STATE OF WISCONSIN PERSONNEL COMMISSION

BARBARA PORTER,

Appellant,

v.,

DEPARTMENT OF TRANSPORTATION,

Respondent.

Case No. 78-154-PC

DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(d), Stats., from the action of the respondent, Department of Transportation, establishing appellant's salary at $4.76 per hour following her appointment as Administrative Secretary I (Ad. Sec. I). At the prehearing conference the parties agreed to attempt to reach a fact stipulation and submit the matter for decision on the merits on the basis of briefs filed by the parties. Such a stipulation was reached and is attached hereto along with four exhibits referenced in the stipulation.

FINDINGS OF FACT

The Commission adapts as its findings the Fact Stipulation filed December 7, 1978, a copy of which, along with appended exhibits, is attached hereto and incorporated by reference as if fully set forth.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over this appeal pursuant to §230.44(1)(d), Stats.

2. The burden of proof is on the appellant to show to a reasonable certainty, by the greater weight of credible evidence, (a) that the

action of the respondent was illegal or an abuse of discretion, Reinke v. Personnel Board, 53 Wis. 2d 123 (1971) or (b) that respondent is equitably estopped from asserting that respondent's action was not illegal or an abuse of discretion. Ryan v. DOR, 68 Wis. 2d 467, (1975).

3. The appellant has carried her burden of proof. She has shown that the establishment of her salary at $4.76 per per hour was an abuse of discretion.

4. The action of the respondent must be reversed.

OPINION

The Personnel Commission will take official notice of the relevant provisions of the Wis. Adm. Code and of the labor agreement between the State of Wisconsin and AFSCME Council 24, WSEU, AFL-CIO and its appropriate affiliated local(s).

It is clear that the respondent as appointing authority was acting within the purview of §230.06(1)(b), Stats. which reads:

> "An appointing authority shall: ... (b) Appoint persons to or remove persons from the classified service, discipline employes, designate their titles, assign their duties and fix their compensation, all subject to this subchapter and the rules prescribed thereunder." (emphasis provided)

Wisconsin Administrative Code, Section Pers. 5.02, Beginning Pay, in subsection (1), "Initial Rate to be Paid," provides two exceptions to the usual rule that "(a) the lowest or initial rate in the pay range shall be the rate payable to any person on first appointment to a position in the class except as otherwise provided."

The appellant's employment by the respondent Department of Transportation constituted "a first appointment to a position in the class" in that appellant had previously held positions only in the unclassified

service as an employe of the legislature. In order for an appointing authority to hire at a rate greater than the minimum, both Pers. 5.02(1)(b) and 5.02(1)(c) require the employing agency to obtain the approval of the director of the Bureau of Personnel (now administrator of the Division of Personnel) in advance of the recruitment and hiring. Subpart (c) further provides that if the purpose of the approved exemption is to give pay recognition at the time of appointment to individuals who have more than minimum qualifications for the class, the increased pay potential must be included in the recruitment information. This option was not specifically mentioned in the recruitment announcement in this case. (See Exhibit 1, Fact Stipulation.) There is no evidence in this case that evaluation of competitive market conditions established that the initial rate is determined to be below the market rate for the class, or that any other element of subpart (b) pertains. Under usual circumstances, one would have to conclude therefore, that the action of the appointing authority in hiring the appellant at the minimum ($4.670 at the time of hire) was neither illegal nor an abuse of discretion.

There are, however, unusual circumstances attendant to this case which need to be considered in determining whether the respondent's action was an abuse of discretion:

> 1. On July 18, 1978, following consultation with a Department of Transportation personnel specialist who correctly advised him of appellant's retention of her current salary level, and despite the fact that he was unsure of the appellant's classification and civil service status, one Gerald Knobeck, who had the responsibility for hiring the Administrative Secretary I in this instance, contacted the appellant and informed her that if she accepted the position with the Department of Transportation her salary "would not be less than her present

salary." (Fact Stipulation, numbers 5 and 6.)

