STATE OF WISCONSIN PERSONNEL COMMISSION

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*
DIANE MESCHEFSKE, *
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Appellant, *
*
v. *
* DECISION
Secretary, DEPARTMENT OF * AND
HEALTH AND SOCIAL SERVICES, * ORDER
and Administrator, DIVISION OF*
MERIT RECRUITMENT & SELECTION,*
*
Respondents. *
*
Case No. 88-0057-PC *
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This matter is before the Commission on an appeal pursuant to 230.44(1)(a) and (d), of respondents' decision to, a) treat the appointment of appellant to a Volunteer Coordinator (PR12-03) position at Winnebago Mental Health Institute (WMHI) as a transfer rather than a promotion, and b) set the starting salary for the position at the appellant's current rate of pay ($10.734/hr.) as opposed to the higher rate previously communicated to the appellant. The parties waived a hearing and submitted a stipulation of facts and briefs for a decision on the merits.

FINDINGS OF FACT

The Commission adopts as its findings the Stipulation of Facts filed by the parties on December 5, 1988. They are as follows (the referenced attachments which are part of the stipulation are not reproduced):

1. Prior to February 1, 1987, the Program Assistant 4 classification was in pay schedule and range (PR 02-09). (See Attachment 1.)

2. Effective February 1, 1987, the Program Assistant 4 classification was changed to PR 02-10 as part of phase 1 of the Comparable Worth Plan. (See Attachment 2.)

3. The PSICM for PR 02-10 on February 1, 1987, was $9.971. (See Attachment 2.) On February 1, 1987, Diane Meschefske's (Appellant) hourly wage was $10.661. The February 1, 1987, change in the Program Assistant 4 pay range did not change Appellant's hourly wage.

4. Effective January 3, 1988, the Program Assistant 4 classification was changed to PR 02-11 as a part of phase 2 of the Comparable Worth Plan. (See Attachment 3.)

5. The January 3, 1988, change in the Program Assistant 4 pay range gave Appellant a $0.073 per hour increase in her hourly wage.

6. On January 21, 1988, the payroll office at Winnebago Mental Health Institute (WMHI) was notified of the change in the Program Assistant 4 pay range.

7. On January 28, 1988, the effected employees received notice of the change in the Program Assistant 4 pay range along with their checks.

8. At all times relevant to this appeal, the Volunteer Coordinator position was in PR 12-03. (See Attachment 1.)

9. PR 02-11 is a counterpart pay range to PR 12-03. (See Attachment 1.)

10. During January 1987, Jim O'Reilly told Appellant of his plans to retire from the Volunteer Coordinator position in January 1988.

11. Around January, 1987, Appellant asked and was told by Dolores Borreson, WMHI personnel manager, that it would be a promotion if she were to get the Volunteer Coordinator position.

12. On or about June 3, 1987, Jim O'Reilly notified Dave Goers, WMHI superintendent, of his intent to resign from the Volunteer Coordinator position. (See Attachment 4.)

13. On or about November 18, 1987, Dave Goers acknowledged Jim O'Reilly's resignation effective January 7, 1988. (See Attachment 5.)

14. On December 15, 1987, the Volunteer Coordinator (PR 12-03) position at WMHI was announced in the State Service Job Opportunities bulletin and Peggy Cox, personnel assistant in WMHI personnel office, was identified as the person to contact if there were any questions. (See Attachment 6.)

15. On December 21, 1987, the Volunteer Coordinator position was announced in the wmhi mini news. (See Attachment 7.)

16. On or about December 21, 1987, Appellant asked and was told by Peggy Cox that if she were to get the Volunteer Coordinator position, it would be a promotion for her.

17. On December 21, 1987, Appellant filled out an application for the Volunteer Coordinator position. (See Attachment 8.)

18. On or around January 5, 1988, Appellant received the Achievement History Questionnaire (AHQ) for the Volunteer Coordinator position and on or before January 19, 1988, returned the completed AHQ for the Volunteer Coordinator position.

