

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WANDA J. LARSON, Appellant,

vs.

**Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS, and
Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,**
Respondents.

Case 110
No. 68983
PA(dmrs)-26

Decision No. 33140

Appearances:

Wanda J. Larson, appeared on her own behalf.

Andrea L. Olmanson, Assistant Legal Counsel, Department of Corrections, 3099 East Washington Avenue, Madison, Wisconsin 53707-7925, appeared on behalf of the Department of Corrections and the Division of Merit Recruitment and Selection.

DECISION AND ORDER

Wanda J. Larson, (herein “Appellant”) filed a timely appeal of the determination that she was “not qualified” for the position of Offender Classification Specialist as a consequence of her score on a civil service examination. Appellant invoked the jurisdiction of the Wisconsin Employment Relations Commission (herein Commission) under Sec. 230.44(1)(a), Stats. The Commission designated Stanley H. Michelstetter II, a member of its staff, as Hearing Examiner. The Examiner held a hearing on June 10, 2010 and the parties made oral argument.

The Examiner issued a proposed decision on October 8, 2010. Any objections were due by October 15, 2010, but none were filed. The Commission adopts the proposed decision without any substantive changes except as indicated by footnotes.

The parties stipulated that the issue before the Commission is:

Whether Respondent’s examination (in terms of both the exam questions and scoring) for the Offender Classification Specialist classification was contrary to the civil service code, i.e. Subch II, Ch. 230, Stats., and the administrative rules established there under?

No. 33140

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

FINDINGS OF FACT

1. The Department of Corrections (Department) operates various corrections facilities around the State of Wisconsin, including without limitation, the Waupun Correctional Institute (Waupun).

2. Appellant Wanda J. Larson was hired by the Department on July 29, 1996. Her most recent position was in its Bureau of Offender Classification and Movement as “Operations Program Associate” at Waupun. She has held that position continuously since 1998. The Operations Program Associate classification is defined to include “non-professional, clerical” positions. The classification specification includes the following definition:

Positions perform complex administrative duties in support of a professional program area or areas. Positions require considerable knowledge of the program area(s) to enable the employee to work effectively and independently in a wide range of work situations under general supervision. Positions have a significant role and responsibility to make complex and independent judgments within the scope of their responsibility as a result of delegated authority. The work is governed by a variety of complex rules and regulations such as statutory language, administrative code or rules, policies, and /or procedures that are applied and often require analysis and interpretation. Positions frequently develop complex databases to maintain program information and prepare statistical data analysis or reports. Positions may, but are not required to, perform leadworker duties, including training, assigning and reviewing the work of other permanent employees.

At the time relevant to this appeal, Appellant was a second year student at Marian College seeking a bachelor’s degree in business administration. Appellant did not have an associate degree or other post-secondary education.

3. The Administrator of the Division of Merit Recruitment and Selection has delegated to the Department of Corrections the authority to conduct the examination for Offender Classification Specialist (OCS or Specialist) positions. Sometime before April 28, 2009, the Department issued an examination announcement for the position of Offender Classification Specialist, state-wide. Applicants were given a deadline of April 28, 2009, to apply and submit the examination answers. The announcement provided in relevant part as follows:

Position duties will require the incumbent to engage the inmate in case planning, to thoroughly document the outcome, and to track the inmate through the system. Recommendations made by the OCS will affect institution and community corrections operations, parole decisions, and inmate movement.

The OCS will conduct hearings which provide for due process safeguards for the inmates, concluding with a decision on custody, placement, and programming and will be responsible for ensuring public, staff, and inmate safety while effectively utilizing facility space and program resources. Incumbent will serve as necessary on committees/work-groups related to position duties.

