

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**TRACIE ARNDT, STEPHANIE BUCK,
and WILLIAM DYNES, Appellants,**

vs.

Secretary, DEPARTMENT OF HEALTH SERVICES, Respondent.

Case 28
No. 68252
PA(sel)-55

Decision No. 32687-A

Appearances:

Tracie Arndt, spokesperson, appeared on behalf of Appellants, who all also appeared individually.

Paul A. Harris, Attorney, Department of Health Services, 1 West Wilson Street, Madison, Wisconsin 53702, appeared on behalf of the Wisconsin Department of Health Services.

DECISION AND ORDER

On August 27, 2008, Appellants Tracie Arndt,¹ Stephanie Buck, and William Dynes filed a timely appeal of Respondent, Department of Health Services' (herein "Department" or "Respondent") decision not to select them for positions classified as Psychiatric Care Supervisor (herein "Care Supervisor" or "PCS") in Sand Ridge Secure Treatment Center (herein "Sand Ridge"), invoking the jurisdiction of the Wisconsin Employment Relations Commission (herein Commission) under Sec. 230.44(1)(d), Stats. The basis for the appeal was the claim 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 April 2, 2009.² The parties stipulated that the issue before the Commission is:

Whether the decision to not hire the three Appellants was illegal or an abuse of discretion?

¹ After the proposed decision was issued, the Commission learned that Ms. Arndt's last name has changed to Bitz. Other than in this footnote, the Commission's decision does not reflect the change.

² The Commission has corrected the hearing date set forth in this paragraph from that reflected in the proposed decision.

The parties waived oral argument or briefing before the issuance of a proposed decision by the Examiner. The record was closed by the Examiner April 2, 2009. Subsequent to closing the record Appellants requested time to obtain legal counsel and requested an opportunity to review the recordings of the hearings. The Examiner held the matter in abeyance. It was discovered that the recording of the hearing was incomplete.³ The parties ultimately stipulated to submit a summary of the omitted testimony in lieu of a re-hearing. The summary was completed and filed July 1, 2009. Appellants also withdrew their request for a stay of proceedings to obtain legal counsel on that date. The Examiner issued a “provisional proposed decision” on September 3, 2009. 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.

The examiner issued a proposed decision on October 16, 2009, indicating that Appellant Arndt had prevailed but that Appellants Buck and Dynes had not. Objections were due by November 16, 2009, but none were filed. The parties entered into settlement discussion, but on July 6, 2010, it became apparent that those efforts were unsuccessful. The Commission has modified the Findings of Fact, Conclusions of Law and Memorandum as a consequence of our conclusion that Appellant Arndt (as well as Appellants Buck and Dynes) failed to satisfy the “but for” causation standard. Other substantive changes are identified by footnote. The Commission has consulted with the hearing examiner as part of our review. The consultation has included the topic of witness demeanor.

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

FINDINGS OF FACT

1. The Department operates Sand Ridge Secure Treatment Center which provides treatment for sex offenders who have completed criminal sentences and have been confined under the Sexually Violent Persons Law, Ch. 980, Stats.

2. Appellant Tracie Arndt has been a Correctional Sergeant at Sand Ridge since April, 2001. She was assigned to the second shift and her immediate supervisor at all material times was Captain Carrie Trepanier. Arndt asserts that she has a speech disability affecting her ability to verbally communicate.

3. Appellant Stephanie Buck has been employed as a Correctional Officer at Sand Ridge since October, 2004. She was assigned to the second shift and her immediate supervisor at all material times was Captain Carrie Trepanier. Buck had also been employed by the Department as a Correctional Officer at the New Lisbon Correctional Institute from March, 2004 to October, 2004.

³ The Commission sincerely regrets the recording error.

4. Appellant William Dynes has been a Psychiatric Care Technician employed at Sand Ridge since February, 2008. His immediate supervisor at all material times was Care Supervisor Griffa. Dynes had also been employed by the Department of Corrections as a Psychiatric Care Technician at the Mendota Mental Health Institution, from July, 2004 to February, 2008.

5. The three Appellants were among eleven individuals who were certified to be interviewed for three Psychiatric Care Supervisor vacancies at Sand Ridge.

6. Psychiatric Care Supervisors are responsible for managing a shift in one of the units at Sand Ridge and are required to interpret and implement policies, procedures and directions as they relate to the assigned unit's operation. They conduct investigations, write reports, schedule staff, supervise, evaluate, discipline and train assigned staff, maintain security and participate in the development and implementation of treatment plans and therapeutic activities for Sand Ridge patients. These positions supervise employees in the classification of Psychiatric Care Technicians as well as other classifications and report to the Institution Unit Supervisor.

7. Kenneth Campbell serves as the Director of Sand Ridge's Human Resources Department ("Human Resources"). Human Resources oversaw the administration of the recruitment process that is in dispute which included establishing and supervising the interview panels, setting the ground rules for candidates during the interview process and conducting all activities involving the candidates before the interview. In this regard, Human Resources established a policy that upon arrival for their interview, applicants would receive the interview questions and have a specified period of time to review the questions and make notes to take into the interview session. The policy provided that the candidates could not take any documents from the review room into the interview room except for their notes and the copy of the interview questions.

8. Jeri Witkowiak was an assistant to Campbell.

9. Candidate Joanne Schumer was employed within Human Resources where she was performing payroll work at the time of the subject interviews. She worked closely with both Campbell and Witkowiak on a regular basis and Campbell was her immediate supervisor. She had served on interview panels for the Department in the past. Schumer had no relevant experience in a Psychiatric Care Technician, Correctional Officer or related position at the time of her interview although she had significant experience in a wide range of personnel matters.

