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PATRICIA LaSOTA,
 Appellant,

v.

Secretary, DEPARTMENT OF
 CORRECTIONS,
 Respondent.

Case No. 94-1062-PC

* * * * *

DECISION
AND
ORDER

A hearing was held in the above-noted case on September 26, 1995. The parties were given the opportunity to file post-hearing briefs with the final brief due on November 22, 1995.

The hearing issue was agreed to by the parties at a prehearing conference held on July 10, 1995, as shown below.

Whether respondent's withdrawal of its offer to promote appellant in December of 1994, was illegal or an abuse of discretion.

FINDINGS OF FACT

1. Prior to November 25, 1994, Ms. LaSota worked as a Correctional Officer 2 (CO-2) at the Racine Correctional Institution (RCI) which is part of the Division of Adult Institutions within the Department of Corrections (DOC).
2. On November 25, 1994, Ms. LaSota and another officer entered an inmate's cell and decorated it with toilet paper, taped a banana to the wall, moved the inmate's belongings, and wrote the word "snitch" on the mirror with shaving cream. The incident was immediately written up. Notice of an investigatory meeting was given on November 26, 1994, and was held the same day. At the November 26th meeting, Ms. LaSota admitted the conduct and explained this was an inmate she joked around with and her actions were intended only as a joke. Ms. LaSota knew by

the close of the November 26th meeting that disciplinary action might be taken for her part in the incident.

3. Lt. Brian Chapman conducted the investigatory meeting of November 26, 1994. He believed that Ms. LaSota's actions in relation to the inmate (as described in the prior paragraph) were intended by Ms. LaSota merely as a joke without any intent to harm the inmate. However, he concluded that horseplay did occur which constituted a "Category B" work rule violation. (Exh. A-2) According to DOC's work rules, the only category for horseplay incidents (work rule 5 violation) is Category B. Lt. Chapman agreed at hearing that the type of horseplay in which Ms. LaSota was involved "can be dangerous".
4. Ms. LaSota was one of two persons interviewed for a CO-3 position at the Milwaukee Women's Center (MWC). The level of staffing at institutions is dependent, at least in part, on the number of inmates housed at an institution. MWC is a minimum security institution housing about 70-80 inmates, with a staff of 10 correctional officers who are supervised by Tommy Hobson. The correctional officers at MWC are all classified at the CO-3 (or sergeant) level. There are no CO-2 positions at MWC. MWC is part of DOC's Wisconsin Correctional Center System (WCCS) (formerly known as the "CAMPS System"), which is headed by Phil Kingston as the appointing authority.
5. Interviews were conducted on or about December 8, 1994. References for the other candidate were checked. Mr. Hobson called for authorization to offer the position to the other candidate. Authorization was received and the offer was made. The other candidate declined the offer.
6. On December 9, 1994, Mr. Hobson called Capt. Simon Walker, the reference given by Ms. LaSota. Capt. Walker told Mr. Hobson that Ms. LaSota had been involved in some horseplay but that it "was nothing". Capt. Walker did not mention that the horseplay incident involved a banana and the word "snitch" written in the inmate's cell, or that potential disciplinary action was still pending. Capt. Walker otherwise gave a good reference for Ms. LaSota. Based on the reference check, Mr. Hobson called Deirdre Morgan, Personnel Manager for WCCS, for authorization to offer the position to Ms. LaSota. Mr. Hobson did not

mention the inmate incident to Ms. Morgan. Ms. Morgan gave him authorization to offer the position to Ms. LaSota.