Job Duties:

- determine custody level and institution placement by assessing, evaluating, and determining each inmate's risk relative to his/her behaviors
- determine program assignments through needs assessment in collaboration with department professionals in the medical, psychological, educational, and security fields
- interview inmates to enable face to face observation to establish professional judgment about program needs
- provide due process safeguards to inmates by holding classification hearings that conclude with a decision on custody, placement, and programming
- coordinate program referrals, program priorities, and start dates and direct the implementation of the classification decision by arranging the inmate move.

...

Job Knowledge, Skills and Abilities:

- criminal justice systems
- highly effective and professional verbal and written communication skills
- ability to work effectively and independently with little on-site supervision
- interviewing techniques and skills
- sociological and Human Services aspects of corrections
- social psychology aspect of human behavior
- dynamics of human interactions with correctional inmates, professional staff and public
- leadership principles and methods
- comprehension of security dynamics and working with special management individuals or groups
- management of physically, psychologically, or cognitively challenged inmates
- Time management and office operations
- Techniques of research, statistics and evaluation methods to effectively make independent decisions

- Impact of crime relative to the public/communities, victim and families, inmate and families
- Work force interactions, teamwork, conflict resolution
- Statutes and executive directives relative to the supervision of an individual within the institution or community

The Department directed each applicant to answer three questions relating to relevant experience, training and education. Appellant was one of 237 applicants to timely complete the examination process. Only 72 applicants passed the examination and were placed on the register of eligible candidates.

4. Prior to conducting the recruitment/examination, Respondent's Bureau of Personnel and Human Resources established benchmarks for evaluating of the answers to each of the three questions. For each question, a 9-point scale was divided into a "less than acceptable" category for 1, 2 or 3 points; an "acceptable" category for 4, 5 or 6 points; and a "more than acceptable" category for 7, 8 or 9 points. Each category included written benchmark descriptions that were typically tied to levels, relevance and duration of post-secondary education, professional work experience and/or training. All of the questions were reasonably job-related to qualifications for the position of Offender Classification Specialist. All of the benchmarks were reasonably related to the position of Offender Classification Specialist.

5. Respondent's Bureau of Personnel and Human Resources designated three teams of two people to score the examinations. Each team of two scored the responses to one of the three questions. The scorers did not receive the applicants' names.

6. Brooks Feldman, a Program Services Supervisor at the Dodge County Correctional Institute and Susan Ross, the Warden of Burke Correctional Center, scored question 1. Both rated Appellant's answer to question 1 as 2, less than acceptable. Timothy Boehrig, Social Serviced Director at Taycheedah Correctional Institution, and Danielle La Cost, scored question 2. Both rated Appellants answer to question 2 as 2, less than acceptable. Deborah Chambers and Thomas Tess scored question 3. Both rated Appellant's answer to question 3 as 4 (acceptable). All ratings were supported by the evidence.

7. Appellant has observed, but not chaired, inmate classification hearings. Upon the recommendation of her supervisor, she also completed the Department of Corrections' leadership training course.

8. Appellant's scores for the three questions were properly totaled.

9. Appellant was previously found eligible for positions in the same classification on May 14, 2007, with a score of 70 (which was the minimum to pass that exam). The benchmarks for that examination were the same as in 2009.

10. Appellant previously received a civil service score in excess of 70, (minimum to pass) for positions in the same classification on a self-scoring examination given in 2005, but was deemed to have failed the mandatory dimension of “professional” work experience.

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

CONCLUSIONS OF LAW

1. The Commission has authority to review State civil service examinations pursuant to Sec. 230.44(1)(a), Stats.

2. Appellant has the burden to establish that Respondents violated the civil service code when it failed to give Appellant a passing score on the 2009 Offender Classification Specialist examination.

3. Respondents did not violate the civil service code when determining that Appellant did not pass the examination.

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

ORDER¹

The Respondents’ action is affirmed and the appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 2nd day of December, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Terrance L. Craney /s/

Terrance L. Craney, Commissioner

¹ 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 Corrections & Division of Merit Recruitment and Selection (Larson)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Appellant appeals a decision by the Respondents awarding her a failing score on the 2009 civil service examination for the position of Offender Classification Specialist.² In an appeal under Sec. 230.44(1)(a), Stats., the Commission's role is to determine whether the examination was conducted in accordance with the Civil Service Code, Subch. II, Ch. 230, Wis. Stats.,³ and the administrative rules issued thereunder.

