycle of Correctional Officer candidates met in late August 2007. All three reviewed each applicant's file which included the application, the background check, any qualifying test, the interview panel's score and notes, and the responses to the reference questionnaires.

24. By letter dated August 31, 2007, Mr. O'Neil notified Appellant that he had not been selected in the second open recruitment cycle for Correctional Officer positions. This decision serves as the basis for the PARKER III appeal.

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 these matters pursuant to Sec. 230.44(1)(d), Stats.

2. The Appellant has the burden to establish that the decisions were either illegal or an abuse of discretion.

3. Appellant has satisfied his burden in PARKER II, but not in PARKER III.

4. Respondent's decision in August 2007 to terminate Appellant's eligibility for reinstatement to Correctional Officer and Correctional Sergeant positions in the Division of Adult Institutions was illegal.

5. Respondent's decision not to select the Appellant in the second recruitment cycle for Correctional Officer positions 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 August 2007 decision in PARKER II to terminate the Appellant's eligibility for reinstatement to both Correctional Officer and Correctional Sergeant positions in the Division of Adult Institutions is rejected. The matter is remanded for action in accordance with the decision. PARKER III is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 14th day of October, 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

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 content of that letter are hereby incorporated as a part of this Order.

Department of Corrections (Parker)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

These matters arise under Sec. 230.44(1)(d), Stats., which provides:

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

In DOC (ZEILER), DEC. NO. 31107 (WERC, 12/2004), the Commission adopted the following description of an “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.)

PARKER II⁴

Mr. Parker is appealing from a decision relating to his effort to reinstate to a position within the Department of Corrections. He had resigned from employment with Respondent in September 2006, worked briefly for a plumbing contractor, and later sought to return to employment with Respondent. Pursuant to Sec. 230.31(1), Stats., the Appellant had reinstatement eligibility upon resigning in 2006:

(1) Any person who has held a position and obtained permanent status in a class under the civil service law and rules and who has separated from the service without any delinquency or misconduct on his or her part but owing to reasons of economy or otherwise shall be granted the following considerations:

(a) For a 5-year period from the date of separation, the person shall be eligible for reinstatement in a position having a comparable or lower pay rate or range for which such person is qualified.

The term “reinstatement” is defined in Sec. ER-MRS 1.02(29), Wis. Adm. Code, as follows:

“Reinstatement” means the act of permissive re-appointment without competition of an employee or former employee under s. 230.31, 230.33, 230.34 or 230.40(3), Stats., to a position:

⁴ The Commission deleted a section in the proposed decision entitled “credibility determination” because it was unnecessary to the resolution of the appeals.

- (a) In the same class in which the person was previously employed;
- (b) In another class to which the person would have been eligible to transfer had there been no break in employment; or
- (c) In a class having a lower pay rate or pay range maximum for which the person is qualified to perform the work after the customary orientation provided to newly hired workers in the position.

There is no dispute that the Appellant separated from the civil service “without any delinquency or misconduct” so that he was granted 5 years of eligibility for permissive re-appointment via reinstatement.

Appellant exercised that eligibility on at least two occasions: he sought to return to a Correctional Officer vacancy at Racine Youthful Offender Correctional Facility and to a Correctional Sergeant with Racine Correctional Institution. In both cases, his specific requests were denied by the institution with the vacancy.

As a consequence of her assignment to investigate Appellant’s claims of improper conduct by Respondent, Stacy Rolston, the Section Chief for Classification and Compensation in Respondent’s human resources program, learned of the two reinstatement denials. It was clear from her contacts with Appellant that he intended to pursue reinstatement options at all of Respondent’s 22 adult institutions, if necessary. Rolston was aware that this process could take up substantial time and resources for Parker as well as for the agency. Rolston was also intent on not repeating a situation where another employee had inadvertently been allowed to reinstate at one institution despite a poor work record at a second institution.

Rolston concluded that based on Appellant’s disciplinary history, the responses to reference questionnaires returned as part of the open recruitment process, an email from the warden at MSDF that he would not rehire Appellant, and the decisions reached independently at two other adult institutions, it was in everyone’s best interest for the Division of Adult Institutions to make a blanket decision to deny reinstatement to Appellant into all Correctional Officer and Correctional Sergeant positions. Upon Rolston’s recommendation and based on the same information, Division Administrator John Bett accepted the recommendation and notified Parker of the decision in a letter dated August 8, 2007. The letter informed Parker “that you will not be reinstated to either classification within the Division of Adult Institutions.”⁵ Bett also advised Parker that as a consequence of the decision, “[i]f you wish to be considered further as a Correctional Officer [or] Correctional Sergeant, you will need to apply through the regular selection process.”

⁵ The record is silent as to the number of officer and sergeant positions within DAI, but the fact that these positions are in more than 20 institutions and serve as front-line positions in the State’s correctional system indicate the number is very large.

