STATE OF WISCONSIN PERSONNEL COMMISSION

BRENDA J. BROWN
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 99-0006-PC

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal of actions taken by respondent in regard to appellant's candidacy for the subject Program Assistant Supervisor position. A hearing was held on June 15, 1999, before Laurie R. McCallum. The parties gave their final argument orally at the conclusion of the hearing.

FINDINGS OF FACT

1. Appellant began her employment with respondent in July of 1994 as a Program Assistant 1 (PA 1). Appellant had satisfactory performance as a PA 1 for respondent until her promotion to a Program Assistant 2 (PA 2) position at the Milwaukee Women's Correctional Center (Women's Center) effective November 9, 1997.

2. Appellant's first-line supervisor in this PA 2 position was Beverly Lewis-Moses who functioned as the superintendent of the Women's Center. Ms. Lewis-Moses was regarded by her supervisor as a manager who gave her subordinates the benefit of the doubt; and who provided her subordinates, through training and mentoring, with every possible opportunity to be successful.

3. In a Performance Planning and Development report signed by Ms. Lewis-Moses on April 9, 1998, she summarized her evaluation of appellant's work performance in the PA 2 position as follows:

> Ms. Brown has failed to satisfactorily meet the responsibilities of the duties described in the Position Description for the Program Assistant II. She has difficulty with the inmate account computer program, as well as other vital functions of the position, in spite of receiving extensive training in all areas from a number of people, and receiving resource materials.
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> On January 8, 1998, I met with Ms. Brown in my office located at 525 N 17th Street, Milwaukee to review her job responsibilities up to that point. During this review, job areas that needed to be improved were gone over and Ms. Brown was instructed to use the Program Assistant Manual that was provided to her in order to assist her in job responsibilities. Further, she was directed to provide me with a daily synopsis of the work she performed each day which was to include any assistance needed in anything that she was having difficulty with. Initially, Ms. Brown failed to provide the synopses. After being directed to do so once again, she provided a synopsis for the following days: January 26, 27, 28, 29, 30, 1998, and February 2, 1998. She Has not provided anything since February 2, 1998. Nor did the synopses she did provide include anything relative to difficulties she may have been having in the job as Program Assistant II.
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> On January 6, 1998, Ms. Brown received a PPD review at which time her job performance up to that date was reviewed and areas gone over that she needed to improve on; (see PPD dated November 19, 1997-January 16, 1998). Ms. Brown has only made minimal progress since the last PPD review and has not effectively functioned in the capacity of a Program Assistant II in the Wisconsin Correctional Center System.

4. In a letter dated April 9, 1998, Phil Kingston, Assistant Administrator, Division of Community Corrections, notified appellant that she was being removed from her PA 2 position for failure to meet probationary standards, and restored to her former PA 1 position or one of like nature. Appellant was subsequently restored to a PA 1 position.

5. Some time prior to December 9, 1998, appellant applied for the position of Program Assistant Supervisor (PA Sup) for respondent's Southeast Regional Office,

Division of Juvenile Corrections. The supervisor of this position was Jan Long, Community Corrections Supervisor.

6. Appellant was interviewed for the PA Sup position on December 9, 1998. Ms. Long was one of the interviewers.

7. On December 14 and 16, 1998, Ms. Long contacted the employment references provided by appellant. Reference JC indicated, in addition to comments relating to appellant's good typing skills and good follow-through, that appellant's working relationships with others was not her strong suit, that she was quiet and aloof at work, and that JC was not comfortable indicating whether she would rehire appellant if she had the opportunity. Reference VT indicated, in addition to comments relating to appellant's good organizational skills and conscientious work, that appellant's strong personality interfered with her ability to get along well with her co-workers, and VT declined to indicate whether she would rehire appellant if given the opportunity. Reference BR indicated, in addition to comments relating to the generally good quality of appellant's work product and organizational skills, that appellant did not get along well with clients and staff, and that BR would be reluctant to rehire appellant if she had the opportunity.

