STATE OF WISCONSIN PERSONNEL COMMISSION

STACIE NELDAUGHTER,

Appellant,

v.

DEPARTMENT OF HEALTH AND SOCIAL SERVICES[DEPARTMENT OF HEALTH AND FAMILY SERVICES],[1]

Respondent.

Case No. 96-0054-PC

INTERIM DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to § 230.44(1)(d), Stats., of respondent's decision not to select appellant for a Nurse Clinician position at MMHI (Mendota Mental Health Institution). This matter is before the Commission following the issuance of a proposed decision and order pursuant to §227.46, Stats. The Commission has considered the parties' arguments and has consulted with the examiner. It now enters the following decision and order, which adopts most of the proposed decision and order.

FINDINGS OF FACT

1. Following an examination, appellant was certified on March 11, 1996, for several permanent Nurse Clinician vacancies in the classified civil service at MMHI.

2. In 1994, appellant also had been certified for Nurse Clinician vacancies at MMHI. During that selection process, MMHI had ascertained from DRL (Department of Regulation and Licensing) that appellant was not licensed as an RN (Registered Nurse), and this information disqualified appellant from further considera-

[1] Pursuant to the provisions of 1995 Wisconsin Act 27, § 9126, the name of the Department of Health and Social Services has been changed to the Department of Health and Family Services.

tion. This information eventually was determined to have been incorrect, but by the time this was discovered, that selection process had already been completed.

3. Appellant was among those certified candidates who were interviewed by a panel at MMHI. The panel evaluated appellant's responses to the items in the interview as either "acceptable" or "more than acceptable." As a result of this evaluation, appellant was deemed eligible for consideration at the next step of the selection process. This (eligibility for consideration at the next step of the process) was the only role played by the candidate's performance before the interview panel.

4. The form letter informing candidates of their interviews (Exhibit 28) included the following: "Please bring with you three work references and a current resume."

5. The "general questions" asked at the interview of all candidates included the following:

* Is there anything about yourself that would be job related that you would like to share with us or feel that we need to know?
* What are your strengths and weaknesses?
* How is your attendance at your present job?
* What will your references say about you?

6. Appellant submitted three references at the interview. They did not include any management references at St. Mary's hospital, where appellant had been employed from February 6, 1989--September 16, 1994.

7. Appellant did not mention at the interview the circumstances surrounding her employment at St. Mary's that led to the termination of her employment there.[2]

8. Assistant Director of Nursing Lydia Reitman was responsible for the hiring decisions for the vacancies in question.

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[2] According to a subsequent (May 24, 1996) letter (Exhibit 3) appellant submitted to MMHI: "St. Mary's terminated my position as a retaliatory action for my 'whistleblowing' about patient right's abuse related to informed consent and electric shock treatments. There was also a disability issue involved that St. Mary's would not accommodate me on."

9. The only information from the interview panel that Ms. Reitman had available when she made her decision whether to hire appellant was that the panel had considered her qualified to perform the work associated with these positions. Ms. Reitman also had available reference checks that had been completed by MMHI staff. These included the references appellant had provided, and in addition, a reference check was done with St. Mary's management. The reference from St. Mary's management stated only that appellant had been employed there as an RN from February 6, 1989, until March 7, 1994, and as a Laboratory Customer Service Assistant from April 25, 1994, until September 16, 1994. Ms. Reitman also had a reference check form completed by Dr. David Israelstrom, a reference appellant had supplied. The latter included the following under "Would you rehire? Why or why not?": "She was not my employee. I was an attending MD on unit she worked at St. Mary's." Under "Actual reason for termination?" Dr. Israelstrom wrote "As far as I can tell, it had to do with advocating too strongly for patients (clients). (vs. not enough)."

10. Ms. Reitman was concerned about the refusal of St. Mary's to have provided any performance or related information, and the nature of the reference provided by Dr. Israelstrom. These factors raised questions in Ms. Reitman's mind about appellant's suitability for employment, and she (Ms. Reitman) ultimately decided that it would involve an undue risk to hire appellant, when, in Ms. Reitman's opinion, there were other available candidates that did not pose a similar risk. Therefore, Ms. Reitman decided not to hire appellant.