“Illegal” standard

Pursuant to Sec. 230.31(1), Stats., Parker was “eligible for reinstatement” to numerous positions within the Department of Corrections until September 2011. The August 8, 2007 letter informed Appellant that his reinstatement eligibility granted by statute had been extinguished for all Correctional Officer and Correctional Sergeant positions throughout the Division of Adult Institutions. The letter is unambiguous. It contravened the express language of the statute that reinstatement eligibility is a right that runs for 5 years from the date of separation. Because the letter was issued only eleven months after Appellant’s separation, it was illegal.

The decision in *FRANK V. PERSONNEL COMMISSION*, 141 Wis.2d 431, 415 N.W.2d 533 (CT. APP., 1987) indicates that an agency may not cut off reinstatement eligibility before the end of the time period established by statute. At the time of the *FRANK* decision, reinstatement eligibility ran only 3 years from the date of separation. Ms. Frank’s employment with the Department of Health and Social Services had ended on April 18, 1980 and her efforts to obtain reinstatement later in 1980 and in 1981 were unsuccessful. She again applied for reinstatement on April 14, 1983, just a few days before the 3-year period of eligibility was to end. The agency declined to process the request because it would not be able to complete the procedure before the 3-year period was over. Frank appealed the action. The Personnel Commission affirmed the agency’s decision, but on appeal, both the Circuit Court and the Court of Appeals concluded otherwise, the latter court noting that “Section 230.31(1), Stats., commands that a separated employee ‘shall be granted’ certain ‘considerations,’ one of which is eligibility for reinstatement for three years.” *Id.*, at 435. The court of appeals rejected the Personnel Commission’s view that at the end of 3 years, the agency would lose the authority to act on any request filed within the 3-year period:

[The Personnel Commission’s interpretation] ignores the sole command of the statute: to grant eligibility for reinstatement for three years. It would reduce the three-year life of the employee’s right by whatever time the agency needed to process a reinstatement request. As the circuit court noted, it would allow the agency to reduce the value of the right merely by holding a timely request until the three-year period ran out. *Id.*, at 436.

The action by DAI with respect to Appellant’s reinstatement eligibility would, if allowed to stand, be a far greater reduction in his rights: from five years of eligibility to only eleven months.

Respondent argues that its decision to deny Appellant reinstatement was only temporary:

[T]hough no time frame was addressed in the [August 8] letter, (and Respondent recognizes that providing a time frame would have been prudent) the evidence at the hearing was that, should Appellant seek reinstatement at a later date,

Mr. Bett stated he would consult with his experts in the Bureau of Personnel and Human Resources to see if that is something that would be done. Thus, Mr. Bett indicated it would in fact be considered. Jean Nichols, Human Resources Manager for the Department of Corrections, testified in response to a similar question that a reinstatement request at a later time would have to be considered by Respondent. Ms. Nichols stated that when a reinstatement request is made, there is a process which must be followed. Ms. Nichols testified that a review of the file would be done at that time and they would have to look at work history and references in order to make a decision. She testified that she could not speculate as to what decision would be made as the decision would be based on what the file contained at that time. Brief, p. 8.

Unfortunately, the testimony that is referenced in the post-hearing argument was supplied at an administrative hearing held 5 months after Respondent's decision. Nothing in the record indicates Respondent had attempted at any earlier point to inform the Appellant that he retained reinstatement eligibility, including Correctional Officer and Correctional Sergeant positions in DAI, until September 2011. Respondent has not modified or withdrawn the written decision supplied to Appellant, which indicates the limitation on his reinstatement eligibility is permanent. Even the issue for hearing ("whether Respondent's refusal to consider any effort by the Appellant to reinstate . . .") reflects a permanent decision. In addition, there was no indication that at the time he issued the letter, Bett (or Rlalston) intended the decision to be something other than permanent.⁶

The August 8 letter (as corrected on August 30) abrogates statutory reinstatement rights that were granted to Appellant by Sec. 230.31(1)(a), Stats., because the correspondence reflects a blanket decision to eliminate all of Appellant's prospects for reinstatement into Correctional Officer positions and Correctional Sergeant positions within DAI.

"Abuse of discretion" standard

Parker also contends that the decision reflected in the August 8 letter was an abuse of discretion. His arguments suggest that his disciplinary history at MSDF was "not uncommon,"⁷ that many of the disciplinary actions were taken without just cause and were due to actions by vindictive co-workers, and that Respondent was acting in retaliation for various complaints he had advanced within DOC and for contacts he made outside the agency to complain about his situation. Appellant has either failed to establish a record to support his contentions or he has misunderstood the Commission's role on review.

⁶The Commission has added the last sentence in this paragraph because it had appeared in the provisional proposed decision.

⁷He also points out that at the time of his resignation, he "was in no danger of termination on the Department's scale of progressive discipline."

In terms of his retaliation theory, he failed to supply any evidence that DOC had a history of granting reinstatement to persons with similar references as well as with a similar record of discipline. We don't disagree that Appellant's circumstances may have been brought to Ms. Rolston's attention because Parker had made a complaint to DOC's Secretary and the August decision may have been made after Appellant contacted legislators to complain to them about how he was being treated. However, as discussed more fully below, the blanket decision was made because of a variety of legitimate factors rather than in retaliation for Appellant having expressed his complaints.

