STATE OF WISCONSIN PERSONNEL COMMISSION

JOHN HOVEL,

Appellant,

v.

DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 78-115-PC

DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal of the denial of the third step of a grievance wherein the appellant sought starting pay above the minimum based on his training and experience; and on reclassification from Social Worker I to Social Worker II. The matter was heard by Commissioner Edward D. Durkin on February 12, 1979. Following the issuance of a Proposed Decision on May 9, 1979, the appellant requested and was granted opportunity for oral argument before the Commission.

On June 28, 1979, the Commission heard oral arguments by the parties; and subsequently, reviewed the documentary evidence and tape recordings of the hearing, and discussed the case with the hearing examiner. The Commission issues herewith its Decision, incorporating the Findings of Fact and paragraphs 1 and 2 of the Conclusions of Law from Commissioner Durkin's Proposed Decision; but rejecting and rewriting the Opinion and paragraph 3 of the Conclusions of Law and issuing a new Order consistent with the revised Opinion. The reasons for the change are set forth in the revised opinion.

The original grievance addressed both starting pay and reclassification. However, this decision does not deal with the latter issue, as the appellant was notified shortly before the evidentiary hearing that his request for reclassification had been approved.

FINDINGS OF FACT

The Commission adopts as its Findings of Fact, the facts as set forth in the attached Proposed Opinion and Order.

OPINION

The issue before the Commission is whether or not the respondent erred in denying the appellant starting pay above the minimum and in denying the grievance in which he requested a retroactive pay adjustment to a higher starting pay.

The respondent's position in this case is that the advertisement regarding hiring above the minimum is a recruitment device pursuant to §Pers. 5.02(1)(c), WAC, and the device was in fact used in the recruitment for the position in which the appellant was hired. However, the appellant agreed to accept the position at the minimum salary of $942 per month and employment was begun at that rate for the appellant and for everyone else on his certification list. In oral argument before the Commission, the respondent asserted that hiring above minimum (HAM) is permissive and was not necessary in the Milwaukee area where appellant was to be hired, because a sufficient number of applicants could be attracted without resort to the HAM incentive. Moreover, they asserted that the appellant, having accepted the position at the minimum, could not now claim that his starting pay was incorrect.

Unquestionably, Pers. 5.02(1)(c), WAC is a recruitment device which, at the discretion of the administrator, may be used by the employing agency upon request[1] "when necessary for recruitment." If it was not necessary for recruitment in Milwaukee as the respondent avers, then the respondent should have qualified its advertisement; for example:

> "Starting pay $942 per month in Milwaukee, or $942 to $1047 in other locations, depending on prior training and experience."

Since there was no such qualification, it is a reasonable inference that any applicant, irrespective of location, could expect to be hired above the $942 per month minimum, if he or she had appropriate training and experience.

The respondent acknowledges that the HAM language was used to attract candidates but it denies that it had any obligation to live up to what the language implied. We do not agree. It is the Commission's view that once the advertisement held out these higher salaries as available, it was no longer in a position to not exercise its discretion with respect to HAM. The exercise of discretion was fait accomplis and at this point, and had to be implemented in accordance with the respondent's rules. It is clear from the evidence in this case that had the HAM rules been implemented they would have resulted in a higher than minimum starting pay for the appellant. It would be a grievous anomaly indeed if the

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[1] The Commission notes that nothing in the record indicates there was an agency request (See finding 11). However, since there is no authority other than Pers. 5.02 for inserting the HAM provision in an advertisement, we conclude that it was a recruitment device in this case.

Commission were to hold that agencies may bait unsuspecting candidates into applying by using this attractive lure, and then, after choosing the "best of the catch," be allowed to renege by claiming that the HAM language was there only to cause people to apply.

The Commission also does not agree that the agency may renege on the grounds that its hiring official was "not knowledgeable" about the provisions. In the Commission's view, the respondent had a duty to know the rules and apply them fairly. Having failed to do so, respondent had an obligation to rectify the mistake when it was brought to its attention. Having failed to do it at that time, the respondent must do so now in accordance with this Decision and Order.

