

competitive promotional examination. Appellant did take this exam on April 28, 1989.

4. Respondents' decision to limit competition for this Officer 3 recruitment to DHSS employees (agency-wide competition) rather than to extend it to employees of all state agencies (service-wide competition) was based on the large size of the likely applicant pool; the conclusion that this was the most appropriate pool, given the training required to become an Officer 3; the fact that there was a good representation of women and minorities within this pool; and the fact that, at the time, all positions in the Officer classifications were located within DHSS.

5. The employment register resulting from the administration of this Officer 3 competitive promotional examination was established on May 19, 1989. Appellant was one of the applicants named on this register. Employment registers usually expire after 6 months. This employment register was scheduled to expire on November 19, 1989.

6. Effective October 29, 1989, appellant requested and received a transfer from his Officer 1 position at Waupun Correctional Institution to a Youth Counselor 2 position at Lincoln Hills School.

7. In November of 1989, DHSS requested that the Division of Merit Recruitment and Selection of the Department of Employment Relations approve the extension of the Officer 3 register established on May 19, 1989. Such extension was approved and the register was used until a new Officer 3 register was established in March or April of 1990.

8. In December of 1989, appellant was contacted by DHSS to determine whether he was interested in being considered for an Officer 3 position at Abode, a correctional facility in Union Grove, Wisconsin. Appellant indicated that he was not interested.

9. Effective January 1, 1990, the Division of Corrections of DHSS was separated from DHSS and became the new Department of Corrections. Positions classified as Officers in adult institutions were located in the new Department of Corrections (DOC) and positions classified as Youth Counselors in juvenile institutions, such as appellant's position at Lincoln Hills School, were located in DHSS.

10. On January 19, 1990, DOC prepared a memo to all the personnel officers in DOC institutions to the effect that:

This is a reminder that if a candidate on this certification is employed by Health and Social Services, they are not eligible to be considered for your vacancy. Please monitor these certifications until the Division of Merit Recruitment and Selection is able to pull out all DHSS employees and certify only Department of Corrections employees for promotional registers.

This memo was sent with each certification list forwarded to DOC institutions between January 19, 1990, and July, 1990.

11. During late 1989 and early 1990, many of the candidates certified for Officer 3 position vacancies at DOC had indicated that they were not interested in such vacancies. On May 16, 1990, as a consequence of this and in order to enlarge the pool of eligible candidates, DMRS generated at DOC's request a group referral list for Officer 3 positions. Appellant's name was included on such list as a result of his certification for an Officer 3 position in December of 1989. (See Finding of Fact 9, above).

12. By letter dated May 20, 1990, from the Assistant Superintendent of the Marshall Sherrer Correctional Center in DOC's Division of Adult Institutions, appellant was asked to contact Marshall Sherrer to be interviewed for one and possibly a second vacant Officer 3 position.

13. Appellant was not eligible for consideration for these vacant Officer 3 positions at Marshall Sherrer which were to be filled by the agency-wide competitive promotional process since he was then employed by DHSS, not DOC.

14. Appellant indicated his interest in the vacant Officer 3 positions at Marshall Sherrer and was interviewed for such positions on June 4, 1990. At some time after his interview, the interviewers' notes relating to appellant's interview were destroyed but not those relating to the interviews of the other candidates.

15. Subsequent to this interview of appellant, Marcy Lyons, personnel manager for Marshall Sherrer, contacted respondent DOC's personnel unit in Madison and indicated to Marge Attaway, an employee of such unit, that it did not appear that appellant was eligible for the positions for which he had interviewed since he was not then employed by DOC.

16. Ms. Attaway then contacted Debra Schwab of DMRS for advice regarding this situation. Ms. Schwab contacted appellant by phone to advise

him that he was not eligible for the positions for which he had interviewed at Marshall Sherrer and followed up with a letter to appellant dated June 29, 1990, which stated, in pertinent part:

The Officer 3 register was created on May 19, 1989, as an agency-wide promotional register for the Department of Health and Social Services (DHSS). DHSS requested a certification from this register on November 28, 1989, to obtain a list of applicants to be contacted for interview for Officer 3 vacancies. It was at that time that your name was certified for interview. You originally indicated to DHSS that you were not interested in interviewing at that time.

