STATE OF WISCONSIN PERSONNEL COMMISSION

BETH LUCHSINGER
Appellant,

v.

STATE PUBLIC DEFENDER,
Respondent.

Case No. 00-0177-PC

FINAL DECISION
AND ORDER

NATURE OF THE CASE

This is an appeal of a hiring decision. A hearing was held on December 20, 2000, before Laurie R. McCallum, Chairperson. The parties provided final argument orally at the conclusion of the hearing. A proposed decision and order was issued on January 4, 2001. Neither party filed objections. Due to a clerical error, the matter was not brought before the full Commission for decision until February 20, 2002.

The Commission adopts the proposed decision as its final decision, with changes denoted by alphabetical footnotes. The changes are unrelated to credibility issues.

FINDINGS OF FACT

1. In September of 2000, a job announcement for the position at issue here, respondent' s Madison Regional Office Administrator (Madison ROA), appeared in the state Job Opportunities Bulletin. This announcement indicated that the starting salary for the position would be between $38,296 and $59,359.

2. Appellant has been continuously employed in state service since October of 1971. Appellant was earning $37,000 annually when she resigned from her position in respondent' s Madison Regional Office in 1999 to take a position as a Senior Procurement Specialist with the University of Wisconsin-Madison. Appellant held this UW-Madison position at a salary of $47,000 when she applied and was being considered for the Madison ROA position.

3. Prior to applying for the Madison ROA position, appellant contacted Michael Blair, a Human Resource Specialist for respondent, and asked him whether it would be a demotion, transfer, or promotion if she were the successful candidate. Mr. Blair advised her it would be a promotion so she would be required to take the exam in order to be considered.

4. Appellant tested and was certified for the Madison ROA position.

5. In October of 2000, respondent interviewed twelve certified candidates, including appellant, for the Madison ROA position. Although it was a close call, appellant was rated as the top candidate by the interview panel, and Ann Post, a current Madison Regional Office employee, as the second-ranked candidate.

6. Dorothea Watson, First Assistant State Public Defender in the Madison Regional Office, recommended to appointing authority Michael Tobin, Director of respondent' s Trial Division, that appellant be appointed to the Madison ROA position. Mr. Tobin then met with Deputy State Public Defender Virginia Pomeroy, Budget Officer Christiansen, and Human Resources Manager Carla Blum to discuss the salary that should be offered appellant.

7 In July of 2000, the subject position was assigned to a "br oad band" pay range. Ms. Blum was under the impression at the time of the meeting with Mr. Tobin, based on training she had received relating to broad banding, that respondent had the discretion to set the salary for the subject position anywhere within the pay range, i.e., anywhere between $38,296 and $59,359.

8. Prior to September of 2000, respondent had used discretionary budget funds to adjust the pay of its Regional Office Administrators in order to eliminate salary disparities. In November of 2000, when the subject hiring decision was made, the salaries for respondent' s seven filled ROA positions ranged from $38,356 to $43,896, and the incumbents of these positions had been employed in state service between 4.8 and 19.5 years.

9. Mr. Tobin and the others present at the meeting were of the opinion that the salary offered appellant should disrupt to the least extent practicable the salary parity

recently achieved for ROA positions. For this reason, a decision was made to offer appellant her current salary, $47,000, and no more. Even at this salary, those present determined that it would take two biennia and the use of additional budget funds to achieve ROA salary parity again. Mr. Tobin communicated this to Ms. Watson and authorized her to make an offer of appointment to appellant at the $47,000 salary level.

10. Ms. Watson contacted appellant on Thursday, October 26, 2000, and made this offer to her orally. Appellant accepted, and she and Ms. Watson agreed on a start date of November 20, 2000. Appellant asked Ms. Watson whether it was possible to obtain additional compensation, since it was her understanding that a pay increase accompanied a promotion, and whether she would be able to obtain reimbursement for parking expenses. Ms. Watson said that she had only been authorized to offer appellant the position at her current salary, and referred appellant to respondent's personnel office for answers to her questions.

11. Late on Thursday, October 26, 2000, Ms. Blum decided to review the compensation plan then in effect, including in particular the revision to Section J of the plan which she had received in June of 2000. In reviewing this revision to Section J, Ms. Blum discovered for the first time that respondent was required to offer appellant an increase over her current salary of an amount equal to 8% of the minimum of the pay range, and determined that this would result in a starting salary for appellant of $50,630.

12. On Friday, October 27, 2000, Ms. Blum brought her discovery to Mr Tobin' s attention, and the two of them met with Ms. Pomeroy and Ms. Christiansen. The group decided to rescind the offer of the subject position to appellant because the salary component of the offer did not comply with the state compensation plan, and not to offer appellant the position at the required salary because of the ROA salary disparity that would result, because of the potential impact on respondent' s budget of a future effort to achieve ROA parity with appellant's salary, and because of the effect hiring appellant at the required salary would have on ROA morale until parity could be achieved several biennia in the future. They decided to offer the job to Ms. Post who

was ranked a close second to complainant after interviews. The starting salary of Ms. Post was lower than what respondent was required to offer complainant and would not raise issues of ROA salary parity and morale.[A] Ms. Blum volunteered to communicate this decision to appellant.

13. On Friday, October 27, 2000, Ms. Blum attempted to reach appellant but was unsuccessful because appellant was out of town. Ms. Blum left appellant a message to call her

14. Appellant returned Ms. Blum's call on Sunday, October 29, 2000, and Ms. Blum notified appellant of the withdrawal of the offer. Appellant asked if there was any room for negotiation and Ms. Blum indicated there was not because of the starting salary respondent would be required to pay her under the compensation plan.

