STATE OF WISCONSIN PERSONNEL COMMISSION

JAMES WEDEKIND,
Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 98-0091-PC

FINAL DECISION AND ORDER

A hearing was held in the above-noted case on November 16, 1998. The appellant elected to make closing oral arguments on November 17, 1998. Respondent elected to file a written brief to which appellant was provided an opportunity to reply. The Commission received the final written brief on December 16, 1998.

The parties agreed to the following statement of the issue for hearing at a prehearing conference held on August 27, 1998 (see Conference Report dated August 28, 1998):

> Whether respondent's decision to deny reinstatement of appellant to a position at Ethan Allen School is an illegal action or an abuse of discretion.

FINDINGS OF FACT

1. The appellant worked for respondent at Ethan Allen School (EAS), starting in or about 1987. He transferred to respondent's Prairie du Chien Correctional Institution in or about September 1996. He applied for a transfer to return to EAS in November 1997, but there was a hiring freeze on all transfers within the juvenile system. He quit his employment with respondent effective November 23, 1997.

2. The appellant submitted a letter requesting reinstatement to EAS in December 1997. He telephoned Renee Marquette, EAS personnel manager, and received her confirmation that his letter had been received.

3. In or about mid-May 1998, the appellant heard that EAS was hiring youth counselors. He had not been contacted for an interview so he spoke with Julie Peters, union

president for EAS (local 15). Ms. Peters was unsure how reinstatement would work so she agreed to contact EAS personnel. Ms. Peters telephoned the appellant about a week later indicating that EAS personnel could not locate his letter requesting reinstatement. She suggested that appellant resubmit a second letter, which he did. A copy of his second letter is in the record as Exh. R-1, and is dated May 21, 1998.

4. By letter dated June 10, 1998 (Exh. R-2), respondent invited appellant to interview for a Youth Counselor 1 position at EAS. The appellant appeared for his interview as scheduled for June 17, 1998 at 1:00 p.m. After he arrived and prior to the interview, he gave two completed forms to Bonnie Paschal who works in the personnel office at EAS. The first form (Exh. R-3) is entitled "Application Supplement - Conviction Record." The second form (Exh. R-4) is entitled "Employment Application/Applicant Registration Supplement." She placed both forms in a folder for safe-keeping. All candidates entitled to an interview were required to complete both forms. After all the interviews were done, the interview panel had access to the second form but not to the first (conviction) form.

5. The first form contained questions regarding appellant's conviction record. The appellant answered "Yes" to the following question:

> Have you been convicted or fined for any offense including traffic but not parking or speeding? (Include offenses which have been expunged from your record.)

The form indicated that if a candidate answered the above question in the affirmative then the candidate should also indicate the nature of each offense, date of offense, and related information. The appellant disclosed on the form that he had been convicted of operating a motor vehicle while intoxicated (OWI) in Milwaukee County in 1992 or in 1993, and as a result had been fined and sentenced to jail. The appellant signed and dated the form in a signature block preceded by the following statement:

> I state that all the information on this application is true and complete to the best of my knowledge and I understand that any falsification or omission of information may disqualify me for this position.

The appellant was aware that less than full disclosure could disqualify him from consideration for the position yet he failed to reveal that he also had a 1990 OWI conviction.

6. The appellant was required to fill out a disclosure of his arrest and conviction record back in 1996, in connection with his transfer to the Prairie du Chien correctional institution. He disclosed his 1990 "OWI" conviction on that form.

7. Appellant's interview results in June 1998, were sufficient for him to be considered further for the position. The conviction record forms completed by candidates, like appellant, who did well enough to be considered further for the position were forwarded to Colleen Jo Winston, respondent's Director of the Office of Diversity. She compared the conviction information disclosed by the candidates against the information received on each candidate's conviction records. Regarding the appellant in particular, she reviewed his disclosure (Exh. R-3) against his conviction record (Exh. R-7) and noticed that he failed to disclose the 1990 OWI conviction. Pursuant to respondent's policy, she informed the Human Resource Director that appellant could not be considered further for the position.