In the evidentiary hearing and in oral argument, there was considerable discussion about whether the appellant inquired about HAM before or after the job offer and/or acceptance. The Commission does not find it necessary to resolve this dispute. In our view, there was no burden on the appellant to know, prior to being hired, precisely what the respondent's compensation provisions were. It is certainly evident that the appellant acted promptly once he learned there may have been a mistake. From that point, it was the agency's responsibility to make what adjustments were necessary, just as they would have done had they inadvertently paid him in excess of what he was entitled to receive. Such corrective action was taken in the case of another HAM-qualified employe and it should be done in this case as well.

CONCLUSIONS OF LAW

* * *

3. Pursuant to §Pers. 5.02(1)(c), Wis. Adm. Code, the respondent should have established appellant's starting salary above the minimum rate upon his appointment.

4. The appellant has sustained his burden of proving that the respondent erred in failing to establish his starting pay rate above the minimum.

ORDER

IT IS HEREBY ORDERED that the respondent's decision in this grievance is rejected and this matter is remanded for action consistent with this decision.

Dated: Oct. 2, 1979. STATE PERSONNEL COMMISSION

Joseph W. Wiley
Chairperson

Charlotte M. Higbee
Commissioner

JWW:AJT:jmg

9/24/79

STATE OF WISCONSIN PERSONNEL COMMISSION

JOHN HOVEL,

Appellant,

v.

THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 78-115-PC

PROPOSED OPINION AND ORDER

NATURE OF THE CASE

This is an appeal of the denial of the third step of a grievance. The grievance concerned starting above minimum pay and/or reclassification from Social Worker I to Social Worker II.

PARTIAL SETTLEMENT

At the beginning of the hearing, the respondent's attorney presented a copy of a letter to the appellant which advised him of his reclassification.

FACTS

1. In the Career Candidate Bulletin of 9/27/76, an opening for Social Worker I was listed with a provision that "starting pay would be between 942 and $1047, depending on prior training and experience." The appellant applied for the job.

2. The appellant was hired as a Social Worker I with the Bureau of Probation and Parole, effective December 13, 1976. The letter from the Bureau of Probation and Parole was dated November 19, 1976. In the letter the appellant was informed that his starting salary would be $942.00 per month.

3. In a follow-up letter of December 2, 1976, the appellant was notified by the Department of Health and Social Services that the $942.00 per month was the minimum of the pay range which was the normal amount employes usually are hired at.

4. Shortly after the appellant was hired he inquired of his immediate supervisor, Joseph Vento, if there were any possibilities of his receiving a salary increase based on his training and experience. (A-E-1.)

5. Mr. Vento informed the appellant that he knew of no way employes could have their starting pay adjusted after they accepted the job and started work. Mr. Vento also knew of no reason in the appellant's case why he qualified for hiring above the minimum. Mr. Vento did know that there were provisions for hiring above the minimum in some cases.

6. Mr. Vento was not knowledgeable about the five particular provisions for hiring above the minimum pay rate listed in the Personnel Manual, two of which were based on education.

7. The appellant had excellent grades which could qualify for one pay step over the minimum. The appellant also had two full semesters in pertinent graduate study successfully completed, each semester qualifying him for one-half step over the minimum pay rate.

8. The Wisconsin Administrative Code, Rules of Director, Bureau of Personnel, 502(1)(c), states in part: "When necessary for effective recruitment, the director may, at the request of the employing agency, give pay recognition at the time of appointment to individuals who have more than the minimum qualifications for the class or recruitment option provided ...."

9. During the recruitment process for the job the appellant was hired

for, over 340 people applied. Over 240 took the exam. Approximately 47 were certified and about 13 were hired.

10. None of those hired off of the appellant's list were hired at above the minimum pay rate.

11. Nothing in the record indicates that the employing agency requested pay recognition to be granted to provide for effective recruitment.