19. On March 8, 1988, Appellant was interviewed for the Volunteer Coordinator position after which she asked and was told by Kathleen Bresser, supervisor of the Volunteer Coordinator position, that if she were to get the position, it would be a promotion.

20. On March 14, 1988, Ms. Bresser recommended to Connie Lee, the Clinical Director, that Appellant be hired for the Volunteer Coordinator position (See Attachment 9.)

21. On or about March 23, 1988, Dave Goers sent Appellant a letter confirming her promotion to the Volunteer Coordinator position, effective April 10, 1988, informing her that her new salary would be $11.808 per hour, and that she would be required to serve a 6-month probationary period. (See Attachment 10.)

22. On March 24, 1988, Appellant signed the Position Description for the Volunteer Coordinator position. (See Attachment 11.)

23. On March 29, 1988, Dave Goers signed the Certification Request/ Action. (See Attachment 12.)

24. At all relevant times prior to April 10, 1988, Appellant was classified as a Program Assistant 4.

25. Prior to April 10, 1988, Appellant was working half time as a Program Assistant 4.

26. Appellant began the Volunteer Coordinator position on a full-time basis on April 11, 1988.

27. The Volunteer Coordinator position was always a full time position.

28. On April 12, 1988, the DHSS, Bureau of Personnel and Employment Relations (BPER), central personnel office received the certification request. (See Attachment 13.)

29. On April 15, 1988, BPER central personnel office forwarded the certification request to the BPER central payroll office. (See Attachment 14.)

30. On April 19, 1988, Abbey Vogel of BPER central payroll office telephoned Konnie Ehlert of WMHI payroll office and told her that because the Program Assistant 4 classification and the Volunteer Coordinator position were in counterpart pay ranges, the action would be a transfer and not a promotion.

31. On April 19, 1988, Konnie Ehlert informed Peggy Cox of this information.

32. On April 19, 1988, Peggy Cox advised the Appellant that the transaction would have to be considered as a transfer and not a promotion because the two classes were in counterpart pay ranges. At that same time she told Appellant that she could go back to her half-time Program Assistant 4 position if she wished.

33. On April 19, 1988, Appellant stated that she would not want to go back to the Program Assistant 4 half-time position.

34. On or about April 19, 1988, Dave Goers sent an amended letter to Appellant confirming her transfer to the Volunteer Coordinator position effective April 10, 1988 and indicating that her salary would remain at $10.734 per hour. (See Attachment 15.)

35. Appellant was not required to serve a probationary period upon her transfer to the Volunteer Coordinator position.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(a) and (d), Stats.

2. Appellant has the burden of persuasion to establish that respondents' decision to treat her appointment to the Volunteer Coordinator position as a transfer rather than a promotion was incorrect, and/or that respondents' action to set her starting salary at her previous rate of pay

as opposed to a higher rate previously communicated to her was illegal or an abuse of discretion and/or respondents' conduct gives rise to equitable estoppel.

3. Appellant has failed to sustain her burden of proof, and it is concluded that respondents' decision to treat her appointment to the Volunteer Coordinator position as a transfer was correct, that setting the starting pay for the Volunteer Coordinator position at her previous rate of pay ($10.734) was not illegal or an abuse of discretion and/or did not give rise to equitable estoppel.

DISCUSSION

The stipulated issues for the decision are as follows:

1. Whether the decision made by DMRS/or DHSS on a delegated basis to treat this transaction as a transfer rather than a promotion was correct?

2. Whether the decision made by DHSS with respect to the establishment of the starting salary was illegal or an abuse of discretion?

3. Whether there is an equitable estoppel which estops respondent(s) from treating this matter as a promotion and/or from establishing the starting salary at other than the level initially communicated to appellants.

In arriving at its decision, the Commission takes note of the Wisconsin Administrative Code, Rules of the Administrator Division of Merit Recruitment and Selection (ER-Pers). Specifically, we look at the definition of promotion §ER-Pers 1.02(27)(a) and transfer, §ER-Pers 1.02(33). ER-Pers 1.02(27)(a) defines promotion as:

> (a) The permanent appointment of an employe to a different position in a higher class than the highest position currently held in which the employe has permanent status in class;

The term "higher class" is defined in ER-Pers 1.02(8) as... "a class assigned to a higher pay range."