10. Candidate Albert Lavender was a Psychiatric Care Technician employed at Sand Ridge since approximately February 1, 2007. Prior to being employed by the Department, he had extensive military police and civilian police and security experience.

11. The interview panel consisted of Melanie Faust, Institution Unit Supervisor at Sand Ridge, Timothy Thomas, Jr., Institution Unit Supervisor at Sand Ridge, and Ray Kruse. Thomas and Faust supervise one or more of the positions in dispute. All interviews were conducted on June 30, 2008. The panel assigned each applicant to one of three categories, from the most successful to the least successful:

- a. For further consideration
- b. No further consideration at this time
- c. No further consideration at all

The panel placed no limit on the number of applicants who could be in the highest category. Each applicant supplied a list of persons he or she wanted to use as references. Witkowiak performed the preliminary functions for the panel during the subject interviews, including, but not limited to, greeting applicants, giving them the interview questions and materials, giving them directions, and conducting them to the interview room at the time scheduled for each person's interview. Witkowiak greeted applicants Lavender, Buck, Preuss, Peters, Dynes, Arndt and Handy when he or she arrived, retrieved documents they brought for consideration in the application process, told them to leave all other documents outside, gave them the interview questions and note paper, allowed them time to make notes, and permitted them to take only the interview questions and their notes into the interview room with the panel. Witkowiak asserts that she treated Ms. Schumer in the same manner.

12. Schumer was the first person interviewed. Whether she was told not to do so or not, she entered the interview room with the position description for the subject positions in her possession and was allowed by the panel to use the position description to aid her in her answers during the interview process. No other applicant was permitted to take any document other than the interview questions and his or her handwritten notes into the interview room. No other applicant used a position description during the interview. Possession of the position description was of some advantage to Schumer relative to the other applicants.⁴

13. After the conclusion of the final interview, Faust asked Witkowiak if all applicants could have used the position description during the interview. Witkowiak incorrectly reported that all applicants had the choice to use a position description in the interview and, therefore, it was not inappropriate for Schumer to have relied on it. No one on behalf of Respondent took any other action with respect to Schumer's use of the position description.

⁴ The Commission has modified the last sentence in this finding to be consistent with our view of the degree of advantage conferred by the position description.

14. At the conclusion of the interviews, the panel placed six candidates (Preuss, Lavender, Schumer, Buck Arndt and Peters), in the highest of the three categories, “for final consideration.” The panel reached a consensus as to the top three candidates (Preuss, Lavender and Schumer)⁵ among the six, but agreed to check references for four (Preuss, Lavender, Schumer and Buck) of the six and agreed to recommend for hire only those with positive references. Finally, the panel placed Dynes and Handy into the middle category of “no further consideration at this time.”

15. The interview panel conducted the reference checks by dividing up the task. The panel used a form for conducting reference checks with the following substantive questions:

1. Was attendance and punctuality adequate?
2. Did the employee respond positively to constructive criticism and supervision?
3. Were there any disciplinary problems encountered?
4. Has the person demonstrated positive work relationships with co-workers, supervisors, and peers?
5. Did the employee display positive leadership skills?
6. Were you satisfied with the employee’s work performance?
7. Would you recommend the re-hire of this person?

The questions are essentially the same as used to check references for Psychiatric Care Technician candidates. Unless otherwise noted below, all persons contacted for providing a reference were initially told the reason for the contact and then asked the seven listed questions but no others. The person performing the reference check made a determination as to whether the answer to a specific question was “positive” or “negative.” The panel as a whole reviewed each reference check when completed and determined whether the reference check was “positive” or “negative” in whole or in part. The panel did not have a fixed standard as to when it considered a reference “negative” as a whole.

16. The reference checks for Preuss were positive. Preuss was ultimately offered one of the disputed positions, but declined to accept it.⁶

17. Panelists Faust and Thomas checked Lavender’s references. Faust relied upon some references that had been supplied for Lavender at the time he was initially hired at Sand Ridge in 2007 because the questions were essentially the same, and the people providing the references had no further employment history with Lavender after 2007. Faust made the

⁵ The Commission has added this list of three to more completely reflect the record, and has reordered the other lists for the sake of consistency.

⁶ The interview and reference materials for Preuss are not in evidence.

decision after consulting with the panel's supervisor at Human Resources and did not do so to influence the outcome of the reference check process. All of the references from Lavender's prior employment were positive. Thomas contacted Lavender's current supervisor at Sand Ridge, Sam Murphy, on July 1, 2008. The reference from Murphy was positive. The panel recommended him for promotion into one of the disputed positions.

18. Faust conducted the reference checks for Schumer and only contacted persons Schumer had named as references. One reference was provided by Campbell, Director of Human Resources, on July 1, 2008. Two references were from persons who supervised Schumer in jobs outside state service that were secondary to the position she held in Human Resources. Those two references were taken July 8, 2008. All references were positive and the panel recommended Schumer for hire into one of the disputed positions.

