

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 BRIAN F. SOULIER,
 Appellant,
 v.
 Secretary, DEPARTMENT OF
 INDUSTRY, LABOR AND HUMAN
 RELATIONS, and Secretary,
 DEPARTMENT OF EMPLOYMENT
 RELATIONS,
 Respondents.
 Case No. 88-0051-PC
 * * * * *

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 DECISION
 AND
 ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(b), Stats., of the denial of reclassification from Unemployment Benefits Specialist (UBS) 2 to UBS 3.

FINDINGS OF FACT

1. The appellant is employed in the classified civil service in a position classified as UBS 2 in the Unemployment Compensation (UC) Division, Department of Industry, Labor and Human Relations. He has been in the UBS 2 classification for approximately 6 years after having transferred from a Job Service Specialist 2 position.

2. UBS 2-3 is administered as a progression series. The position standard reflects that UBS 2 is the entry level and UBS 3 is the objective level. UBS 2 and 3 positions "function as adjudicators and investigate, determine, and render disputed claimant eligibility decisions."

3. By memo dated April 11, 1988 (Respondents' Exhibit 36), the DILHR personnel office informed appellant that his position would not be reclassified to UBS 3 because he was not performing satisfactorily at the UBS 3

level. This determination was based on appellant's inability to have achieved a satisfactory score on the QPI (Quality Performance Index).

4. The QPI is described in the Adjudicator Handbook, Respondents' Exhibit 31, as:

...a process for measuring the quality of eligibility investigations and determinations.

The U.S. Department of Labor (DOL) annually conducts a QPI analysis of nonmonetary determinations. Wisconsin has incorporated the Federal QPI as a means of evaluating the state's performance and as an aid in identifying areas in the initial determination process which needs improvement....

Federal funding of the Wisconsin UC program rests in part on meeting federal standards for these nonmonetary standards as determined by periodic federal audits.

5. For purposes of reclassification from UBS to UBS 3, DILHR requires the employe achieve a satisfactory score (81% or better) on 16 of 20 case files reviewed. If only 15 cases are satisfactory, the department reviews 10 more files and requires that the employe achieve a satisfactory score in at least 24 of the total of 30. About 60% of such reclassifications are granted.

6. Appellant scored satisfactorily on only 15 of 20 files reviewed. Therefore, DILHR reviewed an additional 10 files. Ultimately, 23 of the 30 were scored as passing.¹

7. The first file on which appellant received an unsatisfactory score will be referred to as the "Medinger" claim, Respondents' Exhibit 5. This case involved a claimant who had been employed by her husband's firm.

¹ DILHR changed its position on several cases before the hearing, but appellant was still one short. Of the 7 cases scored unsatisfactory, appellant challenged 4 at the hearing, and these are the only ones the Commission will address. In discussing these cases, the Commission will use pseudonyms rather than the actual names of the claimants.

Appellant's determination to deny benefits dated September 1, 1987, was based on the following rationale:

The claimant's services are not covered because she was employed by her spouse. Such work is excluded. Benefits denied.

8. DILHR rated the foregoing file as unsatisfactory because §108.04(13)(b), Stats., provides:

In the absence of fraud, the department may not apply sub. (5), (6), (7) or (10) or §108.02(15) to disqualify a claimant from receiving benefits that are chargeable to the account of the claimant's employer if the employer has failed to duly file a report required by or under this chapter in the manner and within the time prescribed by the department's rules or has elected not to question² the claimant's eligibility on the required report.

The basis for appellant's determination (claimant's employment by her spouse) is included in §108.02(15) at §108.02(15)(k) 11., and therefore should not have been issued in the absence of fraud, since the employer had not challenged the claim. Prior to issuing this determination, appellant had ascertained from the Bureau of Benefits that the employer had claimed an exclusion with regards to his spouse's wages. This information provided a foundation for fraud and, consequently, a theoretical basis for having issued a denial of the claim. However, appellant failed to document this information in the file. Appellant also had consulted with his local office manager, Dennis Reiter, who advised him under the circumstances to proceed with an excluded employment issue. Mr. Reiter did not tell him to omit the documentation from the file.

9. Appellant cited a similar case handled by a co-worker, Cynthia S. Krizenesky, UBS 3, see Appellant's Exhibit 5. However, unlike complainant's

² This provision was repealed by 1987 Wisconsin Act 38, effective September 13, 1987, but was in effect on September 4, 1987, when appellant issued this determination.

handling of the Medinger file, Ms. Krizenesky documented in the file her contacts with the Bureau of Benefits in her rationale, and included a copy of the form (DILHR-UC - 101) that reflects the claim for exclusion of the spouse's wages.

10. The second file on which appellant received an unsatisfactory score will be referred to as "Wade," Respondent's Exhibit 3. This case involved a claimant who failed to apply for a job when referred by a public employment office. The claimant stated that the reason was because the job was in Oshkosh while he lived in Crandon. Appellant's rationale for allowing benefits was that there was good cause for failure to apply because the job was located beyond a reasonable commuting distance. This file was scored unsatisfactory because appellant's rationale did not address the question of whether the employment offer was suitable.