8. On December 17, 1998, Ms. Long telephoned appellant and requested that she come to Ms. Long's office to discuss the PA Sup position. Ms. Long told appellant that she had checked her references and had received some favorable and some unfavorable comments. Ms. Long asked appellant if she would accept the position if it were offered to her and appellant indicated she would. Ms. Long did not offer the PA Sup position to appellant during this meeting, but she did indicate that she would be recommending appellant for the position. Ms. Long and appellant discussed the fact that this recommendation would have to go through several levels of approval. Ms. Long did not have the authority to offer the PA Sup position to appellant. Appellant interpreted Ms. Long's statements to her during this conversation as an offer of the PA Sup position. As a result of this meeting, appellant advised her supervisor that she

would be leaving her current position for the PA Sup position, and her supervisor told her to submit a letter of resignation.

9. Ms. Long contacted her supervisor, Thomas Van den Boom, Chief of the Southeast Region, to recommend that appellant be appointed to the PA Sup position. Mr. Van den Boom, consistent with his usual practice, contacted Ms. Lewis-Moses, one of appellant's recent supervisors. Ms. Lewis-Moses indicated to Mr. Van den Boom that appellant had been terminated from probation from her PA 2 position at the Women's Center, and sent him a copy of the PPD of April 9, 1998, and of appellant's probationary termination letter. After reviewing this PPD, Ms. Long and Mr. Van den Boom concluded that the PA Sup position should not be offered to appellant.

10. On December 21, 1998, Ms. Long telephoned appellant. During this conversation, Ms. Long advised appellant that she had submitted her recommendation that appellant be selected for the PA Sup position to Mr. Van den Boom who had informed Ms. Long that he had reservations about appellant's selection based on additional information he had received regarding her employment history. Ms. Long further advised appellant that the recruitment process was now on hold, and any questions should be directed to Mr. Van den Boom.

11. Appellant then telephoned Mr. Van den Boom. Appellant told Mr. Van den Boom of her impression that Ms. Long had offered her the position on December 17, 1998. Mr. Ven den Boom told appellant that she had not been offered the position. Mr. Van den Boom based this statement on his conversation with Ms. Long in which she indicated that she had not offered the position to appellant, and on the fact that Ms. Long did not have the authority to offer the position to appellant. Mr. Van den Boom indicated to appellant that the hiring process was now on hold.

12. Mr. Van den Boom did not have the authority to offer the PA Sup position to appellant.

13. Some time on or after December 21, 1998, appellant requested that her resignation be withdrawn, and this request was granted. There was no break in

appellant's employment with respondent resulting from the letter of resignation she submitted and later withdrew.

CONCLUSIONS OF LAW

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

2. Appellant has the burden to show that respondent's failure to appoint her to the subject PA Sup position was illegal or an abuse of discretion.

3. Appellant has failed to sustain this burden.

OPINION

The statement of the issue for hearing to which the parties agreed is as follows:

> Whether the actions taken by respondent on or after December 17, 1998, in regard to appellant's candidacy for the subject Program Assistant Supervisor position were illegal or an abuse of discretion.

The source of the Commission's jurisdiction over this matter is §230.44(1)(d), Stats. *Brown v. DOC*, 99-0006-PC, 4/21/99. This statutory section invests the Commission with the authority to review "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." Here, as noted in *Brown, supra*, appellant is appealing respondent's alleged withdrawal of its offer of the subject PA Sup position to her.

The only argument advanced by appellant which could conceivably be viewed as alleging an illegality is her apparent contention that Ms. Long's alleged offer and her acceptance created a contractual obligation on respondent's part which was violated when she was not appointed to the position. First of all, the facts of record do not support a conclusion that Ms. Long ever offered appellant the PA Sup position. Not only does the record include Ms. Long's testimony that she did not offer the position to appellant, but it also reflects that Ms. Long did not have the authority to offer the position, that she and appellant discussed the fact that her recommendation would have to go through several levels of approval within the department, and that appellant

understood this. Moreover, appellant cites no authority for the proposition that an oral offer and acceptance can establish an employment contract for a position in state government. Although a question exists whether a written letter of appointment can establish such a contract (*See, e.g., Siebers v. Wis. Pers. Comm.*, 89 CV 00578, Outagamie Co. Cir. Ct., 11/9/89), it is undisputed that no such written letter of appointment was created here.