11. Ms. Reitman's approach with respect to the consideration of certain other candidates who were not deemed unsuitable following the reference check process used in this selection process was as follows:

a. Candidate 1: Of four employers listed on her employment application, only two returned MMHI's reference check forms. The form from her current employer was positive. The other returned form only confirmed dates of employment. Ms. Reitman was not concerned about this candidate's reference situation because in her experience it was not unusual for employers to not return reference check forms

and to only confirm dates of employment. Ms. Reitman felt there was nothing with respect to this candidate that was negative.

b. Candidate 2: This candidate had three positive references, including her current employer. No form was returned form one institution which was no longer in existence. One reference (which was excellent) did not fill in the blank for "Reason for termination." Two of the forms were filled out by someone other than whom the applicant had listed as her supervisors. Ms. Reitman felt there was nothing about this candidate that was negative.

c. Candidate 3: The current employer (since 1989) of this candidate did not return a form. The candidate's employer from 1983-1987 returned a positive reference. Also, Ms. Reitman received positive verbal information from this candidate's supervisors when he had been employed previously at MMHI. Ms. Reitman felt there was nothing about this candidate that was negative.

d. Candidate 4: The current (since February 1995) employer did not return a reference form. This was the candidate's only employment as an RN. There were three positive references from MATC, where the candidate had obtained an associate degree as an RN in December 1994.

e. Candidate 5: The current (since August 1994) and only employer of this candidate as an RN did not return a reference check form. Her previous employers, Mendota Mental Health Institution and Central Wisconsin Center, where this applicant had been employed as a Resident Care Technician 2 and an Institutional Aide 2, respectively, returned positive references.

f. Candidate 6: She had been employed at a nursing home for 12 years as a residential aide. This employer provided no reference information. Ms. Reitman was aware that this was consistent with that employer's normal personnel practices. A subsequent employer, a private retail establishment where the applicant had been employed (in a non-health care capacity) while attending nursing school, provided a positive reference.

g. Candidate 7: She had been employed by the same nursing home as the previous candidate. That employer also failed to provide substantive reference information with respect to this candidate. This candidate had a positive reference from an employer for whom she was providing home health care, but Ms. Reitman attached little weight to this information because this person was not familiar with professional nursing requirements. This candidate had not been selected in an earlier (1994) hiring process because of certain concerns about her employment with another employer. Subsequent to the 1994 hiring decision, she had provided an explanation of that employment situation, which, if it had been available in time, would have led MMHI to have hired her. In any event, MMHI did not consider the 1994 materials with respect to the 1996 hiring decisions.

12. After appellant received a form letter advising her of her nonselection, she telephoned MMHI on May 22, 1996, and asked James Billings, the MMHI personnel manager, why she had not been hired. He told her he would look into the matter and get back to her. Appellant told him that if she did not receive a response within two weeks, she would file a complaint concerning the matter.[3] Appellant's demeanor or attitude during this conversation was neither unpleasant nor otherwise inappropriate to the circumstances.

13. On May 23, Mr. Billings called appellant and explained to her that her references from St. Mary's and Dr. Israelstrom, while not negative per se, raised concerns which formed the basis for the decision not to hire her. Appellant said she did not think this was fair because she had not been given an opportunity to have provided an explanation of the circumstance of her employment situation at St. Mary's, which, she asserted were caused by her role as a "whistleblower." Mr. Billings suggested she request in writing that MMHI reconsider its hiring decision.

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[3] Immediately after appellant spoke to Mr. Billings, she called this commission and inquired about her appeal rights. Because of concerns about possibly missing the statute of limitations for an appeal (30 days pursuant to §230,44(3), stats.), she decided she should file an appeal immediately and withdraw it later if her dispute with MMHI were to be resolved. Thus she filed this appeal on May 23, 1996.

14. By a letter to MMHI dated May 24, 1996 (Exhibit 3), appellant requested reconsideration of the hiring decision. This letter included the following:

> I think it was unfair to make a decision not to hire me without obtaining further information and I would like to offer additional information now. St. Mary's terminated my position [sic] as a retaliatory action for my "whistleblowing" about patient's rights abuse related to informed consent and electric shock treatments. . . . I have enclosed a copy of some of the pages from the Wisconsin Coalition for Advocacy's investigative findings entitled "A Report on Violations of Patients' Rights by St. Mary's Hospital, Madison, Wisconsin." . . . This report stems from my reporting to the agency the patient abuses I witnessed and will give you support of my credibility.

15. Following receipt of the aforesaid letter and its attachments, MMHI proceeded again to consider whether to hire appellant. At this point, Ms. Reitman no longer was involved in the decision-making process, which was carried out by Steve Watters, the MMHI director, with the assistance of Mr. Billings.