19. Thomas conducted a reference check for Appellant Buck on July 1, 2008, with Captain Carrie Trepanier. Trepanier was Buck's direct supervisor and Buck had identified her as a reference. Second shift relief captain Nick Baldwin was also present during Thomas' conversation with Trepanier. Captain Baldwin periodically supervised Buck, and Thomas reasonably believed Baldwin to be a credible source for information as to Buck's work performance. In her response to question 1, Trepanier provided information from Respondent's records that in 2008 Buck had used a total of 63.25 hours of the 70.24 hours of sick leave she had earned during the same period. She stated, although Thomas did not write it down, that these absences were excused by a physician and she did not offer an opinion whether the answer to question 1 would be "adequate" or "inadequate." All of Buck's absences during this period qualified as family and medical leave, so were excused.⁷ Thomas concluded that Buck's attendance was "inadequate." For question 2, Trepanier stated that she had no difficulties with Buck, but other supervisors had told her otherwise. Trepanier intended for this comment to reflect negatively on Buck. Thomas wrote down a negative comment and marked the answer "no." Trepanier answered question 3 favorably. Trepanier made both positive and negative comments in response to questions 4 and 5. Thomas considered Trepanier's comments to warrant a negative reference for question 5, but he marked question 4 as a positive response.⁸ As to question 7, Thomas asked if Trepanier would recommend that Buck be employed as a Psychiatric Care Supervisor rather than whether Trepanier would re-hire Buck into his current position of Correctional Officer. Trepanier responded to Thomas's question negatively. Trepanier referred to an incident of which she had no personal knowledge but believed that Captain Nick Baldwin had personal knowledge. Thomas asked Baldwin "if he had anything negative about Buck," but did so only to draw Baldwin's attention to the incident referred to by Trepanier. Baldwin responded that Director Lloyd Sinclair had held a meeting with Buck to discuss her communication style. This information was included in the reference report and Captain Baldwin was listed as a reference on the same form. Thomas

⁷ The Commission has added this sentence to the proposed decision to more accurately reflect the record.

⁸ The Commission has modified this sentence in the proposed decision to more accurately reflect the record.

acted in good faith when he asked the reference questions and wrote down the responses. The panel reached the conclusion that Appellant Buck's reference check was negative.⁹

20. The checks for Peters were negative. Peters was given no further consideration.¹⁰

21. Thomas conducted the reference check for Appellant Arndt on July 18, 2008. The delay of more than two weeks was solely because Preuss had declined the job offer and Buck had been dropped from the top group due to negative references. Trepanier was Arndt's immediate supervisor and Arndt had listed her as a reference, but she was unavailable on July 18. Captain Baldwin was also a reference designated by Arndt and was accessible. However, Thomas, instead, contacted Captain John Roewer because Thomas believed Roewer was likely to be able to give a credible reference. Roewer provided the reference and expressed no reservation in being able to do so. Thomas asked the first six questions as written, but asked whether Roewer would recommend Arndt be appointed to the Psychiatric Care Supervisor position as the seventh question instead of asking whether he would recommend re-hiring her in her Correctional Sergeant position. Roewer's response to question 1 was that Arndt's attendance was not adequate because she had a zero balance in her leave account and had received an attendance warning letter. He answered question 2 by mentioning that Arndt was not always "consistent" with her Captains and that she had not communicated well in one instance. He stated that when any issue concerning the way she performed her job was discussed with her, it did not occur again. Roewer believed his answer was a positive recommendation, but Thomas interpreted it to be negative. In response to question 3, Roewer stated Arndt did not have any disciplinary problems. Regarding question 4, he said that Arndt had difficulty communicating with some of her Captains and with some of her fellow staff. Roewer also intended that his answer to question 4 be a positive recommendation, but Thomas considered it to be negative. Roewer answered question 5 about leadership skills by saying she sometimes had difficulty getting along with staff and mentioned again that her style of communication sometimes made it difficult for her to express herself well. He described Arndt as an average employee when responding to question 6 about work performance, which Thomas correctly viewed as a positive response. Roewer's answer to question 7 was that he would not recommend Arndt to be a Psychiatric Care Supervisor. Had Thomas asked the question correctly, Roewer would have recommended that Arndt be rehired as a Correctional Sergeant. Thomas incorrectly interpreted Roewer's answer for questions 2, 4, and 5 as negative responses. Thomas acted reasonably and in good faith when selecting Roewer, in that he believed Roewer was a knowledgeable and neutral source of information. He acted reasonably when he concluded that Arndt had failed the reference checks. Even though there

⁹ The Commission has added the last two sentences to the proposed decision to describe Thomas' motivation and the panel's conclusion.

¹⁰ The interview and reference materials for Peters are not in evidence.

were potential errors in Roewer's responses, Thomas correctly viewed Roewer's overall reference as a negative recommendation. Even if Thomas had correctly phrased question 7, Roewer's overall reference for Arndt would have been negative. If the panel had disqualified Schumer for having the benefit of the relevant position description during the interview, and consequently if Thomas had obtained the reference for Arndt on July 1 from Trepanier, the overall reference would have been positive.¹¹

22. Once the panel concluded that Arndt had failed her reference check, they went ahead and conducted reference checks for Handy and Dynes who had been rated in the middle category of "no further consideration at this time."

23. Thomas conducted the reference check for Dynes on July 18, 2008, by talking to Ted Schwartz, one of Dynes' former supervisors at the Mendota Mental Health Institution. Thomas again phrased question 7 by asking whether the supervisor would recommend hiring Dynes as a Psychiatric Care Supervisor rather than whether he would rehire Dynes in his current position. The supervisor responded positively to questions 1 and 6 but gave negative responses to questions 2, 3, 4, 5 and 7 (as asked). In essence, he stated that Dynes had serious difficulties communicating and relating to co-workers and accepting constructive criticism, and that Dynes lacked leadership skills. He stated that Dynes had quite a few problematic relationships with co-workers and had engaged in some major yelling matches. Thomas conducted this reference check in good faith. The recommendation was consistent with Dynes' past evaluations at Mendota. Even though question 7 was asked incorrectly, Thomas and the panel correctly concluded that Dynes' reference was negative.