12. On September 9, 1977, Ms. Janis Avenoso, was hired as a Social Worker I with the Bureau of Community Corrections effective September 19, 1977. Ms. Avenoso had essentially the same educational background as the appellant. She also had 8 months part-time work experience in a related field. She was hired at one step above the minimum and was notified of that fact in the letter dated September 9, 1977.

13. On Ms. Avenoso's first pay check, she was paid at the minimum pay rate instead of the one step increase as promised her in her letter of appointment. This error was corrected with the aid of her immediate supervisor shortly after the error was made.

14. Ms. Avenoso was not on the same certified list as the appellant.

CONCLUSIONS OF LAW

1. This case is properly before the Personnel Commission under s. 230.45(1)(c), Wis. Stats.

2. The burden of proof is upon the appellant to prove that the respondent was in error when they set his starting pay at $942.00 per month, which is the minimum pay rate.

3. The appellant has failed to prove that the respondent was in error.

OPINION

The appellant in this case has excellent training and appears, from both exhibits and testimony, to have applied his education and training in his work for the Probationary and Parole Bureau. However, the portion of this appeal relating to his reclassification was agreed to by the appellant at the beginning of the hearing and therefore is no longer part of this case.

The only issue before the Commission is whether the respondent was in error by not starting the appellant above the minimum pay rate of $942 per month. There is a dispute in the record as to when the appellant first talked to his supervisor about starting above the minimum. The appellant testified that it was before he was hired. His supervisor testified that is was after. In reaching the conclusion that it was after being hired, the Commission relys on the appellant's own exhibit number 1.

While the appellant was apparently qualified by education to start at two steps above the minimum, the state did not offer that option to the appellant in order to get him to accept the job. Once the appellant started the job at the minimum pay rate, his only recourse to have his starting pay adjusted would have been to prove he was treated differently in a desperate manner by his employer.

Evidence that others within his certified list were treated better than the appellant would have to be shown. None was provided. Evidence that the state needed to offer more than the minimum to recruit was not established, and in fact, this record proves just the opposite. Hiring above the minimum pay rate can be used to find the most qualified, but

Mr. Hovel himself was a clear example of the most qualified accepting minimum starting pay.

The evidence in the record that a person was hired off a different list at one step above the minimum is not proof of unfair treatment to the appellant for a number of reasons. First, it was a different list and comparisons are not necessarily valid. More importantly, it would appear that the agency hiring the other person made a mistake in judging her experience and, in fact, hiring her above the minimum step. The appellant's exhibit 10 shows that the Personnel Administrative Officer was under the impression she would be started at the minimum pay rate.

Once notifying her and actually letting her start work, the latter information had to be recinded. This one isolated and questionable hiring above the minimum is not convincing to the Commission that the appellant was discriminated against by not being hired above the minimum. There were no other cases in the record.

Having ruled against the appellant in his request for retroactive increase in starting pay, the Hearing Examiner in this case feels some comment should be made regarding the part of the case removed from Commission jurisdiction by stipulation at the beginning of the hearing. The original grievance, step 3, asked for either the higher starting pay or reclassification. Therefore, had the respondent moved for dismissal on the grounds that the appellant had been reclassified, the Commission would have had to give strong consideration to such motion.

However, a resolution of that nature could have made the reclassification retroactive to the date of the appellant's grievance appeal. Furthermore, based on the limited record, and understanding that the

respondent did not offer evidence on the issue, there were still strong indications that the reclassification should have been effected one year sooner.

In conclusion, the Commission would hope that an excellent employe, who is an asset to the state, will not be discouraged by an appeal process that did not provide favorable results for him.

Dated: _____, 1979. State Personnel Commission

_____
Joseph W. Wiley
Commission Chairperson

_____
Edward D. Durkin
Commissioner

_____
Charlotte M. Higbee
Commissioner

EDD:skv

3/20/79