²This memorandum will sometimes shorten the classification title to "Specialist".

³The applicable statutes provide as follows:

230.15 Appointments, promotions, changes in classified service. (1) Subject to the restriction under s. 230.143, appointments to, and promotions in, the classified service shall be made only according to merit and fitness, which shall be ascertained so far as practicable by competitive examination

230.16 Applications and examinations. (1) (a) The administrator shall require persons applying for admission to any examination under this subchapter or under the rules of the administrator to file an application with the division a reasonable time prior to the proposed examination

- (2) Competitive examinations shall be free and open to all applicants who have fulfilled the preliminary requirements stated in the examination announcement. To assure that all applicants have a fair opportunity to compete, examinations shall be held at such times and places as, in the judgment of the administrator, most nearly meet the convenience of applicants and needs of the service.
- (3) The administrator may appoint boards of examiners of at least 2 persons for the purpose of conducting oral examinations as a part of the examination procedure for certain positions. All board members shall be well-qualified and impartial. All questions asked and answers made in any examination of applicants shall be recorded and made a part of the records of the applicants.
- (4) All examinations, including minimum training and experience requirements, for positions in the classified service shall be job-related in compliance with appropriate validation standards and shall be subject to the approval of the administrator. All relevant experience, whether paid or unpaid, shall satisfy experience requirements.
- (5) In the interest of sound personnel management, consideration of applicants and service to agencies, the administrator may set a standard for proceeding to subsequent steps in an examination, provided that all applicants are fairly treated and due notice has been given. The standard may be at or above the passing point set by the administrator for any portion of the examination. The administrator shall utilize appropriate scientific techniques and procedures in administering the selection process, in rating the results of examinations and in determining the relative ratings of the competitors

DISCUSSION

This dispute arises solely under the applicable administrative rule, adopted by the Administrator of the Division of Merit Recruitment and Selection, which is Sec. ER-MRS 6.05, Wis. Adm. Code:

- (1) The administrator shall establish criteria for evaluating applicant qualifications and shall require the same or equivalent examination for all applicants competing for eligibility on a register except as may be provided in Ch. ER-MRS 27.
- (2) Examinations may include any technique or techniques which the administrator deems appropriate to evaluate applicants.
- (3) All examinations shall be:
 - (a) Based on information from job analysis, position analysis or other equivalent information documenting actual job tasks to be performed or skills and knowledges required to perform job tasks, or both;
 - (b) Developed in such a manner as to establish the relationship between skills and knowledges required for successful performance on the test and skills and knowledges required for successful performance on the job;
 - (c) Supported by data documenting that the skills and knowledges required for successful performance on the test are related to skills and knowledges which differentiate among levels of job performance if the examination results are to be used as a basis for ranking candidates;
 - (d) Sufficiently reliable to comply with appropriate standards for test validation; and
 - (e) Objectively rated or scored.

Appellant stated at hearing that she does not dispute that exam questions and benchmarks for the Specialist exam in 2009 were job-related and were developed in a manner to establish successful performance on the job. Her only stated allegation of a violation of statute or rule is that the exam results were not “objectively scored”⁴ within the meaning of ER-MRS 6.04(3)(e).

⁴ See Appellant’s answer to Respondent’s first set of interrogatories.