24. Thomas conducted the reference check for Handy by contacting his former supervisors on July 23, 2008. The responses were entirely positive and established that Handy had been honored by the Department by being selected for the agency's leadership training program, which he had completed. Leadership training was a decided advantage for the subject positions. Handy had also demonstrated the ability to supervise a large number of inmates at his former employment which was considered another advantage by the panel. Thomas conducted Handy's reference check in good faith.

25. Handy, Lavender and Schumer were ultimately recommended for hire and were hired for the three positions in dispute.

¹¹ The Commission has modified the proposed decision by deleting two references to Arndt's physical disability in this finding in order to be consistent with the discussion of *PETTAWAY V. DPI, CASE NO. 01-0013-PC (PERS. COMM., 9/23/2001)* in the Memorandum that accompanies this order. In order to more accurately reflect the record, the finding has also been modified by deleting a reference to Arndt's attendance.

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 Respondent acted illegally or abused its discretion when deciding not to select them for one of three Psychiatric Care Supervisor positions.
3. Respondent did not act illegally in not selecting any of the Appellants.
4. Respondent did not abuse its discretion when it did not select any of the Appellants.

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

ORDER¹²

This matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 6th day of August, 2010.

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

¹² 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 Health Services (Arndt, et al.)

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 Appellants' allegation that the Department of Health Services' failure to select them for one of three Psychiatric Care Supervisor positions at Sand Ridge Secure Treatment Center violated the law and/or was an abuse of discretion. This case involves allegations with respect to the interview process and the subsequent reference checks. 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.

Correct Sequence for Determining the Question of Causation

Below, the Commission addresses various arguments made by the Appellants that the hiring process employed to fill the three PC Supervisor positions was illegal or an abuse of discretion. We are satisfied that the Appellants have been able to show that some aspects of the process were not applied uniformly or fairly to at least some of the applicants. These conclusions raise a legal question of whether the effect of these improper actions on the individual Appellants must be considered when determining *whether* Respondent abused discretion/acted illegally or merely as an element of deciding if the Appellants are entitled to relief as a consequence of the abuse of discretion/illegal action.

The distinction is apparent when comparing the analysis in two cases, *MATAKAS V. DOC*, CASE NO. 99-0088-PC (PERS. COMM., 4/19/2000) and *ROSENBAUER V. UW-MILWAUKEE*, CASE NOS. 91-0071-PC-ER & 91-0086-PC (PERS. COMM., 9/24/1993).

In *ROSENBAUER* the issue was whether the "failure or refusal to select appellant for the position" was illegal or an abuse of discretion. The sole person who conducted interviews, and made the decision to hire, had no set interview questions. The interviews were extremely brief and allowed the interviewer to review the candidate's resume and the candidate to review the position description. The interviewer gave the successful candidate an opportunity to supplement the information on his resume, but did not give Rosenbauer the same opportunity. The Commission found there was no abuse of discretion in having just one interviewer, but that the selection criteria were not uniformly applied when the appellant "did not have the same or essentially the same opportunity to present her qualifications as did the person selected." With respect to the issue of remedy, the Commission held:

The appropriate remedy in this case is limited to a cease-and-desist order. . . .

An individual who prevails in his/her appeal would be entitled to appointment of the next available comparable position but only if he/she shows that he/she would have been hired in the contested position if the illegality or abuse of

discretion had not occurred. THORNTON v. DNR, 88-0089-PC (11/15/89). Ms. Rosenbauer is not entitled to this form of relief because she did not show she was more qualified for the position than the person selected. (Footnote omitted.)

The question of whether the difference in the application of the selection criteria had an effect on the decision not to select Rosenbauer was not addressed until the Commission had already determined that there was an abuse of discretion.

The effect on an appeal's bottom line was considered at an earlier point in the analysis employed in MATAKAS. There, the question was again one of: "Whether the respondent committed an illegal act or an abuse of discretion in not appointing the appellant." Appellant Matakas had been ranked first after the interviews. The successful candidate (RR), because of an arithmetic error, had been ranked #2 even though correct addition would have placed him as #5. Several years earlier, Matakas had been terminated from a position in the same class during his probationary period because of misconduct, and the practice was to not rehire top-ranked candidates if the candidate had previously been terminated while employed:

It is undisputed that respondent incorrectly tallied the score for candidate RR. The result of that error was to rank RR as the candidate with the second highest number of interview points rather than the fifth highest. However, the relative scoring of the top 5 candidates was not the final decision here and the conclusion that RR should have been ranked #5 by the panel instead of #2 does not mean that respondent abused its discretion when it decided not to select the appellant for the vacancy.

Given the testimony of Warden Krenke to the effect that TCI was simply not going to hire appellant for a SO2 position given appellant's previous history at TCI, appellant has failed to show that absent the inaccurate ranking of RR, appellant would have been hired for the vacancy.

The causation question was applied earlier in MATAKAS than in ROSENBAUER. As long as the employing agency had consistently refused rehiring anyone who failed to pass probation when previously employed in the same class, the addition error that affected the ranking of the successful candidate was essentially irrelevant to the determination of whether the agency had abused its discretion in not selecting Matakas. In other words, there could have been an abuse of discretion determination as to the candidate who was ranked #3 but who should have been ranked ahead of RR in the absence of the arithmetic error.

