STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * * *
*
THOMAS D. PULS, *
*
Appellant, *
*
v. * DECISION
* AND
Secretary, DEPARTMENT OF * ORDER
HEALTH AND SOCIAL SERVICES, *
*
Respondent. *
*
Case No. 90-0172-PC *
*
* * * * * * * * * * * * * * * * * *

## NATURE OF THE CASE

This is an appeal of a hiring decision pursuant to §230.44(1)(d), Stats. A hearing was held before *Gerald F. Hoddinott, Commissioner.*

## FINDINGS OF FACT

1. Appellant was first licensed to practice medicine in Wisconsin in 1953. In 1960, appellant completed a residency in psychiatry and thereafter practiced psychiatry until 1984. This included a private practice as well as serving as a member of the faculty of the Medical College of Wisconsin and doing evaluation work for the Division of Vocational Rehabilitation of the Department of Health and Social Services (DHSS).

2. In November, 1984, the Wisconsin Medical Examining Board revoked appellant's license to practice medicine based on their finding, after an administrative hearing, that appellant had engaged in a sexual relationship with one of his patients during 1969. This action of the Medical Examining Board was overturned by Dane County Circuit Court in September, 1985, and appellant's license to practice medicine was restored to him at that time. The basis for the Circuit Court's decision was that the procedure followed by the Examining board violated the requirements of due process; that the doctrine of laches, and the expiration of the statute of limitations, served as a bar to the action; and that the hearing examiner improperly admitted highly prejudicial and incompetent testimony.

3. Sometime during 1985, appellant was involved in an accident which resulted in substantial injury. After his hospitalization for these injuries, appellant began suffering from depression. In a medical assessment completed by a staff physician at the Department of Veterans Affairs in Tomah, Wisconsin, on December 26, 1989, it was noted that appellant had been hospitalized at the Medical Center since October, 1989, for physical and psychological reasons, and that he was ready for discharge; his psychological and physical condition had improved, i.e., he was less depressed and weak than he had been when admitted; and that he was unemployable at that time. Appellant had not practiced psychiatry since his accident in 1985.

4. Sometime during 1990, appellant received a letter regarding a staff psychiatrist position at the Winnebago Mental Health Institute (WMHI), for which he subsequently applied. WMHI is one of the institutions administered by DHSS's Division of Care and Treatment Facilities (DCTF). Appellant was invited for an initial interview with Connie Lee, M. D., the Medical Director of WMHI. Appellant advised Dr. Lee during this interview that his license to practice medicine in Wisconsin had been revoked by the Medical Examining Board in 1984 due to a finding that he had engaged in a sexual relationship with one of his female patients several years earlier and that this revocation had been overturned on appeal; and that, upon restoration of his license, he had suffered from physical injuries as a result of an accident, and from depression, and had not practiced psychiatry since 1985 but felt that he was now ready to practice.

5. Dr. Lee telephoned the Medical Examining Board to verify that appellant had a current license and confirmed that he had. Dr. Lee's philosophy is that, if an applicant has a current license, the basis for any previous revocation should not operate as a bar to hiring the applicant for a physician position.

6. Dr. Lee also telephoned the physician at the DVA Medical Center to request appellant's medical records and to discuss with the physician who had completed appellant's discharge evaluation in December of 1989 appellant's physical and psychological fitness for employment as a psychiatrist. Based on this conversation, Dr. Lee concluded that appellant was medically able to function as a staff psychiatrist at WMHI.

7. Dr. Lee then requested that certain members of WMHI's Medical Executive Committee interview appellant. These committee members concluded that appellant could probably handle the duties and responsibilities of the staff psychiatrist position, but that they had some concerns relating to the fact that appellant had not treated the same type of patients as he would be treating at WMHI if he were hired for the position. These committee members concluded that they would recommend appellant's hire for the position but would provide extra supervision due to this experience factor. These committee members also expressed a lesser concern as to the circumstances which formed the basis for the revocation of appellant's license in 1984.

8. On the basis of her interview of appellant, the interview of appellant by members of the Medical Examining Committee, and by her conversations with the DVA Medical Center, the Medical Examining Board, and with appellant's employment references, Dr. Lee decided to recommend that appellant be hired. Dr. Lee submitted this recommendation with the information she had collected in regard to appellant to David Goers, the Chief Executive Officer of WMHI, who in turn forwarded this recommendation to the offices of the Administrator of DCTF and of DHSS's Bureau of Personnel and Employment Relations (BPER). This recommendation came to the attention of Juan Flores, who was employed at BPER. Mr. Flores had been employed by the Department of Regulation and Licensing, to which the Medical Examining Board is attached, during 1985 and was familiar with the Board's action in revoking appellant's license to practice medicine. Mr. Flores called Dr. Lee and advised her that it was his belief that the revocation of appellant's license was overturned on the basis of a "legal technicality" and suggested that she discuss the matter further with an attorney for the Medical Examining Board. Dr. Lee telephoned this attorney and he advised her that the Medical Examining Board had believed appellant's patient and revoked his license as a result; that the basis of the court's ruling to overturn this revocation was that the applicable statute of limitations had run out; and that, because the court's ruling had been based on the running of the statute of limitations, the court had never reached the question of whether it agreed with the Medical Examining Board that appellant had engaged in a sexual relationship with one of his female patients. Dr. Lee provided this information to Mr. Goers and to

Linda Belton, Administrator of DCTF, but continued to recommend that appellant be hired.