7. Mr. Hobson called Ms. LaSota sometime between 8-9:00 a.m. on December 9, 1994. He offered her the position and she accepted.
8. Wayne Cina is the Personnel Manager at RCI. When he heard on December 9, 1994, that Ms. LaSota accepted a promotional position at MWC, he telephoned Ms. Morgan and told her the investigation involving Ms. LaSota was still pending with the potential for imposing discipline. He told Ms. Morgan that Ms. LaSota had admitted the conduct and indicated it was intended as a joke. Mr. Cina made the call because he felt a responsibility to inform MWC as the potential new hiring authority of the pending investigation to enable MWC to have an opportunity to determine whether MWC still wished to proceed with the promotional hire. DOC has no policy which required Mr. Cina to make this call or to provide such information to Ms. Morgan. Mr. Cina was unaware prior to calling Ms. Morgan that Lt. Walker had been called as a reference for Ms. LaSota.
9. Immediately after Ms. Morgan spoke to Mr. Cina on December 9, 1994, she telephoned Mr. Kingston (the appointing authority). Ms. Morgan felt the MWC officers must exercise good judgment (over and above what is expected at larger institutions) because only one or two officers work on each shift. Further, there is a need at all institutions for the officers to demonstrate to inmates that the officers are in control of the inmates and that the officers will enforce the rules. Ms. Morgan felt that Ms. LaSota's admitted part in the horseplay incident showed Ms. LaSota did not have the level of good judgment required of a CO-3 at MWC. Mr. Kingston agreed.
10. As a result of Mr. Kingston's decision, Ms. Morgan called Mr. Hobson and asked whether the offer already had been made to Ms. LaSota. He indicated it had been made and accepted. Ms. Morgan informed him of the additional information and told him to withdraw the offer of appointment. She could tell he was not looking forward to making the call. She told him the rescission decision had been okayed by Mr. Kingston and DOC's legal department. Mr. Hobson called Ms. LaSota at about 4:30 p.m. on December 9, 1994, and withdrew the offer.

11. In the later telephone call between Mr. Hobson and Ms. LaSota on December 9, 1994 (described in the prior paragraph), Mr. Hobson did not mention the name of Mr. Cina at all. Mr. Hobson did not tell Ms. LaSota that the offer was rescinded because Mr. Cina refused to forward her personnel file to MWC. While it is true that her personnel file would have been transferred to MWC if the job offer had not been rescinded, such action would have occurred based upon a written request from MWC to RCI, and such requests are not made by Mr. Hobson.
12. On December 13, 1994, Ms. LaSota received notice that a pre-disciplinary meeting would be held on December 16, 1994, relating to her alleged violation of DOC work rules. (Exh. A-3) Mr. Cina held the pre-disciplinary meeting to determine if Ms. LaSota's involvement in the inmate incident warranted discipline. (Exh. A-4) RCI imposed a 30-day suspension after the pre-disciplinary hearing for Ms. LaSota's role in the November 25, 1994, incident. The action was reduced to a 10-day suspension through the union grievance process. A copy of the grievance decision was not offered as a hearing exhibit and, accordingly, the basis for reducing the suspension is unknown.
13. Ms. Morgan was aware of an instance where the hiring authority intended to hire the most senior officer applying for a vacant position. The appointing authority, however, learned that this other officer had 3 recent insubordination charges. Based on this information, this other officer was not hired even though he otherwise would have been entitled to the position under the union contract as the most senior candidate.
14. WCCS has a supervisor's manual which provides guidance for hiring decisions. The manual indicates that a candidate's past performance and reference checks should be part of the decision making.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to s. 230.45(1)(a), and 230.44(1)(d), Stats.
2. Ms. LaSota has the burden of proving that the decision to rescind the offer of hire was either illegal or an abuse of discretion.
3. Ms. LaSota has failed to sustain her burden of proof.

4. DOC's decision to rescind the offer of hire as a CO-3 at MWC was neither illegal nor an abuse of discretion.

DISCUSSION

This case involves an appeal under s. 230.44(1)(d), Stats., which provides as shown below:

(d) Illegal action or abuse of discretion. A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.

The question of illegal action was not pursued in Ms. LaSota's post-hearing brief nor would the record support a contention of illegality. Accordingly, the remaining question is whether DOC abused its discretion when it decided to withdraw its prior offer to Ms. LaSota of promotional employment at MWC.