We decline to follow ROSENBAUER.¹³ The MATAKAS analysis is the more appropriate one where (as in both ROSENBAUER and MATAKAS) the question before the Commission is whether the decision *not to select the appellant* is illegal or an abuse of discretion. The focus in both cases should have been on the consequence to the appellant, rather than on the consequence to the selection process as a whole. The same is true in the present case where

¹³ The Commission has added this sentence to the proposed decision to better delineate our conclusion.

the issue is not whether it was illegal or an abuse of discretion to hire Handy, Lavender and/or Schumer, but is: “Whether the decision to not hire the three Appellants was illegal or an abuse of discretion.” For example, if DHS acted improperly by giving Schumer, Lavender and Handy an advantage not accorded to any of the) (claimthree Appellants, the action by DHS might amount to an abuse of discretion as to Appellant Dynes but not Appellant Buck, depending on how Dynes and Buck performed during their interviews and depending on the results of their reference checks. In our analysis below, we have effectively subdivided the statement of issue into two components: 1) Whether Respondent abused its discretion or acted illegally, 2) which had the effect that the individual Appellants were not selected. Only if both of these sub-issues are answered affirmatively do we reach a question of the appropriate remedy.

Irrespective of *when* the Commission, in prior decisions, has addressed the causation question in analyzing an appeal under Sec. 230.44(1)(d), Stats., we have invariably applied a “but for” standard. *JENSEN v. DPI*, CASE NO. 99-0070-PC (PERS. COMM., 8/28/2000) (“As a direct consequence of those errors and inconsistencies, Ms. Drew was hired to fill the TA vacancy. . . . The appellant established it was ‘clearly against reason and evidence’ for the respondent to conclude that Ms. Drew, rather than the appellant, was the better candidate for the vacant position.”); *ZEBELL v. DILHR*, CASE NO. 90-0017-PC (PERS. COMM., 10/4/1990) (“[A]bsent this manipulation, appellant would have been the successful candidate.”); *BLOEDOW v. DHSS*, CASE NOS. 87-0014, 72-PC-ER, 87-0086-PC (PERS. COMM., 8/24/1989) (Addition errors were inconsequential); *SCHMIDT v. DHSS*, CASE NO. 88-0131-PC (PERS. COMM., 6/4/1993); affirmed by Winnebago County Circuit Court, *SCHMIDT v. WIS. PERS. COMM.*, 93 CV 654, 4/28/94; affirmed by Court of Appeals, 94-1545, 7/19/95 (The errors would have moved Appellant Schmidt down from #4 to #5 and would not have had an effect on the rank of the successful candidate); *THORNTON v. DHR*, CASE NO. 88-0089-PC (PERS. COMM., 11/15/1989) (“[T]here is still insufficient evidence on which the Commission could conclude that the appellant would have been selected had the respondent properly ranked the five candidates. . . .”); *HARRISON v. DNR*, 99-0112-PC (PERS. COMM., 8/28/2000) (Appellant Harrison was the best qualified of all the candidates and had the best interview scores).

Accordingly, we will proceed to determine whether, but for the Respondent’s improper actions, any of the Appellants would have been selected for a PC Supervisor position.

Overview and Determination of the Relevant Facts

The three Appellants were among ten persons interviewed for three vacant Psychiatric Care Supervisor positions. Schumer was the only candidate allowed to take the relevant position description into the interview where she conspicuously referred to it. The interview panel grouped the candidates in terms of their relative rank and decided to check references for the top four. Three of those candidates were deemed to have positive references and were offered positions. Two (Schumer and Lavender) accepted but one (Preuss) declined. The fourth candidate in the top group, Appellant Buck, was deemed to have negative references so she was not offered a position. Once Buck was eliminated and once Preuss declined the offer,

Respondent conducted reference checks for Appellant Arndt and Peters. The persons contacting the references and the panel concluded that they were negative for both Arndt and

Peters so they proceeded to check references for Handy and for Appellant Dynes. The references for Handy were positive but Dynes' were viewed as negative. Schumer, Lavender and Handy were hired.

Initial grouping	Date(s) of reference checks	Results of checks	Offered position?	Hired?
<i>Top Four</i>				
Schumer	July 1 & 8	Positive	Yes	Yes
Lavender	~ July 1	Positive	Yes	Yes
Appellant Buck	~ July 1	Negative (disputed)	No	No
Preuss	~ July 1	Positive	Yes	No
<i>Rest of Category 1</i>				
Appellant Arndt	July 18	Negative (disputed)	No	No
Peters	?	Negative	No	No
<i>Category 2</i>				
Appellant Dynes	July 18	Negative (disputed)	No	No
Handy	July 23	Positive	Yes	Yes
<i>Category 3</i>				
Various	Not checked			

Allegation of Illegality

Appellants Arndt and Buck contend that information obtained during their reference checks violated the federal Family and Medical Leave Act, and/or Wisconsin's related law found in Sec. 103.10, Stats. More specifically, they suggest that negative comments made by two references about Arndt's and Buck's low leave balances arose out of absences to which those Appellants were entitled by law. The Commission lacks the authority to enforce either the state or federal laws in question. BOALTC (BEDYNEK-STUMM), DEC. NO. 31295 (WERC, 8/2005) (As an agency of limited jurisdiction as set forth in the statutes, the Commission's jurisdiction does not encompass questions of federal concern such as the Older Americans Act); PETTAWAY v. DPI, CASE NO. 01-0013-PC (PERS. COMM., 9/23/2001) (Claims of employment discrimination, including discrimination based on age, sex, disability, race, color, sexual orientation, and national origin or ancestry, arising from a civil service selection process, must be processed under the Wisconsin Fair Employment Act in Subch. III, Ch. 111, Stats., rather than as an appeal under Sec. 230.44(1)(d), Stats. The Commission also lacks authority to find that the employer's conduct violated federal law.) This result also extends to Appellant Arndt's claim that she was discriminated against based on disability.¹⁴

¹⁴ The Commission has modified this portion of the proposed decision by adding the citation to the PETTAWAY decision which serves as additional support for the preceding legal assertion. The PETTAWAY decision is also the reason the Commission has rejected the subsequent paragraph in the proposed decision and inserted this sentence.