On January 1, 1990, the Division of Corrections became the Department of Corrections (DOC). When DOC separated from DHSS, only employees of DOC remained eligible for certification for Officer 3 vacancies in DOC. Section ER Pers 6.10(1) allows for the removal of an applicant from a certification "who is found to lack any of the preliminary requirements established for the position." At the time the DOC became a department, you were an employee of DHSS. Since you are not an employee of the agency holding the active certification (that is, DOC), you are no longer eligible for the DOC vacancy currently open.

If you would like to return to the Officer series, I suggest you contact the DOC personnel office regarding your eligibility for reinstatement into the Department of Corrections

17. Subsequent to his interview, but prior to the date that the vacant Officer 3 positions for which he had interviewed at Marshall Sherrer were filled, appellant's name was removed from the certification list for such positions.

18. On or around June 5, 1990, Dennis Danner, one of those who had interviewed appellant for the Officer 3 positions at Marshall Sherrer, telephoned appellant to let him know that he had been advised by DMRS that appellant was not eligible to be considered for such positions. Mr. Danner did not offer an Officer 3 position to appellant.

19. Appellant was never offered an Officer 3 position at Marshall Sherrer.

20. The only relevant action appellant took in reliance upon being certified for and interviewed for the subject Officer 3 positions at Marshall Sherrer was to have traveled to and participated in the interview itself.

21. Appellant filed the instant appeal with the Commission on July 6, 1990.

Conclusions of Law

1. This matter is appropriately before the Commission pursuant to §§230.44(1) and (d), Stats.
2. The appellant has the burden to show that respondent DMRS's decision in June of 1990 that appellant was no longer eligible for the Officer 3 vacancies at the Marshall Sherrer Correctional Institution was not correct.
3. The appellant has failed to sustain this burden.
4. The appellant has the burden to show that, once respondent DOC interviewed the appellant for the Marshall Sherrer vacancies, DOC and/or DMRS was estopped from not considering the appellant as eligible for the position.
5. The appellant has failed to sustain this burden.
6. The Appellant has the burden to show that the decision by DMRS to limit the scope of competition for the Officer 3 promotional exam announced in February of 1989 was not correct.
7. The appellant has failed to sustain this burden.

Opinion

In an Interim Decision and Order dated November 28, 1990, the Commission ordered that the instant matter would proceed to hearing on the following issues:

1. Whether the respondent DMRS's decision reflected in the June 27, 1990, letter from Debra Schwab that the appellant was no longer eligible for the Officer 3 vacancy at the Marshall Sherrer Correctional Center was correct.
2. Whether, once the Department of Corrections interviewed the appellant for the Marshall Sherrer vacancy, DOC and/or DMRS was estopped from not considering the appellant as eligible for the position.
3. Whether the decision by DMRS limiting the scope of competition for the Officer 3 promotional exam to agency-wide rather than service-wide was correct.

Section 230.19, Stats., provides for three types of promotions, i.e., promotions within the same agency (agency-wide), promotions within an

employing unit (unit-wide), or promotions between agencies (service-wide). Neither §230.19, Stats., nor §ER Pers 14.03, Wis. Adm. Code, the administrative rule governing promotions, provides for or contemplates promotions made on any other basis. What appellant is essentially arguing here, however, is that respondents were required to consider candidates for promotion from two state agencies, i.e., DOC and DHSS, for the subject Officer 3 vacancies at Marshall Sherrer. Appellant cites no authority for this argument and it appears to the Commission that such an action on respondents' part would conflict with the provisions of §230.19, Stats. Respondents clearly recognized this after January 1, 1990, in view of the memo that accompanied every DOC certification to its institutions after that date (See Finding of Fact 10). Since appellant was not eligible for consideration for or appointment to these vacancies, respondents removed his name from the certification list. This is consistent with §ER-Pers 6.10(1), Wis. Adm. Code, since appellant did not "meet one of the preliminary requirements" within the meaning of this section.

Appellant argues further in this regard that the fact that his name appeared on the certification list and the fact that he was interviewed confirms his eligibility for the subject Officer 3 vacancies at Marshall Sherrer; and that, since he was eligible and since he was the most qualified candidate of those interviewed, DOC was required to have appointed him to one of the vacant Officer 3 positions at Marshall Sherrer. However, an administrative error (see below) cannot confer eligibility where none exists under the applicable law. Since appellant was not eligible for appointment to such vacancies, it is not necessary for the Commission to reach the question of the relative qualifications of the candidates.

Appellant also argues in this regard that respondents improperly interfered with his "rights of transfer." However, the transaction under consideration here involves a potential promotion, not a transfer, and appellant's argument is not applicable.