2. On July 19, 1978, Mr. Knobeck wrote the appellant a letter confirming the job offer and her acceptance of the position, making no reference to her salary. The appellant accepted the job offer in writing on July 21, 1978, to begin work on August 7, 1978. (Fact Stipulation, Exhibits 2 and 3)

3. On August 7, 1978, the appellant's first day at work, with the Department of Transportation, that agency's Bureau of Personnel learned that Mr. Knobeck had erroneously processed the appointment as a transfer (in contravention of Pers. 15.01). The payroll clerk in the appellant's unit was directed to advise the appellant that a mistake had been made and that the transaction would be treated as an original appointment to the classified service with a starting salary of $4.760 per hour. (Fact Stipulation 8)

4. On August 14, 1979, Mr. Knobeck returned from vacation. Ten days later, over a month after appellant had accepted the job offer, Mr. Knobeck wrote appellant a memo explaining that he had not mentioned salary in his letter (of July 19, 1978) offering her the position "... based on the fact that the salary had not been officially established. I anticipated that the salary level would be determined when you arrived." However Mr. Knobeck confirms that he had been under the impression following his July 17 or 18, 1978, conversation with the Department of Transportation personnel specialist, that appellant would either transfer laterally at her present salary or at the minimum for the Administrative Secretary I, whichever was greater. (Stipulation of Facts, Exhibit 4)

Respondent's brief takes the position that the appellant is being compensated in accordance with the civil service statutes and the rules of the administrator, citing Sec. 16.415(1), Stats. (Ch. 196, Laws of 1977, published Feb. 15, 1978) to the effect that "Each appointing authority must certify that each classified employe on the agency's payroll was appointed as provided by law and that the 'pay is in accordance with the law, compensation plan and rules of the administrator then in effect' before any disbursement of compensation may be made by the secretary of administration."

Appellant contends that because she was told by the person with the

authority to do the hiring that she would be employed at either her previous rate or the minimum rate, whichever was higher, the employer should be bound by the verbal agreement. Respondent quotes State v. Industrial Commission (1947) 250 Wis. 140, 26 N.W. 2d 273, in which the Wis. Supreme Court stated on p.143 "By notice of the civil-service act no person can become an employee of the state except in accordance with the provisions of that act."

The respondent's partial quotation concerning the making of a contract of employment is both incomplete and taken out of context. That case involved an Industrial Commission award of (workmen's) compensation for disability resulting from tuberculosis contracted while claimaint was a student nurse in clinical training at the University of Wisconsin General Hospital. The circuit court for Dane County set aside the award on the ground that the claimant was not an employe of the state and that her relationship to the state was that of a student in an educational institution provided by the state. In affirming the circuit court decision, Chief Justice Rosenberry wrote:

> "By these statutory provisions the state has provided how one may become an employee of the state, which requires, in order for a valid appointment to be made, full compliance with the provisions of the civil-service law. These statutory provisions leave no room for a person to become an employee of the state under an implied contract of hire. There was no attempt made to comply with the civil-service act.
>
> The state having prescribed with exactness how one may become an employee and prohibited employment except on compliance with the requirements of the statute, even if the services were of value and were accepted by the state, the person rendering them does not become an employee. Under the act one appointed contrary to its provisions may have a claim against the officer appointing him but he has none against the state.

* * *

> It is apparent that this statute was enacted for the purpose of preventing claims from arising against the state where its representative might have inadvertently accepted some service beneficial to the state." State v. V.I.C., supra, pp. 144-5.

What we are dealing with here is not a case of implied contract based on the respondent agency inadvertently accepting the appellant's services. As pointed out in respondent's brief, the appellant responded to a civil service announcement which resulted in her being placed on an employment register, from which the position in the respondent agency was filled. The one remaining factor in an otherwise proper civil serivce procedure was the appointing authority's oral commitment to the appellant that she would be compensated at a higher rate of pay than the minimum, in apparent violation of the compensation plan and rules of the administrator then in effect.

It is the decision of the Personnel Commission that, as a result of the appointing authority's conduct, on which the appellant relied in accepting the respondent's job offer, the respondent, DOT, is equitably estopped from relying on §16.415(1) Stats. as justification for compensating the appellant at the minimum rate of pay.