We also address whether the reference checks done by Thomas violated the concepts expressed in Sec. 230.20(2), Stats. That subsection provides in relevant part:

(2) An appointing authority may consider only those recommendations which he or she believes provide an objective evaluation of an applicant's character, training, experience, skills or abilities as they relate to the requirements for the position.

The testimony of panel members was that the panel preferred to check references from those listed by the applicant whenever the assigned panel member believed that person to be an objective source with information of the type specified in Sec. 230.20(2), Stats. The panel used other sources if the reference source was not available at the time the reference check was conducted. If the employee had only recently arrived at Sand Ridge, the panel would check at least one credible source from the applicant's prior employment.

This aspect of the dispute focuses on Thomas' selection of Baldwin as a reference for Appellant Buck to supplement Trepanier's reference for Buck, Roewer for Appellant Arndt, and Ted Schwartz for Appellant Dynes. While we view conducting the reference check for Buck in Baldwin's presence as an imperfect procedure, we credit Thomas' testimony that he had good reason to consider Baldwin's description of Buck's employment at Sand Ridge: Trepanier had referred to Captain Baldwin when she spoke of an incident involving Buck, Baldwin was a person with more direct knowledge of the incident, Baldwin had supervised Buck, and Thomas believed Baldwin to be a knowledgeable and objective source. On this basis, we conclude that the action of obtaining reference information from Captain Baldwin did not violate the concepts specified in Sec. 230.20(2), Stats.

We credit Thomas' testimony that he selected Captain Roewer as a reference for Arndt solely because Arndt's immediate supervisor, Trepanier, was on leave on July 18 when he conducted the reference. We conclude that he reasonably believed Roewer was an objective source of the type of information specified in Sec. 230.20(2), Stats. Roewer was, in fact, both objective and knowledgeable.

Similarly, we credit Thomas' testimony that he identified Schwartz as a potential reference for Dynes because staff at Mendota Mental Health Institute had identified him as Dynes' prior supervisor. We find that Thomas reasonably believed Schwarz was an objective and knowledgeable source. We, therefore, find the disputed reference checks were not illegal.

Abuse of Discretion Allegations

Appellants have pointed to several aspects of the selection process which they allege to be an abuse of discretion. In DEPARTMENT OF CORRECTIONS (ZEILER), DEC. NO. 31107-A (WERC, 12/7/04), 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

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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.)

In reviewing hiring decisions, the Commission has further explained its application of the “abuse of discretion” standard in BOALTC (BEDYNEK-STUMM), DEC. NO. 31295-A (WERC, 9/23/05) as follows:

As a general matter, when determining whether an abuse of discretion occurred in the context of a hiring decision, the Commission considers whether the selection criteria used by the appointing authority were related to the duties and responsibilities of the position and whether the criteria were uniformly applied. ROYSTON V. DVA, CASE NO. 86-0222-PC (PERS. COMM., 5/10/88), JORGENSEN V. DOT, CASE NO. 90-0298-PC (PERS. COMM., 6/12/91). SEE ALSO, ROSENBAUER V. UW-MILWAUKEE, CASE NO. 91-0071-PC-ER & 91-0086-PC (PERS. COMM., 9/24/93).

Allegation relating to use of the position description

Appellants correctly contend that Respondent’s decision to permit Schumer to use a position description during the interview, even though the other candidates were forbidden from doing so, was an abuse of discretion because the interview procedures were not applied consistently to all of the candidates and one of the successful candidates benefited from the inconsistency. The three Appellants all credibly testified that they were prohibited from taking any documents with them into the interview room other than the notes they wrote during the period immediately before the interview. We conclude from Dynes’ testimony that Witkowiak prohibited each of the candidates other than Schumer from having access to any documents other than the interview questions after they received the interview questions and while they were making their notes immediately prior to the interviews. We find Witkowiak’s conflicting testimony incredible. It is undisputed that Schumer had the subject position description with her when she was interviewed by the panel and that she used it conspicuously throughout her interview. Thus, we conclude that no applicant other than Schumer was accorded the opportunity to use a position description in the interview. Schumer had no experience in the patient custody or patient treatment functions at Sand Ridge or elsewhere. Schumer did have significant personnel experience including participation in the administration of selection processes. She was an employee of the same department at Sand Ridge involved in administering the pre-interview process. Witkowiak was the employee of Human Resources who controlled the pre-interview process. Faust credibly testified that Witkowiak said all applicants had the option to use the position description but everyone else chose not to do so.

Witkowiak's statement to Faust cannot be squared with Appellants' description of Witkowiak's pre-interview process.