16. Mr. Watters concluded that appellant should not be hired. While he believed that the additional information appellant provided addressed much of the concern entertained by Ms. Reitman, he and Mr. Billings believed that appellant's approach in her telephone conversation with Mr. Billings, wherein she threatened to file a complaint,[4] suggested she would be a disruptive or divisive employe.[5]

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[4] See Finding # 12, above.

[5] Mr. Billings memo summarizing what occurred (Exhibit 1) includes the following:

> The original decision to not hire Ms. Neldaughter initially was based solely on employment related information which gave rise to concerns about her suitability as an employee. Her subsequent demanding behavior, which includes making threats of lawsuits in her first conversation with me, supports the original conclusion that this is an individual who may cause disruptions as an employee. The nature of the patient populations at MMHI require that staff of various disciplines work closely as a team. This means dialogue and compromise, not power struggles, staff splitting and divisiveness, all contrary to achieving the goal and mission of MMHI. Ms. Neldaughter appears to be a person quick to engage in the latter, given her immediate accusatory positions and threats.

CONCLUSIONS OF LAW

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

2. Appellant has the burden of proof to establish by a preponderance of the evidence that respondent's action of not hiring her for in 1996 was illegal or an abuse of discretion.

3. Appellant has sustained her burden of proof.

4. Respondent's action of not hiring appellant in 1996 was an abuse of discretion.

5. Appellant is entitled to an appointment to the next available Nurse Clinician vacancy at MMHI, provided she is then qualified.

OPINION

The jurisdictional basis for this case is §230.44(1)(d), stats., which provides:

> *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.

Since appellant has not made any allegations of illegality with respect to the hiring transaction in question, the sole issue before the commission is whether that transaction involved an abuse of discretion.

An "abuse of discretion" is "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 long as the exercise of discretion is not "clearly against reason and evidence," the commission may not reverse an appointing authority's hiring decision merely because it disagrees with that decision in the sense that it would have made a different decision if it had substituted its judgment for that of the appointing authority. *Harbort v. DILHR*, 81-0074-PC, 4/2/82.

Because appellant requested and was given reconsideration following respondent's initial decision not to hire her, respondent's decisional process consists of two distinct parts. The initial decision was made by Ms. Reitman, the Assistant Director of Nursing, and was based on the questions raised by Dr. Israelstrom's reference, which included the concern that appellant had not volunteered information about her termination at St. Mary's. The second decision was made by Mr. Watters, the MMHI Director, in consultation with Mr. Billings, the personnel manager. That decision was based primarily on appellant's threat of litigation in her initial conversation with Mr. Billings.

In its objections to the proposed decision, respondent contends that the second part of the decisional process (that made by Mr. Watters after appellant requested reconsideration) was not part of the subject matter of this appeal. Respondent argues that in the event the Commission does consider Mr. Watters' decision as part of the subject matter of this appeal, it should reopen the hearing to allow respondent to make an additional record.

In the Commission's opinion, the subject matter of this §230.44(1)(d), Stats., appeal is respondent's failure or refusal to hire appellant as a Nurse Clinician following her certification in March, 1996. After respondent (through Mr. Watters) reconsidered its initial decision (which had been made by Ms. Reitman) not to hire appellant, it decided to stand by its original decision. However, the rationale for its decision changed to include a new reason (appellant's "demanding" behavior as evidenced by her stated intent to pursue litigation if she did not receive a response in two weeks to her question as to why she had not been hired). This additional reason falls within the scope both of the respondent's failure or refusal to hire appellant, and the stipulated issue for hearing: "[w]hether the respondent committed an illegal act or an abuse of discretion in not appointing the appellant to the vacant positions of Nurse Clinician at Mendota Mental Health Institute." Conference report dated June 17, 1996.

The Commission also is of the opinion that respondent waived any objection to the scope of the hearing by never raising this issue until after the promulgation of the proposed decision and order. Respondent states in its objections that respondent was

unaware that the second decision was included in the hearing issue. Yet respondent specifically stated in its closing statement at the hearing that Mr. Watters' decision was not illegal or an abuse of discretion. Further, it was clear from the course of the hearing that both the appellant and the hearing examiner considered this part of the issue for hearing.[6] Indeed, both parties adduced considerable evidence concerning Mr. Watters' decision, and it does not appear that any further hearing could lead to the introduction of any new material evidence. Respondent states in its objections that if it "had known in advance of the hearing that the issue was broader than the formal hiring process in this case, it would have presented testimony about the nature of the many manipulative patients at Mendota, and the importance of consistent, team oriented approach by staff members." Respondent already has presented evidence on these topics, and this evidence was not contested by appellant. Furthermore, additional evidence along these lines could not affect the outcome of this case, because it would not affect the fact that respondent based its conclusion that appellant "was unlikely to work well with the treatment team," respondent's objections, p. 4, solely on her statement that she would pursue litigation if she could not get an answer to her question as to why she had not been hired.