Implicit in some aspects of Appellant's case is his view that the employing agency had to perform some type of independent investigation to determine whether the comments on the reference questionnaires were justified and whether there was just cause for the discipline imposed during his tenure with DOC. However, an agency is not required to have "just cause" for denying a reinstatement request. The agency may choose to rely on information that appears on its face to be reliable. While Appellant may be able to identify excuses for his disciplinary record, the Commission, as well, is not looking to answer the question of whether there was just cause for the discipline imposed in the past, or whether the recommendations coming from MSDF and from Mid-City Plumbing were accurate descriptions of his work performance.⁸

Even though we have already concluded the Respondent's action was illegal because it conflicted with the statutory grant of reinstatement eligibility, we acknowledge that there were some good reasons to address Appellant's reinstatement efforts on something more than a request-by-request basis. Appellant had a lengthy record of discipline imposed when he had been employed at MSDF. Documents showed that the MSDF warden was opposed to rehiring Parker and that Appellant's former supervisor was similarly opposed.⁹ Neither the MSDF Human Resources Director nor Appellant's foreman at Mid-City Plumbing supplied glowing reports of Appellant's employment. Two institutions had already denied reinstatement requests from Appellant. We agree that it would not make sense for Appellant to be forced to travel throughout the state as part of the selection process if it was already clear that no adult

⁸ Appellant may have a higher opinion of his level of performance than some of the people who had worked with him at MSDF, but that higher opinion does not establish an abuse of discretion where Respondent obtained relevant information about the Appellant that appeared to be reliable and then reasonably interpreted the information as an indication that the Division would be better off not returning him to their workforce.

⁹ Examples of cases where an agency was found to not have abused its discretion when denying reinstatement to someone with a relatively similar history to that of Appellant include *RASMUSON V. DHSS*, CASE NO. 85-0124-PC (PERS. COMM. 10/1/1986); *VARRIALE V. DOJ*, CASE NO. 85-0056-PC (PERS. COMM. 4/11/1986); *AFFIRMED BY WAUKESHA COUNTY CIRCUIT COURT, VARRIALE V. STATE PERS. COMM.*, 86-CV-1324, 6/18/1987; *LUNDEEN V. DOA*, CASE NO. 79-208-PC (PERS. COMM. 6/3/1981).

correctional facility was going to hire him. Testimony established that at some point during Rolston's investigation of Parker's complaints, Parker asked whether he was just wasting his time trying to be reinstated. The record also established that before she first learned about Appellant, Rolston was aware of a situation where a former DOC employee who had resigned from one institution with an unsatisfactory work record was inadvertently reinstated by a different institution and subsequently transferred back to the earlier place of employment. The institution made the decision to rehire without going through the proper steps for analyzing the reinstatement question. DOC had a reasonable interest in taking steps to reduce the chance of any reoccurrence. Finally, Respondent's division-wide reinstatement decision was not an unreasonable step in the sense of trying to save state resources.

PARKER III

Appellant's other case arises from the decision made not to select him during the second cycle of the Correctional Officer open recruitment process. The selection panel had not interviewed Appellant (or any of the other candidates). Instead, they relied on various documents submitted by Appellant or obtained from other sources, including: 1) Appellant's application; 2) the results of the criminal background check; 3) three completed reference questionnaires; as well as 4) the notes that were taken by the panel that had interviewed Appellant in June and the score awarded by the interview panel. The record does not include any evidence of the specific analysis undertaken by the selection panel, what the standards were that the panel applied or whether the panelists were unanimous in their conclusions. In the absence of this information, and in the absence of any evidence that the panel selected another candidate with a similar set of reference questionnaires, we have no basis on which to overturn the decision. To the contrary, the evidence indicates that Appellant had a lengthy history of discipline during his previous employment with Respondent and a set of negative or neutral reference questionnaires. The result reached by the August panel was also consistent with the conclusion of a prior selection panel after reviewing substantially identical materials.

Appellant did not sustain his burden of persuasion in PARKER III.

Remedy

In his post-hearing brief, Appellant argued that he "should be granted reinstatement to an open position vacancy within the Wisconsin Department of Corrections, or in the very least have my reinstatement rights returned to me." We agree that Appellant is entitled to the "return" of his reinstatement eligibility to the extent that the Respondent's decision to terminate his eligibility prematurely (as to certain classifications within the Division of Adult Institutions) has been rejected. However, there is no basis for requiring the Respondent to

re-employ Appellant. FRANK V. PERSONNEL COMMISSION, 141 WIS.2D 436 (where the former employee's reinstatement eligibility was terminated prematurely, she was not reinstated). Parker has not shown that absent the August 8 letter, his references and work record were such that a DOC facility would have opted to reinstate him.

Dated at Madison, Wisconsin this 14th day of October, 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