Nevertheless, the Appellant's primary contention is that the experience as an Operations Program Associate in support of one or more Specialists (for purposes of this Decision we will refer to this experience as "in support of a Specialist") necessarily qualifies all similarly situated Operations Program Associates, including Appellant, to pass the disputed exam. Addressing Larson individually, Larson was assigned to support the Waupun Specialist. Her position description lists the objectives of her position as coordinating the classification hearings and offender transfer processes at Waupun. In this regard she manages a data base to insure that each offender's classification is reviewed by a Specialist at least once every twelve months as required by law. This requires that she prepare, distribute and monitor the return of monthly "recall" lists which schedule offenders for the annual review. She assists the Waupun Specialist in the pre-hearing screening process by insuring that the necessary documents are in order, scheduling hearings and maintaining records after hearings. She also revises and maintains the daily transfer lists of offenders for the Program Review Office and obtains medical, dental and other clearances before an offender is transferred. She also uses independent judgment to identify and prioritize appropriate transfer candidates. She arranges for the physical transportation of transferred offenders.

By contrast, the Specialist is responsible for administering the offender classification process, to assess risk presented by the offender during incarceration and to assign a custody level associated with correctional practices that will insure the safety of others. In this regard, he or she interviews offenders to assess their level of risk. The Specialist identifies and documents the individualized set of primary correctional programs that will reduce risk over the period of incarceration and enhance the offender's re-entry into the community. In this regard, he or she collaborates with department professionals in the medical, psychological, educational, and other fields. He or she provides due process safeguards by chairing formal classification hearings and concluding with a decision as to custody, placement and/or programming; uses case planning and management skills to plan for an offender's re-entry into society; and coordinates and schedules offender movement based upon custody level, management, program or re-entry needs of that offender which insures the most efficient use of programs.

The Commission's role in an appeal of an examination is not to develop our own questions and benchmarks. There are innumerable possibilities for both, but we are not here to decide which ones would be the very best. In *ROYAL V. DHFS & DMRS*, DEC. NO. 31884-A (WERC, 6/2007), we wrote:

The Appellant calls on the Commission to ignore the procedure and the standards applied by Respondents to all of the other applicants, to somehow develop our own minimal qualifications for the "CPSM" position and then rely on the Appellant's hearing testimony regarding his education, training, work experience and expertise to decide that he adequately qualified to be scheduled for an interview to fill the vacancy. While the Appellant may disagree with the procedure and the standards that were actually applied, his burden is to show

that they failed to satisfy the provisions of the civil service code. Absent a showing of illegality, the Commission lacks the authority to impose an alternative procedure or alternative standards. [Citation omitted.]

The question before us is of the job-relatedness of the existing questions and benchmarks. The Appellant has not attacked the questions, but she has, at least by inference, attacked the benchmarks.

The benchmarks for the first question for the more than acceptable rating reference a four-year degree in a human services field. The acceptable rating requires an associate's degree in a related field or four years' professional work in a related field or combination thereof. The less than acceptable level allows up to four points depending on how close the applicant comes to stating that he or she has an associate degree or four years of training/education or professional work experience in a related field.

The benchmarks for the second question for the more than acceptable rating emphasize that an applicant has three years of professional work experience in a related field. The applicant at this level would have independently managed a caseload, used assessment tools to generate formal reports, and would have generated, followed, modified and documented case plans. The acceptable rating requires one to three years' professional experience and/or training to use assessment tools to generate formal reports, or to generate, follow, modify and document case plans. The less than acceptable rating allows up to three points when the applicant has less than one year's experience and little or no appropriate training.

The benchmarks for the third question for the more than acceptable rating require more than three years' professional experience in a secured facility, mental health setting or hospital and that the applicant performed caseload management, monitoring and development of case plans. The acceptable rating requires at least one to three years' similar experience. The less than acceptable rating is that the applicant has less than one years' experience of the foregoing nature or the work experience has not been in a professional role.

