BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

JAMES JACOBSON, Appellant, v. DEPARTMENT OF ECOLOGY, Respondent.	Case No. RULE-98-0051 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and GERALD L. MORGEN, Vice Chair. The hearing was held in the Personnel Appeals Board hearing room in Olympia, Washington, on January 5, 2000. NATHAN S. FORD JR., Member, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant James Jacobson was present and was represented Tom Watson, Area Representative of the Washington Federation of State Employees. Respondent Department of Ecology was represented by Stewart A. Johnston, Assistant Attorney General.

1.3 **Nature of Appeal.** This is an appeal alleging violations of WACs 356-22-090, 356-22-180, 356-26-030, 356-26-070, and in general, Chapter 356-26-WAC regarding the recruitment process used for a vacant Environmental Specialist 5 position located in the Eastern Regional Office of the Department of Ecology.

1.4 **Citations Discussed.** WAC 358-30-170; WAC 356-22-090, WAC 356-22-180, WAC 356-26-030, WAC 356-26-070.

II. FINDINGS OF FACT

2.1 Appellant James Jacobson is an Environmental Specialist 3 a permanent employee of Respondent Department of Ecology. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal on December 1, 1998.

2.2 In August 1998, Respondent opened a recruitment bulletin for the positions of Environmental Specialist 4 and Environmental Specialist 5. Appellant was a promotional candidate.

2.3 The Environmental Specialist (ES) 5 position is the subject of this appeal. Respondent had six vacancies at the ES 5 level. Three of the vacancies were in Lacey, one was in Bellevue, one was in Yakima, and one was in Spokane.

2.4 The recruitment for the ES 5 positions closed on August 19, 1998. On September 23, 1998, Respondent requested approval from the Department of Personnel (DOP) for the use of a combined register for the ES 5 classification.

2.5 The DOP director's designee reviewed the request and reviewed the ES 5 register. The designee determined that it was in the best interest of the state to approve the use of a combined register for the vacancies in Bellevue, Yakima and Spokane. On September 24, 1998, in accordance with WAC 356-26-070(b), DOP approved the use of a combined register for the Bellevue, Yakima and Spokane vacancies.

2.6 Appellant was one of the promotional candidates referred for the ES 5 vacancy in Spokane. Because a combined register was used, the top scoring open competitive candidates were also referred for the vacancy.

2.7 The examination process included screening candidates' applications to determine if the candidates met the minimum qualifications and the special requirements for the position and scoring the candidates' experience and training portion of the applications.

2.8 Appellant and Douglas Allen, an open competitive applicant, were among the nine candidates who passed the initial screening. Their experience and training examinations were scored by DOP. Appellant received a score of 95. Mr. Allen also received a score of 95. Appellant and Mr. Allen were among the candidates referred to the agency and interviewed for the Spokane ES 5 position.

2.9 The top nine candidates were given oral interviews that were conducted by an interview panel. The interview panel scored the interviewee's answers. Appellant received scores of 22, 34, 18.5, 27, and 29.5, for a total score of 131 on the oral interview. Mr. Allen received scores of 39, 42, 40, 38.5 and 36.5, for a total score of 196. The oral interviews were held on October 21 and 22, 1998.

2.10 Tony Grover, Regional Director, was a member of the interview panel and he participated in Appellant's oral interview and in the oral interview for the other candidates. On September 14, 1998, Mr. Grover told Appellant that he would not support Appellant for the ES 5 position.

2.11 Respondent provided the ages of seven of the nine candidates for the Spokane position. When the candidates submitted their applications, all but one of the seven candidates were over 40 years of age. Appellant was 48 years old. Mr. Allen was 43 years old.

2.12 WAC 356-22-090 provides, in part:

> (1) The director of personnel, or designated representative, shall determine, by uniform standards, the appropriate examination for a register for a class and the tests, or combination of tests and relative weights to be assigned. Examinations shall be practical in nature and of such character as to determine the capacity of the applicant to perform the duties of the particular class of positions for which the applicant is competing as well as the applicant's general background and related knowledge, and shall be rated objectively. Examinations will be developed and administered in a manner that minimizes bias due to cultural differences. A passing score may be required on each test included in the examination.
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> Examinations shall normally consist of one or a combination of the following:
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> (a) A written test.
> (b) A performance test.
> (c) An oral test.
> (d) An evaluation of experience and training.
>
> . . . .

2.13 WAC 356-22-180(4) provides:

> Members of oral examining panels shall disclose each instance in which they know an applicant to the extent that they have formed a prior personal bias for or against an applicant and shall disqualify themselves without rating the applicant or biasing the remaining members.

2.14 WAC 356-26-030 describes the various employment registers and includes their composition, the method of ranking of names on the registers and the life of the registers.