9. Ms. Belton is the appointing authority for DCTF. Based on the information she had received relating to appellant's candidacy for the staff psychiatrist position at WMHI, Ms. Belton decided that appellant should not be offered the position. Ms. Belton based this decision on the circumstances surrounding the revocation of appellant's license; her concern regarding the special vulnerability of WMHI's patients; the potential risk to public confidence in WMHI; and the fact that it would not be possible to isolate appellant from female patients at WMHI. Ms. Belton communicated her decision to Mr. Goers and Dr. Lee and advised that appellant be sent a standard non-hire letter. Such a letter was sent to appellant based on a form letter provided by WMHI's personnel unit.

10. WMHI has a lengthy set of bylaws governing "The Medical Staff Organization of Winnebago Mental Health Institute." These bylaws govern, among other things, the initial appointment of a physician to the medical staff, the granting of practice privileges to a physician, the reappointment of a physician to the medical staff which is required every two years, and the procedure to be followed when a physician is denied appointment, privileges, or reappointment. The procedure for appointment/reappointment requires the three physician members of the Credentials Committee, acting for the Medical Executive Committee, to review all relevant information for the purpose of judging clinical competency and to make a formal recommendation. If an "adverse decision" is reached on an appointment, reappointment, or granting of privileges, the bylaws provide a formal internal appeal process involving a hearing and require that the notice of the adverse decision include notification of the availability of this process. In practice, these bylaws have not been interpreted to apply to the civil service hiring process but instead to the process by which professional competency is assessed and practice privileges granted or denied after a tentative hiring decision is made.

11. Appellant was provided a copy of these bylaws on or around the time that he was interviewed by Dr. Lee. The non-hire letter sent to appellant did not notify him of the procedure specified in the bylaws for appealing "adverse decisions." Appellant did not file an internal appeal of respondent's

decision not to hire him for the subject position. An application from appellant for appointment to the medical staff was never referred to nor formally reviewed by the Credentials Committee.

12. Appellant filed a timely appeal of respondent's decision not to hire him for the psychiatrist position at WMHI with the Commission.

## CONCLUSIONS OF LAW

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

2. The appellant has the burden to show that respondent's action in not selecting him for the subject Psychiatrist position at WMHI was an abuse of discretion.

3. The appellant has failed to sustain this burden.

## OPINION

The parties agreed to the following issue:

> Whether the respondent's decision not to select the appellant for the position of Psychiatrist at Winnebago Mental Health Institute was an abuse of discretion.

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, Case No. 79-208-PC (6/3/81). The question before the Commission is not whether it agrees or disagrees with the appointing authority's decision, in the sense of whether the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather, it 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. DIILHR, Case No. 81-74-PC (1982).

In this case, the appointing authority decided not to hire appellant due to the fact that his license to practice medicine had been revoked in 1984 based upon a finding by the Medical Examining Board that appellant had engaged in a sexual relationship with a female patient and, according to an attorney for the agency to which the Medical Examining Board is attached who was familiar with the revocation, this revocation was overturned on appeal based upon the

court's conclusion that the applicable statute of limitations had run. Ms. Belton, the appointing authority, took the following into consideration in making this decision:

a. the fact that the duties and responsibilities of the psychiatrist position necessarily involved contact with female patients. Even if appellant could have been assigned to provide direct care solely to male patients, when it would have been his turn to serve as the Officer of the Day, he would have had to treat any patients who needed care, including female patients.

b. her conclusion, based on the information Dr. Lee obtained from the attorney for the Department of Regulation and Licensing, that the review court never overturned the Medical Examining Board's finding that appellant did engage in a sexual relationship with one of his female patients.

c. her concern that hiring a physician who had been found to have engaged in a sexual relationship with one of his patients (even though the revocation decision was subsequently overturned) could adversely affect the public confidence in WMHI and the quality of care provided by the institution.

d. her concern that the vulnerability of the female forensic patients at WMHI makes them particularly susceptible to inappropriate actions on the part of their care-takers and her knowledge that such actions, including sexual relationships, had occurred at WMHI.

The record does not reveal that any of these factors is clearly contrary to reason and evidence; i.e., the necessity of the position to deal with female patients was clearly established in the record; Ms. Belton was justified in relying on information obtained by Dr. Lee from an attorney for the Department of Regulation and Licensing who was familiar with the revocation of appellant's license and concluding that the Medical Examining Board's finding that appellant had engaged in a sexual relationship with one of his patients had never been overturned; it was not unreasonable for Ms. Belton to conclude that public knowledge of appellant's license revocation and the circumstances surrounding it could alarm WMHI patient's families and create a public concern regarding the quality of care provided by WMHI; and the record clearly indicates that the patient population at WMHI is vulnerable

and, as a result, especially susceptible to manipulation or victimization by their care-givers.