ER-Pers 1.02(33) defines transfer as:

> (33) "Transfer" means the permanent appointment of an employe to a different position assigned to a class having the same or counterpart pay rate or pay range as a class to which any of the employe's current positions is assigned.

Looking at these definitions and the fact situation at the time Ms. Mefscheske was appointed (April 11, 1988), the transaction (appointment) has from a strict technical standpoint been correctly identified and treated as a transfer.

The respondents argue that they had no choice (since they are bound by statute and rule) in treating either the transaction or the pay decision in any way other than as a transfer, and that they used the discretion they had available to retain appellant's current pay in the new position of Volunteer Coordinator. The appellant does not argue that the transaction and pay determination were inconsistent with the statutes or rules. Rather, appellant argues that the respondent is bound by their previous representations that the transaction was a promotion and that she would get a pay increase. Appellant states that the action is illegal or an abuse of discretion and/or gives rise to equitable estoppel.

The appellant has not provided any information to show that the action was incorrect or illegal. Legally, the respondent took the action required to make the transaction conform to the statute and the administrative rules promulgated under those statutes. The issue of whether the respondent properly exercised their discretion is addressed in the case of Taddey v. DHSS, No. 86-0156-PC, 5/5/88.

The circumstances in the Taddey case are similar to the instant case. Specifically, the appellant (Mr. Taddey) had been notified in writing that he had been appointed to the position of Teacher-Auto Detailing at $9.321

per hour. Subsequent to his beginning work in the position, but before he actually received a paycheck, the department discovered an error in setting the starting salary and reduced his pay to $8.87 per hour. In Taddey (page 5) the Commission stated the following:

> The term "abuse of discretion" has been defined as "...a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence. Lundeen v. DOA, No. 79-208-PC, 6/3/81....
>
> ...[i]t is a question of whether, on the basis of the facts and evidence presented, the decision of the appointing authority may be said to have been "clearly against reason and evidence." Harbort v. DILHR, No. 71-74-PC, 1982.

The Commission holds in this instant case, as it did in Taddey, that the action of respondent to correct appellant's starting pay, as soon as they discovered they had treated her differently and incorrectly based on the applicable statutes and rules, is clearly not against reason and the evidence. The appellant's argument, in this case, is that respondent is bound by the salary representation they made previously regardless of other requirements placed on the respondent by the statutes and the rules. No authorities are cited by appellant to support this position, and the Commission, therefore, concludes that respondent's actions did not constitute an abuse of discretion.

The crux of the issues in this case, however, is whether the respondent is equitably estopped from changing the transaction from a promotion to a transfer and from reducing appellant's starting pay in the new position. 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." Porter v. DOT, 78-154-PC, 5/14/79, aff'd, Dane

Co. Cir. Ct. 79-CV-3420, 3/24/80. The three factors or elements essential for equitable estoppel to lie are stated in Gabriel v. Gabriel, 57 Wis. 2d 424, 429, 204 N.W. 2d 494 (1973), as follows:

> "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 nonaction which induces (2) reliance by another (3) to his detriment." (footnote omitted)

In order for equitable estoppel to be applied against the state, "...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." Surety Savings & Loan Assoc. v. State, 54 Wis. 2d 438, 445, 195 N.W. 2d 464 (1972).

The arguments presented by the appellant fall short of showing that the agency's action amount to "a fraud or a manifest abuse of discretion." The factual representations made about the transaction and impact on Ms. Meschefske's pay prior to January 3, 1988, were correct. The second phase of the plan approved by the Joint Committee on Employment Relations to correct pay inequities identified by the Comparable Worth Study was implemented on January 3, 1988. The appellant was subsequently told orally and provided a letter of appointment which incorrectly continued to identify her appointment as a promotion accompanied by a pay increase.