With respect to the merits of respondent's initial decision (by Ms. Reitman), while it is a borderline case, in the Commission's opinion respondent's actions have not been shown to have been an abuse of discretion. Certainly as a matter of sound personnel management, it was questionable to attach the weight that was given to Dr. Israelstrom's somewhat nebulous comment on the reference form he filled out under "Actual reason for termination?": "As far as I can tell, it had to do with advocating too strongly for patients (clients) (vs. not enough)." Dr. Israelstrom had also stated on the form that "She [appellant] was not my employee. I was an attending MD on unit

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[6] For example, as respondent points out in its objections, the examiner raised a question during respondent's closing statement at the end of the hearing about the public policy implications of Mr. Watters' reliance on appellant's threat of litigation as a reason for his decision. No objection was raised at that time that this concern about Mr. Watters' decision was outside the scope of the hearing issue.

she worked at St. Mary's." The combination of his uncertainty about the circumstances of her termination and his nonmanagement role at the hospital seemingly would raise a significant question about any weight to be given to his comments about her termination. On the other hand, it is not unreasonable that an attending physician on the unit where appellant worked would know about her termination, and Ms. Reitman's concern was focused not so much on the termination per se, but on appellant's failure to have come forward on her own with any information about this aspect of her employment at St. Mary's. This raises the question of whether Ms. Reitman's belief that appellant should have volunteered this information had any kind of reasonable basis.

Appellant contends that she was not informed that she should have offered this kind of information, and that she had no way of knowing that respondent would be looking into her employment at St. Mary's because she had not listed anyone in management there as a reference. Respondent contends essentially that it is inherently reasonable for an employment applicant to provide information about a termination by a recent employer, and that management had indicated that it wanted applicants to do this through its "general questions" asked at the interviews which included: "[i]s there anything about yourself that would be job related that you would like to share with us or feel that we need to know," and "[w]hat will your references say about you?" While appellant pointed out that the references she had provided did not include anyone in management at St. Mary's, the first question was general enough to have signaled applicants that management was interested in hearing information about something as significant to the hiring decision as a termination.[7] In the commission's opinion, Ms. Reitman's belief that appellant should have volunteered some information about her termination at St. Mary's was not completely without a reasonable basis.

As part of her effort to demonstrate an abuse of discretion, appellant attempted to compare respondent's handling of her situation with that of other candidates. Lack of consistency in dealing with comparable matters could contribute to a conclusion of

an abuse of discretion. In the commission's opinion, this effort has not been successful because appellant has not shown that her case is really parallel with those of the other candidates in question. What this record shows is that Ms. Reitman was dealing with a widely varied approach by the employers who had been asked to participate in the reference check process. Some returned complete evaluations, some merely confirmed dates of employment, and some did not respond at all. Ms. Reitman was working with a limited amount of time and needed to fill the vacancies in an expeditious manner. She knew that the candidates she was evaluating had passed the preliminary screening and had the essential qualifications for the position. She basically worked with the information she had and tried to decide if there were negative information in the reference check material that would dictate the elimination of any candidate. While some of the other candidates had gaps or questionable areas, none had the kind of negativity associated with the unexplained termination in appellant's background. Thus, while again it could be argued from a personnel management standpoint that Ms. Reitman should have handled things differently, the commission can not conclude that her treatment of appellant in comparison to the other candidates constitutes, either in itself or in combination with the other circumstances of record, an abuse of discretion.

In a related vein, appellant also argued that she should have been considered better qualified than other candidates because of having done better in the panel interview. However, Ms. Reitman viewed the panel's role as a screen – i. e., to weed out from those certified any unqualified candidates. She deemed all the candidates who passed the panel evaluation as hirable, as long as their reference checks did not contain anything negative. Appellant was not hired because of her reference checks, not because other candidates were deemed better qualified in a relative sense.

Once respondent decided to reevaluate appellant's application, it is clear from the testimony of Mr. Billings and Mr. Watters that the deciding factor in the second decision not to hire appellant was the fact that she had threatened to file a complaint if

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[7] In any event, since appellant listed a professional colleague (Dr. Israelstrom) at St. Mary's as a reference, she could reasonably have anticipated that the subject of her termination there

she did not get a response from MMHI about her denial within two weeks.[8] It is this aspect of respondent's decisional process that falls into the category of abuse of discretion.