Equitable estoppel may be defined as the effect of voluntary conduct of a party whereby he or she is precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct. American Bank and Trust Co. v. Trinity Universal Insurance Co., 205 So. 2nd 35, 40; 251 La. 445. The person who in good faith relied on that conduct acquires some corresponding right, either of contract or remedy. Kind v. Slaton, Mo. App., 409 S.W. 2d 253, 257.

"'Equitable estoppal' stands for the precepts of common honesty, clear fairness, and good conscience. United States v. Certain Parcels of Land, D. C. 131 F. Supp. 65. Stated in another way, estoppel 'is founded in natural justice' and ' is a principle of good morals as well as law.' Gregg v. Von Phyl, 1 Wall 274, 281, 17 L. Ed. 536." Fansteel Metallurgical Corp. v. U.S., 172 F. Suppl 268, 271, 145 Ct. Cl. 496.

"Equitable estoppel" in the modern sense arises from the conduct of a party, including his spoken or written words, his positive acts, his silence or negative omission to do anything. Its foundation is justice and good conscience, and its object is to prevent unconscientious and inequitable assertion or enforcement of claims which might have existed or been unenforceable by other rules of law unless prevented by estoppel. Its practical effect is to create and vest opposing rights in the party who obtains the benefit of the estoppel. Thomas v. Comden Trust Co., 175 A 2d 355, 359, 59 N.J. Super. 142.

The principles set forth in Thomas supra, are demonstrable in the instant case. The appointing authority's oral representation on July 18, 1979 followed by his "silence or negative omission" regarding starting salary in his letter of July 19, 1978, confirming the offer and acceptance of the position by the appellant, and finally his failure to advise the appellant to the contrary during the intervening 3 weeks, taken as a whole establish a course of conduct under which it would be unconscionable and inequitable to permit respondent's assertion of the statute as justification for denial of appellant's claim.

As the Wisconsin Supreme Court pointed out in Surity Savings and Loan Association v. State, 54 Wis. 2d 438, at p. 445, "Estoppel is rarely

applied against a government or one of its agencies, especially when it is seeking to exercise its police power" (which is not the case here). The acts of the state agency must be proved by clear and distinct evidence and must amount to a fraud or a manifest abuse of discretion, and the injured party must have acted honestly and in good faith reliance on the conduct of the department.

There is no evidence here disputing that the appellant acted honestly and in good faith reliance on the appointing authority's conduct, nor that this authority's action amounted to actual fraud. 28 Am. Jur 2d, Estoppel Sec. 43, "Fraud or bad faith, concealment," pp.649-651, points out that "In many instances it is necessary to expand the terms 'fraud' or 'fraudulent' to situations which are more accurately described as 'unconscionable' or 'inequitable.' Neither actual fraud nor bad faith is generally considered an essential element. But there must be either actual fraud involving an intention to deceive or constructive fraud resulting from gross negligence or from admissions, declarations, or conduct intended or calculated, or such as might reasonably be expected to influence the conduct of the other party (emphasis provided), and which have so misled him to his prejudice that it would work a fraud to allow the true state of facts to be proved."

It is not always necessary that a fraudulent purpose be present at the inception of the transaction. "The fraud may, and frequently does, consist in the subsequent attempt to controvert the representation and to get rid of its effects, and thus injure the one who relied on it." Ibid, p. 651 (See also: Markese v. Ellis, 11 Ohio App. 2d 160 229 N.E. 2d 70.

In the case at hand, the facts are such that constructive fraud

could be imputed to the respondent, bringing the case within the perameters of Surety, supra. As to the alternative requirement of "a manifest abuse of discretion," "an accurate, exhaustive definition of the phrase ... would be difficult, each case being determined with its own peculiar fact ... the decision of what is just and proper under the circumstances ..." Root v. Bingham, 128 N.W. 132, 133, 20 S.D. 118. There is abuse of discretion by public officials where power or right to act in an official capacity is unreasonably exercised. Caras v. Delaware Liquor Commissioner, 90 A 2d 492, 494. It is not merely an error of judgment, but if, in reaching a conclusion, the law is overridden or misapplied, or the judgment is manifestly unreasonable or the result partiality, prejudice, bias or ill will, as shown by the evidence or the record, it is an abuse of discretion. Com. ex rel McQuiddy v. McQuiddy, 58 A 2d 102, 104.