11. Respondent DILHR's Adjudicator Handbook, Appellant's Exhibit 4, contains the following at p. 28 of the QPI Guidelines:

An adequate suitable work investigation must first establish that there was a bona fide job offer or referral. Once that is established, the investigation must address suitability. If the work is suitable, the investigation must establish if there was good cause for refusing the work or for failing to apply.

12. DILHR's Unemployment Compensation Manual, Volume 3, Part VII, Chapter 5, Respondent's Exhibit 35, includes the following:

IV. Job Offer/Failure to Apply

A. General Overview

1. Basic Elements

In the resolution of the issues of job refusals or failure to apply (when notified by the public employment office), there are four major questions which must be answered in the investigative process. They are called "basic elements." These elements are:

- 1) Was there a bona fide offer/referral?

- 2) Was the work "suitable" for the claimant?
- 3) Was there "good cause" for the refusal/failure to apply?
- 4) If "good cause" is established, is the claimant able and available for work on the general labor market? p. 5

* * *

4. Investigative Process

A successful "suitable work investigation" dictates that the adjudicator follow the "pattern" of investigation outlined below. This procedure assures an adequate and complete investigation.

Conduct investigation in accordance with the following format:

Step #1 Determine if the offer of work/referral was bona fide. IF NOT, the suitable work investigation is complete. However, still investigate any able and available issue. If the offer is bona fide, proceed to Step #2.

Step #2 Determine whether the work meets the "substantially less favorable" criteria. IF YES, the investigation is completed. However, still consider able and available. IF NO, determine whether the work was otherwise suitable.

If the work is suitable, continue to Step 3.

Step #3 Determine whether the employe had good cause for failing to apply/accept work.... p.25.

13. The third file on which appellant received an unsatisfactory score will be referred to as the "Half" case, Respondent's Exhibit 7. In that case, the claimant stated that he could not attend group registration in Antigo because he would be in Appleton seeking work. Appellant's rationale for not denying benefits was as follows:

Benefits are not denied for the week ending 4/5/87 because: the claimant is given personal good cause for not attending group registration on 11/3/87. He is available for work in this labor market. His mother knows where he will be staying while he is seeking work in the Appleton area and he is able to return within 24 hours if offered work in the Antigo area.

This file was scored as inadequate because it did not reflect that the claimant lived with his mother, or, if not, how she would know if he received an offer of work. Appellant had been informed verbally by the claimant that he lived with his mother but appellant did not explicitly document this in the file.

14. DILHR's unemployment compensation manual provides at Chapter 3, Part VIII, Section D, Respondent's Exhibit 34, as follows:

D. Exceptional Circumstances

There are special circumstances which require specific information pertaining to claimant's restrictions or personal circumstances, in addition to those specified above.

1. Indefinitely laid off claimant - temporarily absent from labor market area

When a claimant is away from his/her labor market area for more than one day (Monday-Friday), there is a presumption that the claimant is not able and available for work in the area where he/she is registered for work.

The claimant has to establish that he/she has made definite arrangements for prompt notification of any job offer and is able to return home within 24 hours.

The following information must be obtained:

- a) Dates out of area;
- b) Purpose of trip;
- c) Method of traveling (plane, car, train, etc.);
- d) Where he/she went;
- e) How claimant would be aware of any calls from employer/Job Service. Who was authorized to open his/her mail;

- f) If there is a contact person would he/she know where the claimant could be contacted.... p. 26.

15. The fourth file which DILHR scored as inadequate will be referred to as "Stein," Respondent's Exhibit 9. In this case, the claimant stated she quit her job in order to take a new job. She then was terminated by the second employer before she had been employed long enough to qualify for benefits from that employer. Pursuant to §108.04(7)(L), Stats.:

"L) Paragraph (a) [restricting benefits in the case of voluntary termination] does not apply if the department determines that the employe terminated his or her employment to accept another job in employment covered by the unemployment compensation law of any state or the federal government, and worked at least 4 weeks in the subsequent job after the week in which the terminated occurred, if the job:

1. Paid an average weekly wage equal to or greater than the employe earned in the terminated employment; or
2. Offered the same or a greater number of hours of work than those performed in the work terminated; or
3. Offered the opportunity for significantly longer term employment; or
4. Offered the opportunity to accept a position the duties of which are primarily discharged at a location significantly closer to the employe's domicile than the location of the terminated employment.

Appellant's write up of this case included the following statement by the second employer:

I offered her to work 4 nights per week, from 5 p.m. to closing or around 2 a.m.

Respondent evaluated this file as unsatisfactory because appellant did not verify with the second employer the date the offer was made and the starting date.

16. DILHR's Unemployment Compensation Manual, Volume 3, Part VII, Ch. 1, Respondents' Exhibit 32, includes the following concerning the "quit-to-take" situation involved in the foregoing file:

1) Investigation Elements

a) What new work was offered?

- (1) On what date was the work offered?
- (2) Who made the offer?
- (3) What starting date was agreed to?
- (4) When did the employe give notice of quitting?
- (5) How long did the employe work for the subsequent (take) employer?
- (6) Was the work with the subsequent employer in covered employment?