In *Kelley v. DILHR,* 93-0208-PC, 3/16/95, the commission held that "if an agency *considers a factor it should not have considered,* or fails to consider at all a factor it should have considered, this can amount to an abuse of discretion. *See Motor Vehicle Mfrs. Assn. v. State Farm Mut.,* 463 U. S. 29, 43, 77 L. Ed. 2d 443, 458, 103 S. Ct. 2856 (1983)." (emphasis added). In the latter case, the Court noted that agency action normally would be considered arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider." *Id.* An applicant for state employment has the statutory right under §230.44(1)(d), stats., to challenge an agency's hiring decision.[9] A hiring decision should not rely on a person's use of, or stated intention to use, a legitimate, statutorily provided avenue of redress, because to do so would have a chilling effect on an applicant's exercise of his or her lawful rights, and conflict with the legislature's action in creating the right in the first instance. There is no reasonable basis for an agency to deny state employment to a person on the basis of the person's exercise, or stated intent to exercise, a statutorily-provided means of administrative redress.

This is not a case of someone acting in an abusive or obnoxious manner while threatening to file a claim. The appellant knew she had certain (time limited) rights with respect to her non-hire, and she merely informed respondent that if she did not receive an explanation for its action within a certain time, she would exercise those

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would have come up in the course of a reference check.

[8] Mr. Billings' summary of what occurred (Exhibit 1) included the following: "Her subsequent demanding behavior, which includes making threats of lawsuits in her first conversation with me, supports the original conclusion that this is an individual who may cause disruptions as an employe."

[9] Appellant also considered challenging her nonselection under the "whistleblower law," §230.85, stats., since she believed she had been terminated at St. Mary's because of her opposition to improper practices associated with the use of electroshock therapy. However, once she learned that that law did not apply to employe disclosures made in connection with non-state employment, she realized this was not a viable option.

rights. The Commission cannot accept the contention that respondent's decision was based *not* on the appellant's threat of litigation but rather on her "demanding behavior," respondent's objections to proposed decision, p. 4, because the record clearly establishes that the only reason for this conclusion by management *was* her threat of litigation.

It should also be noted that Mr. Billings expressed some concern about the fact that appellant filed her appeal with the commission the same day she told him she would file if she did not get an explanation from respondent within two weeks.[10] Review of the hearing tapes following the promulgation of the proposed decision indicates that Mr. Billings was not aware of this fact at the time he made his recommendation to Mr. Watters.[11] While it is arguable that if this had been the only basis for respondent's second rejection of appellant, it would not have constituted an abuse of discretion, the record is clear that the respondent's primary motivation for its second decision was appellant's stated intent to file a claim if she did not receive an explanation. For example, Mr. Billings' testimony included the following:

> If I'm a prospective employer, and a person who is interested in a job with me comes to me and asks me questions about – OK, I didn't hire that person and that person wants to be reconsidered; if they come to me and ask for reconsideration and give, you know, reasons why in terms of I'm a good employe, etc., etc., I view that one way. If they come to me and they say I want reconsideration, and if you don't reconsider me I'm going to file some type of suit against you or an appeal on your decision, I guess I view that negatively. . . . You [appellant] threatened to file some type of suit, appeal, whatever, against Mendota, because, and your words were, because you wanted some answers to some questions, and if you didn't get those, you were going to file that suit or appeal. To me, my personal opinion, that's a very negative approach in terms of getting information. You could have gotten that information without threatening.

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[10] After appellant finished her conversation with Mr. Billings, she called the commission to inquire about her rights. Based on the information she obtained, she decided she needed to file at once to avoid a potential statute of limitations problem.

[11] While testifying on this subject, Mr. Billings interrupted himself to say "well, I'm not sure I had that information [at the time he made his recommendation to Mr. Watters]."

With respect to the remedy, the proposed decision concluded that appellant was entitled to back pay. However, while back pay is an available remedy in certain kinds of discrimination proceedings, *see, e. g.,* §111.39(4)(c), Stats., the statutory framework governing civil service appeals of this nature does not provide for back pay awards, *Seep v. Personnel Commission,* 132 Wis. 2d 32, 409 N.W.2d 142 (Ct. App. 1987).

ORDER

Respondent's action of not offering appellant an appointment as a Nursing Clinician is rejected, and this matter is remanded for action in accordance with this decision.

Dated: _____, 1997 STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson

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