8. Ms. Winston had not known the appellant before she compared his disclosure against his conviction record (as described in the prior paragraph). She was unaware that he previously had worked for respondent.

9. Respondent relies on each candidate's disclosure of convictions tendered at the time of interview. Respondent fills so many positions on a yearly basis that it is not feasible to attempt to identify candidates who previously worked for respondent and to search for prior disclosures. Respondent's policy is to evaluate all candidates on the same criteria during the interview process. Searching for prior disclosures by a former employe could be viewed as inconsistent with respondent's policy.

10. Ms. Paschal was informed by the "central office" on June 19, 1998, that the appellant could not be considered further for the position due to falsification on his application supplement (Exh. R-3). Ms. Paschal went to Laurie Schraefel, an interview panelist who had been asked to check appellant's references. Ms. Paschal asked if Ms. Schraefel had called appellant's references yet. Ms. Schraefel said she had not made the calls yet. Ms. Paschal

advised that Ms. Schraefel could "skip" the reference calls for the appellant because respondent could not hire him.

11. Respondent informed the appellant by letter dated July 1, 1998 (Exh. R-8), that he was not selected for the position. The text of the letter is shown below:

> Thank you for taking the time to go through our interviewing process for the Youth Counselor 1 positions at Ethan Allen School.
>
> We have reviewed your qualifications carefully. However, we have selected someone whose background, knowledge, and experience were better suited to our needs.
>
> We recognize and appreciate the time and effort you have invested in exploring a career with Ethan Allen School. We were very pleased to have met you, and we wish you every success in your career endeavors.

It is respondent's standard practice to send a form letter like the above to candidates who were not hired. It is against respondent's standard practice to explain to candidates the reason why they were not selected.

12. The person who signed the no-hire letters was Nichol Koremenos, the Human Resources Director at EAS. This was Mr. Koremenos' first State job which he started on June 8, 1998. After the appellant received the no-hire letter, he telephoned Mr. Koremenos and asked why respondent did not hire him. Mr. Koremenos was unfamiliar with the details surrounding the hiring decision and, accordingly, asked the appellant to read the rejection letter out loud. Based on the information in the letter, Mr. Koremenos replied that the appellant probably did not fulfill one of the requirements, or did not score well enough to meet the hiring criteria. Mr. Koremenos also told the appellant that appellant's first two references had been checked as part of the interview process.

13. Respondent did not tell the appellant until the prehearing conference was held on this appeal, that the reason he was not hired was because he failed to disclose all convictions on the form he completed the day of his interview.

14. Respondent's arrest and conviction policy effective as of June 4, 1998, provides in pertinent part as shown below (Exh. R-9):

II. POLICY STATEMENT
To help ensure that the Department meets its mission and at the same time complies with the Wisconsin Fair Employment Act, we may consider a pending criminal charge (arrest) and a conviction record only on a very restricted basis. A pending criminal charge or a conviction may only be considered if the circumstances of the offense substantially relate to the circumstances of the job . . .

IV. DOC PRE-EMPLOYMENT CRITERIA ONLY
A. Affected Applicants: This procedure applies to all permanent, projet and limited term appointments, including all new hires, and permissive reinstatements . . .

V. JOB ANNOUNCEMENTS . . .
B. Security Criminal Conviction Information
Applicants who are certified will be required to complete an "Application Supplement/Conviction Information" form prior to any employment interviews . . .

In addition, before an offer of employment is made, a security check will be conducted on applicants who are selected for appointment.

If the security check or application supplement indicates a pending charge or conviction record, the Appointing Authority shall make the substantial relationship determination in accordance with this policy. If there is a substantial relationship between the pending charge or conviction record, including the circumstances of the crime and the job, the applicant may not be hired.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this case pursuant to §230.45(1)(a) and 230.44(1)(d), Stats.

2. The appellant has the burden of proof to establish that respondent's failure to hire him for the Youth Counselor position in June 1998, was either illegal or an abuse of discretion.