While these representations were in error, they do not constitute fraud or a manifest abuse of discretion for the following reasons:

1) As soon as the agency discovered the error, they took steps to correct it. They informed appellant of the error and what correction would be made to her pay.

2) The agency offered her the opportunity to return to her previous position.

3) She indicated she would stay in the new full-time position and not return to her previous half-time position. Appellant retained her current pay rate and benefits in the new position.

While it might be argued that appellant took the position because she relied on the fact that she would receive a pay increase, there is an indication that she had an interest in the position outside of pay (Stipulated Facts #10 and 11). Even if we assumed that she didn't have such an interest (outside of the pay increase), her reliance on the information would have to be shown to be to her detriment. Nothing in these facts indicates any loss or change in her status, except that she went from a half-time to a full-time position. While she didn't receive an increase to go to the new position, we do not find this detrimental considering that the employe retained her pay, benefits and status at the same job location.

In part, we rely on Landaal v. State of Wisconsin (Personnel Board, Dane Co. Cir. Ct. No. 138-392 (11/21/73). In that case, the agency was equitably estopped from collecting an overpayment of wages prior to the time that the employe was informed of the error and his pay rate reduced. Additionally, in Landaal, the agency was not estopped from reducing the employe's pay rate because the same options (take the job respondent offered or resign) were available to the employe at the time he was informed of the overpayment as were available to him upon initial appointment to the job. In this case, the appellant had the opportunity to return to her former position when she was informed that changes made in the pay plan (over which respondent had no control) necessitated correcting her starting pay. She had not received any pay at the higher rate and, therefore, was

presented with the same facts and decision she would have had to make if she had been told on January 3, 1988.

In the more recent case of Siebers v. DHSS, 87-0028-PC, 4/28/89 (petition for judicial review pending), the Commission concluded there was no evidence that the appellant in that case had relied to his detriment on the respondent's representation that his salary would be $8.522 per hour rather than the $8.352 per hour rate under a new pay plan which respondent first learned of one week after the appellant began working. In Siebers, the appellant had left his former position, which paid $16.72 per hour because he wanted more job stability. The Commission concluded that it would be speculative to have inferred that appellant would not have left his former position if he had known his new job paid $8.352 rather than $8.522 per hour.

The Commission recognizes that appellant took an examination while other transfer applicants were allowed to skip the examination and be considered at the interview stage. While this does represent inconvenience and different treatment of the appellant relative to the persons who were considered for appointment on a transfer basis, it does not indicate a manifest abuse of discretion and would not entitle the appellant to the higher level of pay, especially where the application process was initiated before the effective date of the change in the Program Assistant 4 pay range.

Appellant raises one final issue relating to an employment contract being established at the time she applied for the position (December 21, 1987). Since this occurred prior to January 3, 1988, it is argued that the application (and its acceptance) represents an employment contract (or establishes some form of contractural right) which determines what the

transaction and starting pay should be. No authorities are quoted, and the Commission is not aware of any that would support characterizing applying for a civil service position as an employment contract. To the contrary, the Commission notes that according to 15A Am Jur 2d, Civil Service, §48: "The salary of a civil service employee fixed by statutes and the rule of the board or commission may not be altered by contract." (Footnote omitted) Also see State ex rel. v. Barlow, 235 Wis. 2d 169, 183, 292 N.W. 290 (1970).

In civil service, the legislature could specifically establish or identify circumstances under which employment contracts could exist, but employes/applicants or appointing authorities are not able to act in such a manner as to create an employment contract on their own. Additionally, to carry this logic out, an appointing authority would be unable to correct an error in a transaction or the starting pay of an employe even if it was authorized by the statutes or administrative rules and would benefit the employe.

ORDER

Respondents' action identifying the appointment of appellant to the Volunteer Coordinator position as a transfer and establishing the starting pay at appellant's current rate of pay (10.734/hour) is affirmed and this appeal is dismissed.

Dated: July 14 ,1989 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

GFH:jmf
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