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We addressed a similar issue in DEPARTMENT OF WORKFORCE DEVELOPMENT (BAKKEN), DEC. NO. 32086-B (WERC 1/08). We concluded therein that there was an abuse of discretion when the appellant was rated negatively for having handwritten a writing sample immediately prior the interview, when all candidates other than the appellant had been shown to a computer and shown how to use it for the writing sample. Here, Schumer was allowed to use the position description and did so, while the evidence indicates that none of the other candidates had a similar opportunity. The Appellants showed that the employer abused its discretion in that regard.¹⁵

Reference check allegations

Appellants' next major contention is that there were substantial irregularities in the reference check procedure that amount to an abuse of discretion. One of these allegations is that Thomas selected individuals other than those named by each Appellant for the purpose of securing a negative reference. Securing a reference from a source known not to be an objective source is evidence of an abuse of discretion if the person from whom the reference was obtained is known to be prejudiced rather than objective. Here, there is no evidence as to why Thomas might have been motivated to undermine the Appellants' efforts to obtain one of the positions. Based upon our conclusions already set forth in the portion of this Memorandum addressing the Appellants' allegations of illegality, we find no evidence to support a finding that Thomas abused his discretion in his choice of persons to contact as references.

We turn to Appellant Dynes' more specific concerns about his reference check. His main contention is that Schwartz, Dynes' former supervisor at Mendota, gave an unduly negative reference when contacted by Thomas. We have consistently held that an agency need not look behind a negative reference if it appears reliable. In DEPARTMENT OF CORRECTIONS (PARKER), DEC. NO. 32481 (WERC 10/08), p. 10 we stated:

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

¹⁵ These last two sentences replace a portion of the proposed decision that is more appropriately addressed as part of the causation analysis.

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. [Footnote omitted.]

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In this case, Thomas reasonably believed Schwartz to be a credible source. Dynes' performance evaluations while at Mendota confirm that the negative comments were not a recent fabrication. Thomas credibly related the negative comments in that reference to the PCS position and the entire panel concurred that Dynes had failed the reference check. Difficulty in maintaining co-worker relationships is a factor that is quite relevant to a selection decision for a supervisory position.

Similarly, Appellant Buck complained that Trepanier gave her an unnecessarily negative reference and improperly referred to absences that were excused, contrary to DOC policy. Thomas acknowledged that he improperly asked Trepanier whether she would recommend Buck's hire as a Psychiatric Care Supervisor rather than whether she would recommend Buck's rehire to her Correctional Sergeant (non-supervisory) position. Thomas applied this particular reference check standard inconsistently which was an abuse of discretion. There is also testimony suggesting that irrespective of the requirements of the Family and Medical Leave Act, Respondent's policy was to not assign any negative connotation to an employee's excused family and medical leave. For purposes of our analysis, we assume this to be the case and that Appellant Buck established that all her leave during the relevant period was excused family and medical leave. Therefore, we assume that Thomas should not have concluded that Buck had any attendance problems as a Correctional Sergeant and that the reference check relating to the first question was positive. As explained below, the conclusion that there was some impropriety in terms of the reference check for Appellant Buck does not determine the ultimate question before the Commission.¹⁶

Appellant Arndt makes similar arguments relating to Thomas' action of obtaining Arndt's reference from Captain Roewer rather than from either Captain Trepanier or Captain Baldwin, both of whom had been listed by Arndt as possible references. Trepanier was unavailable on July 18 when Thomas sought the reference. Thomas might have opted to contact Baldwin, but we cannot say it was against reason and evidence for Thomas to rely on Roewer for the reference because Roewer was also very familiar with Arndt's work performance and Thomas had no reason to believe a reference check with Roewer would yield unreliable information. As a general matter, the appointing authority has the freedom to obtain performance information from sources other than those specifically listed by a candidate. We conclude that Thomas did not abuse his discretion in seeking a reference from Roewer or in concluding that it was negative.

However, there is at least one deficiency in the Roewer reference that is similar to problems with Trapanier's reference for Buck. Thomas again acknowledge that he asked Roewer whether he would recommend Arndt's hire as a PCS rather than recommend rehiring

¹⁶ The Commission has substantially revised this paragraph in the proposed decision. The revisions reflect our conclusion that Capt. Trepanier's hearing testimony was influenced by her desire to maintain an adequate working relationship with Ms. Buck.

her in her Correctional Sergeant position, a material variation from the reference check “script.” Appellant Arndt also appears to argue that Roewer improperly referred to her zero leave balance and to an attendance warning letter, but Arndt did not provide evidence that the underlying absences were excused.

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Accordingly, we conclude that Respondent abused its discretion by: 1) permitting Schumer to use the position description; 2) relying on Buck’s excused leave despite a policy to the contrary; and 3) inconsistently and inaccurately posing the final question to Trepanier regarding Buck and to Roewer regarding Arndt.¹⁷

***The Effect of the Illegality/Abuse of Discretion
on the Individual Appellants: Causation Analysis***¹⁸

Causation analysis relating to Schumer’s use of the position description

Even though the Commission has concluded that it was an abuse of discretion to make a position description available to Schumer during her interview, but not to make the same material available to the other candidates, we are still left with the question of whether this action had an effect on the results of the selection process as to the three Appellants.

Witnesses testified that Schumer referred to the document during the interview. We have compared the information on the position description with the interview questions, with the benchmark responses, and with the panelists’ notes from Schumer’s interview. For the most part, the pre-set interview questions focused more on the role of a supervisor generally, and not on the set of knowledge and skills that might be peculiar to positions classified as Psychiatric Care Supervisors. In terms of the relatively small aspect of the interview for which experience in a role comparable to that of a Psychiatric Care Technician or Correctional Officer might be relevant, there was no strong correlation between the information on the position description and the checked benchmarks on the panelists’ interview notes for Schumer. Schumer had access to the position description during her interview, which was inappropriate. However, she also had access to the same document, appropriately, during the days leading up to the interview. Any knowledge she derived during that earlier period should not be relied upon to find a causal relationship regarding her subsequent use of the document. Schumer did not testify.