In the instant case, the abuse of discretion lies in the appointing authority's misapplication of the law in advising the appellant that, if she accepted the position with the Department of Transportation, her salary would not be less than her present salary. Although the appointing authority was not sure of the appellant's classification nor of her status within the civil service at that time, he made no further attempt to clarify the facts and to verify the appropriateness of his salary offer before appellant reported for work. Seventeen days thereafter he wrote her a memo explaining that he did not mention salary in the letter offering appellant the position "based on the fact that the salary had not been officially established" and that it "would be determined when you arrived." This action was no mere mistake or error in judgment; this was "manifestly unreasonable conduct," evincing a rather cavalier

disregard for sound personnel procedure, clearly an abuse of discretion in making a salary commitment without full knowledge of all the facts, which were readily at his disposal. Ryan v. DOR, 68 Wis. 2d 467 is a 1975 Wisconsin case citing Surety Savings and Loan supra, p. 471, in support of the general proposition that a government or one of its agency is not subject to estoppel to the same extent as an individual. Justice Beilfuss went on to say "as stated in Monahan v. Dept. of Taxation (1963), 22 Wis. 2d 164, 169, 125 N.W. 2d 331:

> ' ... there is no estoppel in pais if the party seeking to invoke it was aware of facts which made it its duty to inquire into the matter ...'
>
> "With respect to any justifiable reliance on the part of the appellants, as stated in Monahen, supra, p. 168, 'the right to assert estoppel in pais does not arise unless the party asserting it has acted with due diligence.'"
>
> "In the instant case, the appellant's attorney admitted being fully aware, at all relevant times, of the pertinent filing deadlines. Yet even after his second conversation with the woman at the (Wisconsin Tax Appeal) Commission, at which time he learned that with only one day left in the filing period the petition still had not been filed, he made no attempt to go to Madison to get the petition and did not file a copy of the petition with the clerk of courts until about five days later, after the filing period had expried. In view of the attorney's knowledge of the deadline and the fact that the petition had not been filed, it can hardly be said that he acted with due diligence or that he was justified in relying upon the woman's original representation."

In the Ryan case the court held that the appellants had failed to make an adequate showing of facts sufficient to create an estoppel. In the instant case, the facts are diametrically opposed to those in Ryan. Here the appellant, a secretary, raised the issue of the transferability of her benefits in the course of her interview with the respondent agency. The department's personnel specialist provided the appointing

authority with the correct interpretation of the applicable administrative rules. The appointing authority, apparently without seeking any further information about the appellant's classification or civil service status, nevertheless offered the appellant the position at no less than her present salary. Not only was the appellant justified in relying upon the appointing authority's original representation, especially since the issue of salary was not raised in the letter of confirmation which followed, but also it was the appointing authority who failed to exercise due diligence by his failure to ascertain the appellant's status before making a salary commitment. See also Brown v. Richardson 395 F. Supp. 185 (1975), W.D., Pa. which contains, on pp. 189-192, a comprehensive summary of the law of estoppel as asserted against an agency of the federal government. In the Brown case the court upheld the Social Security Appeals Council's finding that the claimant's reliance on the alleged agency representations was not justified. Despite statements in its pamphlet that benefit recipients need not bother counting remaining benefit days because they would be notified of the number of days remaining in any given benefit period, the Social Security Administration failed to do so. The agency conceded that the plaintiff, relying on that representation, pursued a course he would not otherwise have followed. The court held:

> "... mere detrimental reliance is insufficient to support a claim of estoppel. That reliance must have been reasonable."
>
> "'One who claims the benefits of estoppel on the ground that he has been misled by the representations of another must not have been mislead by his own lack of reasonable care and circumspection. A lack of diligence by a party claiming on estoppel is generally fatal. If the party conducts himself with careless indifference to the means of information