NOTE: A contact with the subsequent employer is necessary to attempt to verify items a) (1), (2), (3) and (5).... p. 54

17. Appellant's local office manager has on a number of occasions stressed the importance of adjudicators getting work out and has emphasized quantity over quality of output.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(b), Stats.
2. Appellant has the burden of proof to establish that respondents erred in denying reclassification from UBS 2 to UBS 3.
3. Appellant having failed to satisfy his burden, it must be concluded that respondents' decision to deny reclassification from UBS 2 to UBS 3 was not incorrect.

DISCUSSION

In order to prevail on this appeal, appellant must establish that DILHR erred in evaluating his performance as inadequate for reclassification to the UBS 3 level. In making this determination, DILHR reviewed a total of 30 of appellant's case files using the QPI process which

incorporates the federal QPI. Appellant has challenged the scoring of 4 of the files on which he received an unsatisfactory grade.

As to each of the 4 files in question, DILHR's position was supported by a reference to a specific provision in the statutes and/or the agency's UC Manual.

Medinger. Pursuant to §108.04(13)(b), Stats., as effective on the date of the transaction, it was improper to have raised the issue of the claimant's spousal relationship to the employer in this case in the absence of fraud. While appellant did have evidence of fraud, this was nowhere documented in the file, so it was not possible for DILHR to have known (or a federal auditor to know) there was a basis for the adjudicator to have taken administrative notice of the problem with the employer relationship.

Appellant makes the point with respect to this and other cases that the "bottom line" conclusion was correct but he merely failed to document it in the file. This argument is refuted by a number of points.

First, the QPI system itself (see Adjudicator Handbook, QPI Guidelines, p. 11, Appellant's Exhibit 4) specifically provides:

The scorer will consider only those facts which are documented in the investigation. Facts which are only implied or are referred to in the rationale but appear nowhere else in the investigation will not be considered adequately documented. Where necessary information is not presented, the scorer will assume that there was no attempt to obtain such information unless there is documentation that the party was unable to provide that information to the adjudicator.

Second, there is no reason to think that a federal auditor would take a different approach and question the auditor to determine if there was a basis for the decision that was not reflected in the file, inasmuch as the state and federal QPI process is the same.

Appellant also argues in a post-hearing brief that the Bureau of Benefits erred in not advising him to document in the case file the

information they provided him. However, there is no basis on which to conclude that it had this responsibility of advising appellant how he should write up his determination in the case file. Similarly, while appellant's supervisor advised him to deny benefits, this has nothing to do with the question of how the case was written up by appellant.

Wade. Both the Adjudicator Handbook and the UC Manual make it clear that the investigation must address the issues of bona fide offer and suitable work prior to addressing the good cause issue. It is unquestioned that this was not done.

Half. The UC Manual requires that in cases of this nature, the adjudicator must obtain information establishing "How claimant would be aware of any calls from employer/Job Service. Who was authorized to open his/her mail...." Respondents' Exhibit 34. Since appellant did not document this in the file, the department graded this file correctly. While it would be possible to draw some inference from the file ("His mother knows where he will be staying while he is seeking work in the Appleton area and he is able to return within 24 hours if offered work in the Appleton area." (Respondents' Exhibit 7)) that the claimant resided with his mother, the specific information required by the UC Manual as set forth above simply is not there.

Stein. The UC Manual requires under these circumstances ("quit to take") a contact with the subsequent employer to attempt to verify certain items, see Respondents' Exhibit 32. This was not reflected in the file. Appellant cited a training session (Appellant's Exhibit 9) where adjudicators were told that the claimant's statement would be considered more acceptable if the new employer does not recall the date the work was

offered. However, this does not relieve the adjudicator from the requirement of at least attempting to verify the point with the second employer.

Appellant argues that the criticisms of the 4 files in question constitute, in effect, "nit-picking" or "hair-splitting" suggestive of special treatment against him. However, the record is clear that the department was applying standards identical to those used by the federal government in auditing the Wisconsin UC program. While it could be argued that some of the requirements amount to "overkill" or are unduly detailed, there is no indication on this record that DILHR was singling out appellant for special treatment.

Finally, appellant brought out testimony that his supervisor placed a great deal of emphasis on quantitative output that was inconsistent with meeting the QPI. To the extent that this constitutes an attempt by appellant to show that the QPI is an unreasonable measure of UBS 3 performance under the prevailing working conditions, he falls short of making such a showing. His co-worker, Ms. Krizenesky, was able to make UBS 3, and it was uncontradicted that about 60% of reclassifications are granted.

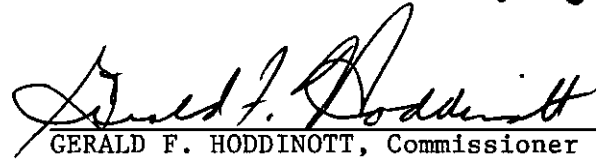
ORDER

Respondents' action denying reclassification of appellant's position from UBS 2 to UBS 3 is affirmed and this appeal is dismissed.

Dated: Jan 25, 1989 STATE PERSONNEL COMMISSION

AJT:jmf
JMF08/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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