We conclude that the benchmarks used herein are all job-related. The Specialist is a professional level position requiring independent professional social work judgment and skills in a number of its duties. The work of the Specialist requires the use of a risk assessment tool to determine offenders' risks to others. The use of that assessment tool involves a substantial degree of professional judgment. It also requires case management so that the Specialist must make intellectual determinations as to which programs are appropriate for an offender. This requires an ability to interview an offender, evaluate the offender's statements, and to understand the purpose, availability, and priorities of the Department's programs. It is a higher level responsibility than scheduling hearings. The benchmarks all emphasize the work experience which would enable one to succeed in performing the main professional tasks of the Specialist position.

Appellant had to receive an acceptable rating on all three questions by both raters to pass the exam. Appellant received a less than acceptable rating of 2 by both of the raters to both question 1 and 2. Appellant received a minimum necessary score of 4 from both raters as to question 3 for the acceptable rating. Two of the evaluators who scored Appellant's exam testified in this proceeding and explained why they gave her a rating of 2 out of 9 possible on the first and second questions. Their testimony also formed the expert judgments underlying the scoring of Appellant's exam.

Brooks Feldman testified to his evaluation of Appellant's answer to question 1. The benchmarks for question 1, in part, relate to the applicant's level of education. Appellant did not meet the education level necessary for an acceptable rating for question 1. The benchmarks alternatively provided for a level of "professional" work experience. Appellant had the length of service necessary to merit the more than acceptable level, but it was in a position that provided support to a professional level position. Feldman's rating was based on his correct conclusion that Appellant's work experience was not at the "professional" level contemplated by the question. Feldman is Program Services Supervisor at Dodge Correctional Institution. Feldman had worked in the position now known as Operations Program Associate in support of a Specialist or Specialists thirty years ago. He did not view the work of an Operations Program Associate as "professional" within the meaning of question 1.

Tim Boehrig is the Social Services Director at Taycheedah Correctional Institution. He sits in on the classification hearings conducted by Specialists and also sits on a committee to oversee the recommendations and work of the social workers. Classification Specialists regularly use a set of guidelines (referred to as an "assessment tool") in classifying offenders. Operations Program Associates also are familiar with that tool and are required to understand it, although they do not make the classification judgments. Boehrig correctly concluded that Appellant's work merely assisting the Specialist was not "professional" level work with that assessment tool and that her work merely administering the data base was not "case management" at the "professional level."

The Department has structured the offender assessment and classification responsibilities so that the Operations Program Associate performs those relatively routine clerical and organizational tasks which would otherwise have been performed by the Specialist. Testimony establishes that the Specialists tend to be focused on the intellectual tasks of the position including:

1. Chairing the classification hearings, making the decision classifying offenders using the "assessment tool",
2. Interviewing the offender and otherwise assessing offender's needs to determine the appropriate program to which the offender should be assigned,
3. Preparing a case plan for each offender and evaluating the offender's progress under that case plan.

The benchmark of “professional” level work is clearly related to the ability to successfully perform those intellectual functions. The essence of “case management” is to plan the program tailored to an offender’s specific needs and to assess the offender’s progress as it relates to the case plan.