3. The appellant failed to sustain his burden of proof.

OPINION

The appellant first contends that he had a right to the Youth Counselor job at EAS in June 1998, due to his reinstatement rights. He argues that the term "reinstatement" to the average person means you have a right or ability to get your job back. The apparent corollary argument is that respondent should have just given him the job and not required him to interview or to fill out the conviction form. His argument is incorrect.

The state civil service system grants certain employees who lose their job in a layoff the right of mandatory reappointment without competition (meaning there is no need to take a civil service exam). This mandatory right is called "restoration." See §§ER-MRS 1.02(30), and 22.10, Wis. Adm. Code. The appellant voluntarily terminated his employment and, accordingly, his situation did not fit the criteria for mandatory reappointment.

Individuals who voluntarily terminate their state employment are entitled to permissive reappointment without the need to take a civil service exam. This permissive right is called "reinstatement." See §§ER-MRS 1.02(29) and 16.035, Wis. Adm. Code. Respondent complied with appellant's permissive rights by allowing him to go forward to an interview without first requiring him to go through the civil service examination procedures. (See §230.25, Stats.)

The appellant has not shown that respondent abused its discretion or committed an illegal act by granting him permissive reinstatement rights rather than mandatory reappointment. Appellant's "common-sense" definitions cannot override the definitions and provisions contained in properly promulgated administrative rules.

The appellant raised a second argument of illegality or abuse of discretion based on the wording of respondent's arrest and conviction policy. It was Ms. Winston who discovered appellant had not made a full disclosure on the conviction form and who determined he therefore could not be hired. The appellant contends this violates respondent's policy because the policy requires this determination to be made by the "appointing authority" rather than by some "anonymous person in Madison." The Commission rejects this argument because it is based upon an incorrect reading of respondent's policy. The policy requires the appointing authority to make the determination of whether "there is a substantial relationship between the

pending charge or conviction record" and the job. Respondent did not get this far. There is no indication that Ms. Winston compared the circumstances of appellant's OWI offenses to the job requirements. Rather, she discovered that appellant failed to make full disclosure of his conviction record and made her decision on that basis. Her involvement is not contrary to respondent's policy. In fact, disqualifying a candidate from further consideration due to falsification of application materials is specifically authorized in §ER-MRS 6.10(7), Wis. Adm. Code.

The appellant also faults respondent for failing to check his prior employment records to see if he had disclosed the 1990 OWI previously. In essence, his argument is that respondent abused it discretion by relying on the conviction disclosure he gave at the time of his interview in June 1998, rather than searching his prior employment records to see if he had made full disclosure previously. He wrote as noted below in post-hearing arguments, which the Commission received on December 16, 1998:

> If DOC had spent one-tenth of the time checking their own records as they have defending their position they would have found all this information they wanted had been previously disclosed to them.

The appellant's argument fails to recognize that appellant himself could have avoided the entire situation by fully disclosing his conviction record in June 1998. He signed the form knowing he could be rejected from further consideration if he failed to make a complete disclosure. When asked at hearing why he failed to disclose the 1990 OWI, he said he thought he only needed to disclose convictions which occurred after he left state service because he previously disclosed convictions prior to that time. His explanation makes no sense. He did note on the form in June 1998, that he had a prior OWI in 1992 or 1993. If he truly thought he only needed to disclose convictions occurring after he quit state service, then he would not have disclosed the OWI in 1992 or 1993. In short, his explanation was not credible.

In *Ebert v. DILHR*, 81-64-PC, 11/9/83, the Commission stated:

> 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*, 79-208-PC, 6/3/81. The question before the Commission is

> not whether the Commission would have made the same decision if it substituted it 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. DILHR*, 81-74-PC, 4/2/82.

The Commission finds that respondent did not abuse its discretion by relying upon the conviction disclosure form completed by the appellant as part of the interview process in June 1998, as opposed to searching for disclosures previously made when he was a state employe. The record shows that searching prior employment records would create an undue burden for respondent because of the large number of positions filled each year. This, coupled with the warning about incomplete disclosure contained on the form, results in a finding that respondent's reliance upon the form completed as part of the interview process was not clearly against reason or evidence.

ORDER

This case is dismissed.

Dated: February 24, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, 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