2.15 WAC 356-26-070 sets forth the order in which the director of DOP will certify names from the registers. The rule states that the director will normally certify names from the registers in the following order:

> (1) Agency reduction in force register.
> (2) Service-wide reduction in force register.
> (3) Dual-agency reversion register.
> (4) Agency promotional register.
> (5) Higher education reduction in force register.
> (6) Service-wide reversion register.
> (7) Transfer register.
> (8) Voluntary demotion register.
> (9) Service-wide promotional register.
> (10) Reemployment unranked register.
> (11) Inter-system employment register.
> (12) Open competitive register.
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> However, if the director of personnel or agency designee with local list authority establish that it is in the best interest of the state to broaden the competition, agencies may request the director of personnel or agency designee to certify names combined from registers (4), (9), (11), and (12) provided:
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> (a) The written request to the director or agency designee shall be evidence of assurance that:
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> (i) Such a request will not harmfully affect utilization of affected group members who are applicants for this class.
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> (ii) If the position is within a collective bargaining unit, the exclusive representative has been provided a copy of the request.
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> (iii) That the request is in the best interest of the state and not solely intended to circumvent the policy of promotion from within the state as provided in WAC 356-30-150.
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> (b) Request for combined registers must be made on a position-by position or a class basis and prior to recruitment or referral.

III. ARGUMENTS OF THE PARTIES

3.1 Appellant argues that the Board should reconsider its September 29, 1999 order denying his Motion to Grant Appeal because he was not afforded an opportunity to reply to Respondent's response to his motion in accordance with the Civil Rules. Appellant further argues that the thrust of his appeal goes to the fairness issue, that Mr. Grover should not have taken part in his oral interview, and that Respondent's motive for requesting a combined register was not to obtain the

best qualified candidates for the position, but rather, was to circumvent the promotional candidates who were on the register for the position. Appellant contends that Respondent's actions were contrary to the spirit of the merit system rules and state policy and were biased against older promotional candidates.

3.2 Respondent argues that the agency complied with the merit system rules, that based on the best interest of the state, DOP appropriately approved the agency's request for a combined register, and that their actions did not circumvent promotional candidates. Respondent contends that promotional candidates were considered for each of the three positions included in the combined register and that with the exception of the Spokane position, promotional candidates were appointed to the positions. Respondent asserts that the ES 5 position was a new, politically sensitive position that would be performing consolidated functions and representing the agency to a wide variety of outside entities. Therefore, Respondent argues that it was in the best interest of the state for the agency to consider the most qualified candidates, regardless of whether they were open competitive or promotional candidates. Respondent contends that the agency underwent a thorough, fair recruitment process, that the request for a combined register was made by the agency and approved by DOP in good faith, and that no violation of the merit system rules occurred.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

4.2 Appellant's request for reconsideration of his Motion to Grant Appeal is denied. This appeal originally came on for hearing on August 25, 1999. At the outset of the hearing, Appellant moved for summary judgment. The Board scheduled Appellant's motion for September 20, 1999,

set a briefing schedule for the motion, and recessed the hearing. Appellant and Respondent participated in setting the briefing schedule. The briefing schedule did not include a cutoff date for Appellant to file a reply to Respondent's response. Furthermore, while the Board looks to the Civil Rules for guidance, we are not bound by their provisions.

4.3 In a hearing on appeal of an alleged rule violation, Appellant has the burden of proof. WAC 358-30-170.

4.4 Appellant has failed to meet his burden of proof. Appellant alleges that Respondent violated WAC 356-22-090 and WAC 356-22-180. These rules speak to the examination process. In this case, the examination process was conducted by the Department of Personnel, not by Respondent. In addition, Appellant alleges that Respondent violated WAC 356-26-030 and WAC 356-26-070. These rules speak to actions performed by the Department of Personnel. The Department of Personnel is not a party to this appeal.

4.5 Appellant alleges that in general, Respondent violated Chapter 356-26 WAC. The Department of Personnel conducted the examination of applicants for the ES 5 position. Appellant has failed to prove that through the actions of the Department of Personnel, Respondent violated the rules. Respondent requested a combined register which was approved by the Department of Personnel. Appellant has failed to prove that Respondent's request constituted a violation of the rules. The Department of Personnel certified names of eligibles to Respondent. Appellant has failed to prove that through the actions of the Department of Personnel, Respondent violated the rules. Respondent conducted oral interviews for the position. The oral interviews were not examinations, therefore the provisions of Chapter 356-26 WAC do not apply to the oral interviews.

4.6 Furthermore, Appellant has failed to prove that Respondent's actions circumvented promotional candidates or that the recruitment process was unfair or biased. The appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of James Jacobson is denied.

DATED this _____ day of _____ 2000.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Gerald L. Morgen, Vice Chair