Ms. LaSota argued in her post-hearing brief that an abuse of discretion occurred relating to the decision made by Ms. Morgan and Mr. Kingston to withdraw the promotional offer of employment for the first two reasons listed below. The third reason listed below is based upon Ms. LaSota's apparent hearing strategy which was not expressly repeated in her post-hearing brief.

1. The withdrawal decision was made without first talking to Ms. LaSota to obtain her view of the November 25, 1995 incident. Specifically, while Ms. Morgan and Mr. Kingston knew Ms. LaSota had admitted to the conduct of November 25, 1995, she had not admitted that such conduct constituted a serious violation of the work rules.
2. Ms. Morgan and Mr. Kingston simply told Mr. Hobson to withdraw the offer without first asking Mr. Hobson what information he had obtained from Mr. Walker as Ms. LaSota's reference check.
3. Mr. Cina had improper motives for telephoning Ms. Morgan on or about December 9, 1994, and providing information regarding Ms. LaSota's involvement in the November 25, 1994 incident. Such allegedly improper

motives included a desire to have Ms. LaSota remain at RCI, or a desire to blow her role in the November 25th incident out of proportion in the context of potential discipline.

Abuse of Discretion - General Analysis

The Commission previously has defined the term "abuse of discretion" as "a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." Lundeen v. DOA, 79-208-PC (6/3/81), as recited in Skaife v. DHSS, 91-0133-PC (12/3/91). In Harbort v. DILHR, 81-74-PC (4/2/82), the Commission interpreted the standard as follows:

Thus, 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."

First and second allegations of abuse of discretion

The first and second claims (listed previously) of DOC's alleged abuse of discretion suggest DOC should have done more than rely on the information received from Mr. Cina. The Commission disagrees.

The appellant in Puls v. DHSS, 90-0172-PC (5/1/92), disclosed during his interview for a staff psychiatrist position that his license to practice medicine had been revoked by the Department of Regulation and Licensing (DRL) in 1984, based on DRL's finding he had engaged in a sexual relationship with one of his female patients. Puls also informed the interview panel that the courts overturned the revocation on appeal. Puls was the first-ranked candidate after interviews and the candidate recommended for hire. DHSS later learned from a DRL attorney familiar with Puls' license revocation case, that the court's action was taken due to statute of limitation problems, rather than due to any disagreement regarding DRL's finding that Puls had engaged in improper conduct. Accordingly, an offer of employment was not extended to Puls.

The Commission, in the Puls case, concluded that DHSS' reliance on the conduct underlying Puls' license revocation (sexual relationship with a

patient) in the context of the duties of the job vacancy involved was not an abuse of discretion. The Commission also stated as shown below:

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 [Puls] cites the Commission's decisions in Jacobson v. DILHR, Case No. 79-28-PC (1981) and Jensen v. UW 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.

Puls v. DHSS, 90-0172-PC, p. 7-8. In accord, Skaife v. DHSS, 91-0133-PC (12/3/91) Also, see, Vesperman v. UW, 81-PC-ER-66 & 81-232-PC (3/31/83) where the Commission acknowledged on page 5 of the decision that "past work performance and work relationships are certainly one indication of probable future work performance and relationships."

The information Mr. Hobson received from Mr. Walker was as a reference check with Ms. LaSota's first-line supervisor. The hearing record

does not reveal Mr. Walker's degree of familiarity with Ms. LaSota's involvement in the November 25, 1994 incident or his knowledge regarding the status of resulting disciplinary meetings.

