STATE OF WISCONSIN | CIRCUIT COURT | DANE COUNTY

SECRETARY, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, STATE OF WISCONSIN,

Petitioner,

vs.

WISCONSIN PERSONNEL COMMISSION, STATE OF WISCONSIN,

Respondent.

OPINION

Case No. 81-CV-1635

We call attention to the fact that briefs were filed on behalf of both parties by the Attorney General, although prepared by different Assistant Attorney Generals. The Attorney General is the head of a large law office dedicated to serving the state. For a private firm by different individuals to appear on both sides of a case would be a clear violation of the Code of Professional Responsibility, EC-5-15. We see no reason why this should not apply to the Attorney General. Even if there was not a written code of professional responsibility, any firm of attorneys should know better than to appear on both sides of a case. To do so raises questions in an adversary system which destroys the appearance, at least, of the firm's integrity. While in this case no consideration was given by the Attorney General to the practice followed, it should not reoccur.

The issues of fact in this case include whether the rejection of Paul as Facilities Supervisor or Chief was the result of arbitrary and capricious action.

Donald Percy was the Secretary of the Department of Health and Social Services. Patricia Kallsen was the Administrator of the Division of Vocational Rehabilitation. The ultimate authority was the Secretary and the Administrator by delegation was the one who made the appointment to the vacant position.

Sec. 230.15 calls for appointments to be made "according to merit and fitness, which shall be ascertained so far as practicable by competitive examination." After written examinations for the position of Facilities Supervisor, there were certified five names for consideration by a panel, consisting of McClarnon, Brekke, and Biddick. They interviewed the ones certified and McClarnon and Brekke chose Weiss as their preference. Biddick chose Paul. This result was reported to Kallsen who appointed Weiss, who now holds the position.

Paul filed an appeal to the Personnel Commission which, after hearing determined that the rejection of Paul and the appointment of Weiss was an abuse of discretion. The Commission's findings of fact contain a mixture of evidentiary facts, recitals of testimony with an ultimate fact that the Department committed an abuse of discretion in not appointing Paul to the position, because: "Appellant was eminently more qualified for the position in question than the person selected. Also, the Commission found that McClarnon and Brekke had made up their minds prior to the interviews that Paul would not be selected.

We find no contention made that Weiss was not fit and qualified for the position. Nor is any contention made that Paul was not fit and qualified, nor that any of the other rejected candidates were not fit and qualified. The position of the Commission was that in its opinion Paul was more qualified than Weiss. Assuming this is true, that Paul was the most qualified, does this prevent appointment of one who is qualified, but perhaps less qualified than Paul? May not the appointing authprity exercise a discretion in the choice?

The evidence in this case relates largely to Paul's qualifications. They indeed do show his qualifications. There is no evidence that Weiss was unqualified. The only mark against him appears to be lack of experience in the Department, although he had had similar experience elsewhere. There comes to our attention what was said in State ex rel. Buell v. Frear, 146 Wis. 291, 181 NW 832 (1911): "The opinion doubtless also prevailed in the legislature that a selection from three candidates on the certified eligible list would provide a sufficient scope for the exercise of a reasonable discretion by the appointing officer in making appointments found to be qualified to perform services under the appointing officer."

The power of appointment to the position in question is the appointing authority. Sec. 230.25(2). This means the chief administrative officer of the agency. Sec. 230.03(4). It does not mean the three persons appointed to interview the applicants. Respondent does not dispute that Weiss was appointed by the proper authority and holds the position from which he cannot be ousted because of his appointment instead of Paul. Sec. 230.44(4)(d).

The appointing authority had the right to pick any of the persons certified for the interview, no matter what the recommendation of the interviewers. Weiss was chosen. This was an exercise of discretion of the appointing authority, not of the interviewers. The testimony went entirely to the alleged conduct of the interviewers and the claim that two of the interviewers were prejudiced against Paul. The respondent found that the relationship between Paul and McClarnon began deteriorating in 1977, that McClarnon's and Brekke's reasons for not considering Paul were based on pretext and they had made up their minds prior to the interviews.

There is no evidence except the speculation of some witnesses that they had made up their minds before the interviews. There is no evidence that McClarnon's refusal to transfer Paul as he requested was not justified for the reasons given--that he had a bad attitude, violated confidences and was unable to communicate. Assuming that McClarnon's and Brekke's expressed reasons for not recommending Paul--that he was moody and depressed--were pretexts and not based on merit, there is no evidence that the appointing authority, who never was asked why Weiss was appointed instead of Paul, did not consider Paul for the position. The finding of an abuse of discretion by the appointing authority is without any evidence to support it, unless one assumes that the appointment was made blindly because McClarnon and Brekke recommended it. There is no evidence on what the appointing authority acted. One must presume that the appointment was made on due consideration of all of the certified candidates. To attribute the appointment of Weiss instead of Paul to "not properly considering" Paul for the position as respondent did is to point the finger at the appointing authority with an absence of evidence that the appointing authority did not give him full consideration, even if McClarnon and Brekke did not. The appointing authority had the ultimate discretion in choosing among several qualified applicants. We find no authority that the choice must be made of the most qualified, if such Paul was.

The respondent manufactured a form of relief. Respondent ordered that Paul be given the position when next it became vacant if he is still qualified for the position. No authority is offered us for such a form of relief nor do we find any. The only provision for an appointment requires that it be only by the means provided in the statute. Sec. 230.15(3). Petitioner seeks to justify the relief granted by referring to the power of the Commission to modify the action of the agency. The only authority that petitioner had was to make the appointment to a vacancy. This is a simple act. There were only two choices to make an appointment or not. It had no authority to make an appointment for the vacancy that existed and also at the same time to appoint to the vacancy that would some time in the future occur when the appointee to the present vacancy for some reason vacated the position. To make an appointment to a future vacancy would usurp the right of the appointing authority who was in office at the time of the future vacancy to make the appointment in the manner provided by statute. The Commission by its order sought to make an appointment to a vacancy which did not exist. Nowhere in the statutes does the legislature give anyone the authority to fill vacancies which do not presently exist or to anticipate when in the future there may be a vacancy and fill the future vacancy. Nor does the statute permit the Commission to choose the candidate for a vacancy or to manufacture equitable relief which intrudes upon the power of the petitioner to choose the appointee to a vacancy when it occurs.

Respondent contends that the Commission has the power to modify the action of the petitioner. This is limited so that the Commission cannot remove or delay the appointment. Sec. 230.44(4). Were it not for that section, the Commission might remove Weiss, which respondent concedes cannot be done. When the statute, 230.44, uses the word "modify" it cannot apply to an appointment, although it could apply to cases of discipline, for instance, by modifying the discipline imposed. We cannot conceive how, in the absence of a power to remove an appointee, the Commission can possibly modify the act of appointment. To modify means to make changes. To modify the act of petitioner would be to make a change in the appointment, which the statute does not permit. The power to modify does not include making changes in an appointment, although it might well apply to other acts of petitioner, such as discipline, demotion, etc.

Even if the finding of an abuse of discretion is valid, there is no relief available to give Paul any appointment or other meaningful relief, so the finding of abuse of discretion is meaningless in the presence of Sec. 320.44(4)(d).

We conclude that the order of the Commission must be set aside, and direct the attorney for the petitioner to prepare the proper order.

Dated September 18, 1981

By the Court:

W. L. Hackman
Reserve Judge