The next question is whether the tenets of equitable estoppel apply here. The Commission discussed the elements of equitable estoppel in Goeltzer v. DVA, Case No. 82-11-PC (5/12/82) as follows:

The only circumstances under which [dismissal for filing outside the 30 day limit] can be avoided are those which give [rise] to an equitable estoppel. Equitable estoppel has been 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, Case No. 78-154-PC (5/14/79). In order to establish estoppel against a state agency, "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 Assn. v. State of Wisconsin (Division of Highways), 54 Wic. 2d 438, 195 N.W. 2d 464 (1972).

In Porter v. DOT, supra, at p. 12, the Commission noted three factors essential for equitable estoppel to lie: (1) action or inaction which induces (2) reliance by another (3) to his detriment.

It is clear from the record that DOC's interview of appellant for the Officer 3 vacancies at Marshall Sherrer resulted from an administrative error. The creation of the new Department of Corrections from what had been DHSS's Division of Corrections had resulted in the appearance, after January 1, 1990, on DOC certification lists of the names of DHSS employees who had been eligible for agency-wide promotions prior to but not subsequent to January 1, 1990. In its memo of January 19, 1990, DOC acknowledged that this had occurred, that such employees were not eligible for these agency-wide promotions, and that every effort was being made to remove the names of these DHSS employees from agency-wide promotional registers and certification lists. This is clearly not the type of situation which would lead the Commission to conclude that respondent's actions resulted from fraud or a manifest abuse of discretion.

Appellant also claims that he "relied to his detriment" on DOC's interview of him to a sufficient extent to invoke the doctrine of equitable estoppel. However, the only "detriment" that appellant has claimed is the fact that he expended time, energy, and money to travel to and participate in the subject interview. This does not come close to the type of "injury" contemplated by the Commission in Porter v. DOT and Goeltzer v. DVA, supra, or Taddey v. DHSS, Case No. 86-0156-PC (5/5/88). Such "injuries" would include such things as taking a substantial cut in pay, moving to another city, resigning from a job, etc. Traveling to and participating in a job interview is not equivalent to any of these situations and would not constitute a sufficient "injury" to invoke the doctrine of equitable estoppel under the circumstances of this case.

The final issue relates to the decision by respondents to do an agency-wide promotional competition for the Officer 3 recruitment announced in February of 1989. Section ER-Pers 6.01, Wis. Adm. Code, states that the Administrator of DMRS, in determining the most appropriate base of recruitment, shall consider such factors as:

affirmative action; agency goals; staff development patterns; availability of qualified applicants in the service, agency or the employing unit, and effect on employe morale or turnover; designated promotional patterns in the classification series; availability of trained people in the labor market, including the number who have completed or are completing training for the type and level of positions; value of bringing new personnel with different backgrounds into the service; current pay; employe benefits and hiring practices for the types of positions; the interests of other agencies which may use the eligible lists; and efficiency in conducting recruitment programs and examinations.

Clearly, respondents considered many of these factors in determining the base of recruitment under consideration here (See Finding of Fact 4, above). Appellant has failed to show that any of the factors considered by respondents were inappropriate under §ER Pers 6.01, Wis. Adm. Code; that respondent's characterization of the factual situation existing at that time was inaccurate or misleading; or that respondents did not reach the proper conclusions upon application of such factors to such factual situation.

Appellant objects to respondents' citation of Commission and court decisions in its briefs and argues that his case is "unique in its own right and should not be influenced by other cases." However, the use of case precedents is a common and well-accepted tool used by courts and administrative agencies in deciding cases. Appellant also argues that such cases were not part of the "record" in this case. The Commission has the authority to take notice of such cases without the cases being mentioned in or entered into the record.

Finally, the appellant argues that respondents should have anticipated what effect the creation of the new Department of Corrections would have on employees such as he and should have "grandfathered" their eligibility for DOC positions after January 1, 1990, at least as long as DOC continued to use the registers established prior to January 1, 1990. The Commission does not disagree with appellant that this could have been a sensible approach to this

problem, but fails to conclude that there was any requirement that respondents do so or that their failure to do so was improper in any way.

Order

The actions of respondents are affirmed and this appeal is dismissed.

Dated: October 3, 1991 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

Roger B Augustin
P O Box 53
Tomahawk WI 54487

Robert Lavigna
Administrator DMRS
137 E Wilson St
P O Box 7855
Madison WI 53707

Patrick Fiedler
Secretary DOC
149 East Wilson Street
P O Box 7925
Madison WI 53707