Neither Ms. Morgan nor Mr. Kingston was aware that Mr. Walker had provided any information regarding the November 25th incident to Mr. Hobson before the decision was made to withdraw the offer of employment. Ms. Morgan's and Mr. Kingston's knowledge was based solely on information received by Ms. Morgan from Mr. Cina, including the knowledge that Ms. LaSota had admitted her involvement in the incident. Further, the decision to withdraw the offer was based upon Ms. LaSota's admitted conduct which Ms. Morgan and Mr. Kingston reasonably felt evidenced poor judgment on Ms. LaSota's part. Since Ms. LaSota's admitted conduct was the basis for DOC's decision, the actual imposition of discipline and the official characterization of such conduct for disciplinary purposes is irrelevant. Under these circumstances, the Commission cannot say Ms. Morgan's and Mr. Kingston's reliance on the information from Mr. Cina was clearly against reason and evidence, or was an abuse of discretion.

Mr. Cina's motive for reporting the information to Ms. Morgan

Although not addressed in post-hearing briefs, the hearing examiner's impression was that Ms. LaSota's theory of her case included an allegation that Mr. Cina's motives for contacting Ms. Morgan were improper. The Commission wishes to clarify that Ms. LaSota failed to show that Mr. Cina placed the call due to improper motives.

Ms. LaSota testified that Mr. Hobson told her the offer had to be withdrawn because Mr. Cina refused to forward her personnel file from RCI and that MWC could not hire her without having her personnel file. She also testified that she kept notes of the telephone conversation (which Mr. Hobson did not), but she failed to offer such notes as a hearing exhibit. Mr. Hobson denied mentioning Mr. Cina and denied mentioning Ms. LaSota's personnel file during the telephone conversation in which the offer was withdrawn. Mr. Hobson testified that he had not spoken with Mr. Cina regarding Ms. LaSota and, even if he had, Mr. Hobson would not have had a reason to ask Mr. Cina for her personnel file. Mr. Cina confirmed that he did not speak with Mr. Hobson as alleged by Ms. LaSota. Mr. Hobson acknowledged that an employee's

personnel file would be transferred to the new hiring agency, but said such requests are made in writing and by someone other than himself. The testimony by Mr. Hobson in this regard was more persuasive than Ms. LaSota's contrary testimony. This conclusion might have been different if Ms. LaSota had offered her hand-written notes of the conversation as a hearing exhibit or if she had shown that Mr. Hobson would have had a reason to ask Mr. Cina for her personnel file.

Ms. LaSota also questioned Mr. Cina's motives based on her perception that Mr. Cina would not wish to lose her as a correctional officer at RCI. Mr. Cina conceded at hearing that RCI has difficulty getting sufficient names for candidates when a vacancy exists and has a high staff turnover rate (maybe due to a preference for a more urban geographic area). However, he denied that he called Ms. Morgan in an attempt to keep Ms. LaSota employed at RCI. He affirmatively stated what his reasons for the call were (as recited in par. 8 above) and such reasons are not improper. The Commission concluded that Ms. LaSota's evidence of the allegedly improper motive was insufficient to meet her burden of proof on this factual dispute.

Mr. Cina's motives were questioned further by Ms. LaSota's hearing observation that he listed two work rules as potentially violated by her conduct in the November 25, 1994 incident. Mr. Cina explained that two work rules were cited in the pre-disciplinary letter dated December 13, 1994 (Exh. A-3), because it was his responsibility to list all potential violations to provide adequate notice of the issues which could be addressed at the pre-disciplinary meeting on December 16, 1994. Such explanation was persuasive and was unrefuted by Ms. LaSota.

Mr. Cina's motives also were questioned based on Ms. LaSota's testimony that Mr. Hobson reported Mr. Cina as saying she was "unpromotable". However, (and as discussed previously) Mr. Hobson did not speak to Mr. Cina regarding Ms. LaSota. The Commission concludes Ms. LaSota's memory is faulty in this regard.


ORDER

DOC's decision to withdraw the offer of employment to Ms. LaSota is affirmed and this appeal is dismissed.

Dated January 23, 1996.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner

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

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats. 2/3/95