Appellant relied upon the testimony of Specialist Fait to support her position that work of the Operations Program Associate in support of Specialists necessarily qualified them to make the foregoing judgments. Fait had a high school education, but no further relevant training when she was hired by the Department. She promoted from a clerical position to what is now known as Operations Program Associate supporting a Specialist in 1996 and served in that role for four years. She stated that during that time she performed all of the work of the Specialist, except chairing the classification hearings. The work included, but was by no means limited to, preparing for and attending the formal classification due process hearings conducted by the Specialist that are required annually by law for each offender. After Fait was promoted to Specialist she was given special training in conducting those hearings by observing four of them and then independently chairing them. There is ambiguity in this record as to whether she received further formal education during her tenure as Operations Program Associate that was considered in her selection to be a Specialist, but we assume for the purposes of decision that she did not. Fait has worked at a number of Department institutions. She served on a committee which surveyed the work of the various program associates system-wide. She testified that there is a great similarity of duties in these positions throughout the Bureau of Offender Classification and Movement. We conclude from her testimony that it is possible for an Operations Program Associate to learn to make the professional level judgments required in the Specialist position. We view Fait’s testimony as demonstrating that she is an exceptionally gifted individual as it relates to social work and it is highly likely that the Specialists she worked with might have delegated higher level responsibilities to her than would ordinarily be delegated to an Operations Program Associate. She repeatedly demonstrated professional level judgment throughout her testimony. We agree with Appellant that while it is possible that a Specialist might delegate professional level judgments to a perceptive and trusted Operations Program Associate, we don’t believe this necessarily occurs with every Operations Program Associate supporting a Specialist. There is nothing in Appellant’s exam to show that this occurred. Irrespective of Ms. Fait’s level of judgment, the standards that were relied upon when she was hired to fill a Specialist position are not of record. If those questions and benchmarks were substantially similar to what was used to rate the Appellant in 2009, the fact that Fait passed her exam roughly 10 years earlier might have some significance in the present matter. No comparisons can be drawn, however, because the questions and benchmarks that were applied to Fait are unknown.⁵

The foregoing and all of the evidence causes us to reject the Appellant’s suggestion that the rater’s scores had no reasonable basis.

⁵ The Commission added the final three sentences to the proposed decision in order to better articulate its reasoning.

We understand from Appellant's arguments and comments at hearing that Appellant also made the following arguments:

1. The 2009 exam systematically rejected persons (like the Appellant) who had lengthy experience in a social work support capacity from achieving promotion to the Offender Classification Specialist.
2. Appellant received special on-the-job training which qualifies her for the position.
3. Appellant followed the advice of the Department in furthering her education, yet she was not given credit for the educational requirements of the position.
4. The test could not have been "objectively" scored because she had previously succeeded in achieving a higher rating in previous competitive examinations for the same position.
5. The evaluation process was "subjective" versus "objective" within the meaning of ER-MRS 6.05 (3)(e).

As to the first contention, that the 2009 exam systematically rejected persons with experience in social work support like the Appellant, we note that none of the exam questions specifically sought to determine whether or not an applicant had worked in support of a Specialist. None of the benchmarks referenced experience in support of a Specialist. However, some benchmarks did include higher level experience (or a related degree) in social work or a related field. We agree that someone without any relevant education or experience other than work in support of a Specialist presumably would fail the 2009 Specialist exam. However, the Appellant's argument assumes work in support of a Specialist is the only reasonable qualification for working as a Specialist. Testimony established that this is not true. It should also be obvious that the Appellant would not have failed the Specialist exam if she had an associate's degree in a field relating to social work or even had a four-year degree in a related field to supplement her work experience at the Department of Corrections.

The evidence is insufficient to persuade us that an Operations Program Associate who made it clear that he or she had been delegated the responsibility to chair hearings, make classification decisions, interview offenders and/or make program decisions, etc., would necessarily have failed this exam. Finally, the evidence is insufficient to conclude that an applicant who had engaged in related activities, paid or unpaid, such as counseling, would necessarily have been excluded. We conclude that the exam makes reasonable job-related distinctions among those Operations Program Associates who apply.

Appellant's allegation that she received special on-the-job training which was not considered in the scoring process is without merit. The training she alleges that she received was that she had observed classification hearings. We note that Fait testified that her training

consisted of observing four classification hearings and then acting as the chair in at least one subsequent hearing. The mere fact that one observes the hearings does not indicate that one has attained the level of making “professional” level classification judgments. Rather, we conclude the observation trains one in the procedure of handling hearings. Fait’s testimony demonstrates that she made “professional” level judgments prior to her promotion to Specialist.