> reasonably at hand or ignores highly suspicious circumstances, he may not invoke the doctrine of estoppel.' 28 Am. Jur 2d §§79-80." (p. 191)

The Social Security Administration had sent no notices to the recipient (since deceased) for more than a year prior to January 13, 1970, during which time the decedent had been hospitalized on four separate occasions. The court found (p. 192) that "A suspicious situation had thereby arisen ... the claimant has not alleged that he ever sought clarifying information from the local Social Security office, a course readily at hand, and the record does not reflect any such request for information."

Again, in the instant case, the appellant's reliance on the respondent's representations was reasonable under all the circumstances and it was the appointing authority who was "misled by his own lack of reasonable care and circumspection."

The circuit court for Dane County applied the doctrine of equitable estoppel against the state in the case of Landaal v. Personnel Board, Case No. 738-392, November 26, 1973, before the Hon. George R. Currie, Reserve Circuit Judge. (Copy attached)

Justice Currie cited three factors essential for equitable estoppel to lie, as stated in Gabriel v. Gabriel (1972), 57 Wis. 2d 434, 429:

> "'The tests for applicability of equitable estoppel as a defense derive from the definition by this court of such estoppel to be: ' . . . action or nonaction on the part of the one against whom the estoppel is asserted which induces reliance thereon by another, either in the form of action, or nonaction, to his detriment . . .' Three facts or factors must be present: (1) Action or inaction which induces (2) reliance by another (3) to his detriment.'"

As in the instant case, Landaal presented a situation wherein there was both action and inaction on the part of the state agency in failing

to correct promptly the original representation; and the petitioner acted to his detriment, as that term is understood in the law, foregoing an alternative course of action upon the inducement of another. See Landaal, supra, p. 12. In support of its determination that equitable estoppel would lie against the state the court then cites Park Bldg. Corp. v. Industrial Commission, (1959), 9 Wis. 2d 78, 87, in which the Supreme Court quoted with approval from Davis, Administrative Law Treatise Vol. 2, p. 541, Sec. 17.09. Pointing out that the subject matter of Landaal, as here, relates to the business dealings of the governmental unit, Justice Currie states that the position of the Wis. Supreme Court is clear:

> "'Quoting from 48 Harvard Law Review 1299, the court says: "If we say with Mr. Justice Holmes, 'Men must turn square corners when they deal with the government,' it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens.'" Libby, McNeill & Libby, supra, p. 560.'"

The Commission therefore determines that the action on the part of the appointing authority in misrepresenting the appellant's starting salary, was a manifest abuse of discretion, that the appellant suffered irreparable injury by honestly and in good faith acting in reliance thereon, and that the respondent is equitably estopped from asserting that the action or decision of the Department of Transportation in fixing the appellant's salary at the minimum rate was in conformance with the civil service law and the rules of the administrator.

As in Landaal, "There remains for resolution the question of for how long a period does this estoppel extend." (Landaal, supra, p. 15). The Commission, like Justice Currie, has had considerable difficulty in arriving at a determination and, after much reflection, reaches the

conclusion that neither of the precise alternatives proposed in Landaal are appropriate under all the facts and circumstances of this case. However, following the spirit of those alternatives, the Commission determines that the relief to which the appellant is entitled is the red-circling of her salary at the rate which she reasonably expected to be employed, namely $5.494 per hour, until such time as normal progression within the range for Administrative Secretary (PR 2-06) exceeds that rate of pay.

ORDER

IT IS HEREBY ORDERED that the action and decision of the respondent denying appellant compensation no lower than her previous salary is rejected and the matter is remanded to the respondent for action in accordance with this decision, pursuant to §230.44(1)(d) and (4)(c), Stats.

Dated: May 14, 1979.

STATE PERSONNEL COMMISSION

Joseph W. Wiley
Chairperson

Edward D. Durkin
Commissioner

CMH:jmg

5/30/79