The focus then shifts to whether appellant demonstrated that respondent abused its discretion when Ms. Long and Mr. Van den Boom decided that appellant should not be recommended for the position based on her probationary termination from a PA 2 position at the Women's Center. The Commission has previously 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. 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."

It appears that appellant is contending in this regard that it was an abuse of discretion for Ms. Long and Mr. Van den Boom to consider information relating to complainant's employment history other than that provided by appellant during the recruitment process. In view of the tendency of candidates for employment to portray their qualifications and employment history in the most positive light, it would clearly not be unreasonable for a prospective employer to attempt to get a more objective view. Here, Mr. Van den Boom consulted one of appellant's recent supervisors, a practice he testified he routinely followed. The information obtained by Mr. Van den Boom from supervisor Lewis-Moses indicated that appellant's performance in a position of the type she would be supervising if she were the successful candidate for the PA Sup position

was unsatisfactory. It was not clearly against reason or evidence for Ms. Long and Mr. Van den Boom to conclude from this that appellant was unlikely to be successful in the subject PA Sup position and that the position should not be offered to her. The Commission has previously held that it is not an abuse of discretion for an employer to base a decision not to hire a particular candidate on an unfavorable reference or employment history. *See, e.g., Skaife v. DHSS*, 91-0133-PC, 12/3/91. Appellant has failed to show that respondent abused its discretion in this regard.

Appellant also appears to be arguing that respondent should be estopped from not appointing her to the position since she accepted Ms. Long's offer of the position. The doctrine of equitable estoppel was discussed by the Commission in *Meschefske v. DHSS & DMRS*, 88-0057-PC, 7/14/89:

> Equitable estoppel may be 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*, 78-154-PC, 5/14/79, aff'd, Dane Co. Cir. Ct. 79-CV-3420, 3/24/80. The three factors or elements essential for equitable estoppel to lie are stated in *Gabriel v. Gabriel*, 57 Wis. 2d 424, 429, 204 N.W. 2d 494 (1973) as follows:
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> "The tests for applicability of equitable estoppel as a defense derive from the definition of this court of such estoppel to be: '. . . action or nonaction on the part of the one against whom the estoppel is asserted which induces reliance thereon by another, either in the form of action, or nonaction, to his detriment . . . ' Three facts or factors must be present: (1) action or inaction which induces (2) reliance by another (3) to his detriment."
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> In order for equitable estoppel to be applied against the state, ". . . 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*, 54 Wis. 2d 438, 445, 195 N.W. 2d 464 (1972).

First of all, as concluded above, appellant has failed to show that the alleged action, i.e., the offer and its subsequent withdrawal, occurred. The preponderance of the credible evidence shows instead that Ms. Long did not offer the position to

appellant but indicated she would be recommending appellant's appointment to the position; and that Ms. Long mentioned and appellant understood that there were several levels of approval which needed to be completed before appointment could occur. Moreover, even if the record showed that an offer had been made and withdrawn, appellant has failed to show that she suffered any detriment as a result. Appellant did not give up her former position, she did not suffer a break in state service, she did not take a cut in pay. Appellant was in the same situation *vis a vis* her employment after Ms. Long and Mr. Van den Boom decided not to recommend her for appointment as she had been before she applied for the position. *See, Kelling v. DHSS*, 87-0047-PC, 3/12/91; *Gold v. UW & DER*, 91-0032-PC, 6/11/92. Appellant did not sustain her burden of proving the elements of equitable estoppel under the circumstances present here.

ORDER

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

Dated: August 25, 1999

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

LRM. 990006Adec1

Parties:

Brenda J. Brown
DOC
4200 N Holton St
Suite 210
Milwaukee WI 53212

Jon Litscher
Secretary, DOC
P.O. Box 7925
Madison, WI 53707-7925

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.)