The complexity of this case increases substantially because of what occurred after the interviews were completed. All three Appellants performed well enough during their interviews so that they “passed” the interview stage, but they were later rejected because of

¹⁷ The Commission has replaced language in the proposed decision corresponding to the final two paragraphs that failed to address Arndt’s allegation relating to the final reference question and that prematurely addressed questions of causation.

¹⁸ The Commission has replaced this portion of the proposed decision to more clearly and directly address the Appellants’ various allegations, to address additional aspects of causation that remain as a result of the changes made earlier in our decision, to reflect our different conclusion relating to Appellant Arndt, and to delete that portion of the Memorandum that had addressed the Commission’s remedial authority.

negative results on their reference checks. Positive reference checks were a requirement that was completely independent of the candidate's performance during his/her interview. We have already rejected Appellant Dynes' argument that his reference check was a separate abuse of discretion. As a result, he has failed to draw the necessary causal link between Schumer's

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access to the position description and Dynes' own rejection as candidate. We explain in the next section why Appellant Buck has failed to establish a similar causation connection to her own reference problem. Appellant Arndt, on the other hand, advances the unique argument that Respondent would never have obtained a negative reference from Captain Roewer for her on July 18 if Arndt had been in the group whose references were checked on July 1, because Trepanier, whom Arndt had identified as a reference, was available on July 1 whereas she was not available on July 18. This raises the question of whether, if Schumer did not have access to the position description during her interview, Arndt would have ranked high enough to have her references checked on July 1.

The record is insufficient to conclusively determine the relative ranking of the candidates at the end of the interviews. Nevertheless, we interpret the evidence to show that Schumer and Lavender were ranked by the panel closely together, both behind Preuss, but both ahead of Appellant Buck. Appellant Arndt and candidate Peters completed the "for final consideration" group. Respondent initially checked the references for the top four candidates. If, absent the position description, Schumer's rank would have dropped below hers, Appellant Arndt's theory of causation would still be intact, at least to the stage of deciding whether the record shows she would have received positive references had they been checked on July 1.

We are not satisfied that Schumer's access to the position description during the interview was enough to rank Arndt ahead of Schumer. Our interpretation of the panelists' notes that are of record is that Arndt received scores well below those of Schumer on four of the interview questions and the same score as Schumer's on the final question. Because the focus of the interview was on topics that had little overlap with the information on the position description, we do not find a causal relationship between the Respondent's impropriety in allowing Schumer to use the position description during her interview and Respondent's decision to include Schumer, but not Arndt, in the first round of reference checks. Hence, the delay in checking Arndt's references, which arguably resulted in Roewer rather than Trepanier providing a reference for Arndt, which in turn arguably resulted in a negative rather than a positive reference for Arndt, did not causally affect the Respondent's decision not to select Arndt for the PC Supervisor position.

Causation analysis relating to abuses of discretion during the reference check process

Captain Thomas incorrectly stated the final reference check question for both Trepanier (Buck's reference) and Roewer (Arndt's reference). In addition, because Trepanier improperly relied upon excused absences when describing Buck's attendance, we have assumed an abuse of discretion regarding the first question of that reference. We find that neither Buck nor Arndt have been able to draw the necessary causal connection between this misconduct and their non-selection.

We believe that as to Appellant Buck, the panel would have correctly concluded that the remainder of Trepanier's reference was negative and followed its pattern of not selecting candidates with a negative reference. Trepanier testified that even though she made some negative comments about Buck to Thomas, she intended to express positive conclusions for

many of the individual reference questions posed by Thomas. We find that this testimony arises from Trepanier's desire to maintain a stable working relationship with Buck and that it does not accurately describe the comments made by Trepanier and Baldwin to Thomas. Thomas' testimony and his handwritten notes on the reference form indicate that Trepanier and Baldwin identified a number of very legitimate concerns about Buck's work performance as it related to a Psychiatric Care Supervisor vacancy. These concerns were not a recent invention because they were referenced in Buck's two most recent performance appraisals.

Even though Thomas did not follow the script when he asked the seventh reference question, we believe that if it had been properly phrased, Trepanier still would have expressed the opinion that Buck "ruminates" and "can be difficult at times to work with." Trepanier also commented, when asked whether Buck responded positively to constructive criticism and supervision, that she "[gave i]nconsistent responses to different supervisors, does not always demonstrate willingness to make recommended changes, especially in tactful communication." She said that Buck had a positive work relationship with some co-workers, "mostly officers", but that there was a clique among the officers and that "her communication skills can be better." Even if we ignore Buck's attendance record, Thomas, along with Capt. Baldwin, made enough negative comments that were highly relevant to whether Buck should be extended an offer of employment as a Care Supervisor, that both Thomas and the interview panel would reasonably believe she would be a bad fit for the position.

Similarly, Thomas' phrasing of the final reference question during his conversation with Roewer about Appellant Arndt did not alter the bottom line for the reference. Roewer also noted that Arndt was out of leave time, had received an attendance warning letter, had communication difficulties with some of the captains and technicians and had trouble getting along with some of the same people. These comments provided an independent basis for describing the reference as negative rather than positive.

In light of the Commission's conclusions on the causation question, we must dismiss the appeal.

Dated at Madison, Wisconsin, this 6th day of August, 2010.

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