Appellant points out that she followed the advice she received after asking one or more of her superiors about how she could get promoted. In this regard, she took part in the Department’s leadership training program and engaged in various volunteer activities, but still failed the Specialist exam. The advice was not in the form of a promise to promote the Appellant. Even if it was, it would have no bearing on whether the 2009 Specialist exam was job-related and whether the scoring of the Appellant’s exam was reasonable. Our authority is limited to determining whether the exam questions and benchmarks were job-related and, therefore, this argument exceeds the scope our limited review under Sec. 230.44(1)(a), Stats.⁶

We address Appellant’s allegation that the results of the disputed examination could not have been objectively scored because she received a higher and successful ranking on the examinations for 2005 and 2007 for the same position. Evidence that individuals had received different exam scores on different years may relate to the reasonableness of the raters’ conclusions and/or their objectivity. We conclude that the value of the evidence is negligible if the scoring difference is, as here, insignificant. In *SUTTON V. DOC & DMRS, CASE NO. 96-0155-PC (PERS. COMM. 6/4/97)*, and again in *SAVELAND V. DHFS & DMRS, DEC. NO. 32033-A (WERC 8/07)* at p. 12 et seq., we addressed similar concerns.

In 2005, Appellant achieved a passing civil service score on one aspect of the exam, but failed a second “mandatory dimension” to that exam. She was, therefore, not certified to the register. Human Resources Specialist Walters testified that the 2005 exam was an “Objective Inventory Questionnaire.” This form of test is one in which an applicant rates himself or herself by answering multiple choice type questions about his or her background. The test is mechanically scored without verification or review by a panel of experts. Appellant views her work experience providing support to a Specialist as “professional” whereas the raters evaluating her subsequent tests did not. In any event, the “mandatory dimension” in the 2005 process was a minimum requirement that the applicant have a four-year college degree, four years’ professional experience, or a combination thereof equaling four years. Appellant was deemed not to have passed the “professional” work experience requirement even though she had had more than four years’ experience in her position at that time. As a consequence, we view the results of that overall process as the same as the examination now in dispute.

By contrast, the examinations of 2007 and 2009 were Achievement History Questionnaires in which applicants wrote an essay about their experience and the essay is evaluated by experts familiar with the job. The exam questions and the benchmarks were

⁶ The Commission has added the final sentence by moving that language from what had been footnote 5 in the proposed decision. The remainder of that footnote has been deleted because it was redundant.

essentially the same in the 2007 and 2009 exams. Appellant barely passed the 2007 examination and barely failed the 2009 exam. The scoring was similar even though there were different raters. We view the value of this specific evidence as negligible. A minor difference is to be expected.

Appellant's allegation that the test was not "objectively" scored because the exam evaluators used subjective judgment is also without merit. Section ER-MRS 6.05, Wis. Admin. Code, provides that an exam must be objectively rated or scored. The term "objectively" is used in this context to mean scored without reference to factors not related to the job. The concept of "objective" does not preclude the use of some judgment in scoring an exam. We note that Section 230.16(4), Stats, contemplates the use of job-related judgment in the examination process. A panel of experts can use benchmarks to score exams and still meet the test of "objective" evaluation. See, *RING v. DP*, DEC. NO. 79-49-PC (PERS. COMM., 11/19/1981) and *SMITH v. DMRS*, Case No. 90-0032 (PERS. COMM., 8/3/1995), explained 1/5/1996, aff'd. Dane County Circuit Court, *SMITH v. SHAW, ET AL.*, 90 CV 5059 (12/10/1996). The questions in the examination in dispute were job-related, the benchmarks were job related and created by persons other than the panel of evaluators, the applicant's indentifying information was not available to the panels, and the panels all involved qualified individuals who applied the benchmarks. Walters testified that she used statistically acceptable methods to validate this exam in order to determine whether the judgment of the evaluators tended to have a disparate impact upon protected groups.

Accordingly, we conclude that Appellant has failed to meet her burden to show that the examination was in conflict with the Civil Service Code. We, therefore, dismiss the appeal.

Dated at Madison, Wisconsin, this 2nd day of December, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Terrance L. Craney /s/

Terrance L. Craney, Commissioner