It was also not clearly against reason and evidence for Ms. Belton to conclude, based on these factors, that hiring appellant for the position would not be in the best interest of the institution. Certainly, providing a high quality of professional care in an environment free of exploitation or intimidation was established in the record as one of the overriding goals of the institution. Ms. Belton's conclusion that this goal would not be served by a physician who had been found to have engaged in a sexual relationship with one of his female patients is not clearly contrary to reason and evidence.

Appellant argues that respondent failed to gather enough information relating to the revocation and, as a result, got an incomplete picture of the basis for the court action overturning the revocation. Although the appellant cites the Commission's decisions in Jacobson v. DILHR, Case No. 79-28-PC (1981) and Jensen v. U.W. Milwaukee, Case No. 86-0144-PC, (1987), for this argument, neither of these decisions would require a prospective employer to conduct an independent and exhaustive search of all relevant information relating to a job applicant. The Jacobson case stands for the proposition that an employer abuses its discretion when it ignores current employment information and bases its decision solely on information from a former employer. The Jensen decision provides that an employer is justified in relying on first-hand information it may possess regarding a current employee who has applied for a different position with the employer and, as a result, is not required to also contact other job references provided by this employee. We have neither situation here. Respondent did not ignore any information relating to appellant. In addition, respondent contacted the agency directly involved in the revocation, spoke to the attorney for that agency who was familiar with the revocation, and relied upon the information supplied by that attorney. The Commission does not conclude that it was clearly against reason and evidence for the respondent to have contacted this source or to rely on the information provided by this source. In addition, the record does not show that there was any reason for respondent to have concluded that the information provided was incomplete or inaccurate and, in the absence of such a showing, the Commission does not conclude that it was clearly against reason and evidence for respondent to have ended its inquiry there. To

require an employer to conduct an independent investigation to determine the accuracy and completeness of the information provided to them by apparently reliable and knowledgeable outside sources would place an unrealistic and unattainable burden on an employer and the Commission does not intend to do so.

Appellant implies that Ms. Belton ignored the recommendation of the Medical Director and those members of the WMHI Medical Executive Committee that appellant be hired. However, the record clearly indicates that these individuals viewed their charge as the assessment of a candidate's professional competence based on his education, work experience, work performance, and physical and mental health. The record does not show that Ms. Belton disagreed with them or the references that appellant provided as to appellant's professional competence but instead based her assessment of his candidacy not only on his professional competence but also on the circumstances surrounding the 1984 revocation of his professional license and balanced these factors in reaching her decision.

Appellant also argues that respondent's decision not to hire appellant violated the Fair Employment Act in that it constituted discrimination on the basis of arrest or conviction record. However, this case was not brought under the Fair Employment Act, and the issue to which the parties agreed does not present a question as to whether the subject action was illegal, only whether it constituted an abuse of discretion. In any event, appellant's argument that an allegation of professional misconduct brought before the Medical Examining Board is tantamount to a record of "arrest or conviction" appears strained.

Appellant also argues that respondent's failure to follow the WMHI bylaws governing "adverse decisions" relating to "appointments" by providing appellant notice of his right to have his non-hire reviewed through the internal hearing process specified in these bylaws is in itself evidence of an abuse of discretion. However, the Commission concludes that these bylaws govern the appointment and reappointment to the medical staff and the granting of practice privileges to physicians appointed to the medical staff and do not govern the process by which a civil service hire to a physician position is made. Not only has this been the practice followed by WMHI which is the institution which drafted the bylaws and put them in place but this conclusion is also consistent with the language of the bylaws. For example,

the bylaws provide that a physician must apply for "reappointment" every two years. Clearly, this could not refer to a civil service process since such a biannual reapplication is inconsistent with the underpinnings of the civil service system. As another example, the bylaws clearly provide that the application for appointment is not complete until the application is referred to the Credentials Committee and this committee makes a formal recommendation. The logical conclusion which can be reached from the facts in the record is that appellant was never denied "appointment" within the meaning of the bylaws since his application was never considered or formally voted on by the Credentials Committee. The Commission also agrees with the conclusion of respondent that, even if these bylaws did encompass the civil service hiring process, the failure to provide notice would constitute harmless error. Such failure could not have deprived the appellant of a right to due process since it was not shown that he had a substantial property interest in the position. In addition, the appellant had a right to, and took advantage of his right to, a de novo hearing before the Commission.

ORDER

The action of respondent is affirmed and this appeal is dismissed.

Dated: May 1, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

GFH:rcr

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

Parties:

Thomas B. Puls
P.O. Box 175
Pine River, WI 54965

Gerald Whitburn
DHSS, Secretary
P.O. Box 7850
Madison, WI 53707

NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICAL REVIEW OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

**Petition for Rehearing.** Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.