15. On Friday, October 27, 2000, Ms. Watson offered the subject position to Ms. Post and she accepted it.

CONCLUSIONS OF LAW

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

2. Appellant has the burden to show that respondent's decision not to hire her for the subject Madison ROA position was illegal or an abuse of discretion.

3. Appellant has failed to sustain this burden.

[A] Two sentences were added to Finding 12 to add information that already was included in the discussion.

OPINION

The jurisdictional basis for this proceeding is found in §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.

The appellant has not made any contention here which could be reasonably interpreted as an allegation that respondent acted illegally in not appointing her to the Madison ROA position. 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 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." *Harbort v. DILHR*, 81-74-PC, 4/2/82.

Appellant appears in this regard to take issue with three actions taken by respondent: the establishment of her starting rate of pay at a level other than the one offered to her by Ms. Watson; the withdrawal of the oral offer of promotion; and the decision to appoint Ms. Post to the subject position.

Section 230.15(3), Stats., provides that "[n]o person shall be appointed, transferred, removed, reinstated, restored, promoted or reduced in the classified service in any manner or by any means, except as provided in this subchapter." Pursuant to §230.06(1)(b), Stats., the compensation of classified civil service employees is established by the appointing authority "subject to this subchapter and the rules prescribed thereunder." The compensation of classified employees is governed by the compensation plan established pursuant to §230.12, Stats. Respondent had no choice but to modify its determination of appellant's starting rate of pay once it discovered

that the salary originally offered did not comply with the compensation plan then in effect and, as a result, it is concluded that respondent did not abuse its discretion in this regard. *Taddey v. DHSS*, 86-0156-PC, 5/5/88, at 6; *Meschefske v. DHSS & DMRS*, 88-0057-PC, 7/14/89, at 8.

A withdrawal of an oral offer of promotion based on information obtained after the offer was made does not constitute an abuse of discretion *per se*. *LaSota v. DOC*, 94-1062-PC, 1/23/96; cf. *Holley v. DOCom,* 09-0116-PC, 1/13/99.[B] The question becomes one, then, of determining whether the employer properly exercised its discretion once it had this information.[C] Respondent essentially considered two main alternatives, i.e., to appoint appellant at the higher salary, or to appoint Ms. Post. Respondent considered the fact that the choice between these two candidates was a close one; and that the appointment of appellant would raise issues of ROA salary parity and morale, and would have an effect on future budgets (See Finding 12, above), which the appointment of Ms. Post would not. Taking into consideration the potential impact of a hiring decision on all or part of a unit or an agency is not improper or unreasonable. The record here shows that the conclusion reached by respondent to select one of two closely ranked candidates whose hire did not have the unfavorable impact on salary parity, morale, or budget which appellant's hire would have, was not clearly against reason and evidence.

Appellant also appears to be arguing an equitable estoppel theory here, i.e., that respondent should be equitably estopped from withdrawing the oral offer of appointment it made to her or, in the alternative, from failing to appoint her to the subject position at the required salary. In *City of Madison v. Lange*, 140 Wis.2d 1, 6-7, 408 N.W.2d 763 (Ct. App. 1987), the Court discussed the basic principles of equitable estoppel against the government as follows:

> Equitable estoppel has three elements (1) action or inaction which induces (2) reliance by another (3) to his [or her] detriment. Before

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[B] The citations were reordered to clarify that the *Holley* case is not directly on point but is instructive.

[C] The Commission deleted two sentences from the Proposed Decision to avoid confusion.

> estoppel may be applied to a governmental unit, it must also be shown that the government's conduct would work a serious injustice and that the public interest would not be unduly harmed. Finally, the party asserting the defense of equitable estoppel must prove it by clear and convincing evidence (citations omitted)

As to the first element, the Wisconsin Supreme Court has held that:

> In order to estop the government, the government's conduct must be of such a character as to amount to fraud. But this court has noted that the word fraud used in this context is not used in its ordinary legal sense; the word fraud in this context is used to mean inequitable. (citations omitted) *State v. City of Green Bay*, 96 Wis.2d 195, 202-203, 29 N.W.2d 508 (1980).

As to the second element, the Wisconsin Supreme Court has held that the reliance must be reasonable and justifiable. *Id.* at 202, citing *Chicago & Northwestern Transportation Co. v. Thoreson Food Products, Inc.*, 71 Wis.2d 143, 153, 238 N.W.2d 69 (1976).[D] Appellant has failed to show that she relied to her detriment on the oral offer to her of the subject position. The record shows that appellant did not leave her position with the UW-Madison based on this offer or suffer any other detriment. Appellant essentially points to the inconvenience of competing for the position and the disappointment she suffered when the offer was withdrawn as the detriment she suffered. However, neither of these rises to the level required for a finding of equitable estoppel. *See, Augustin v. DMRS & DOC*, 90-0254-PC, 10/3/91.

Appellant also appears to be arguing that respondent's offer to her created an employment contract. However, an offer of a starting wage for a civil service position does not create an enforceable employment contract if the wage is inconsistent with the pay plan. *Kelling v. DHSS*, 87-0047-PC, 3/12/91, relying on the Wisconsin Supreme Court case of *State v. Industrial Commn.*, 250 Wis. 140, 144, 26 N.W.2d 273 (1947).[E]

[D] Changes were made to this paragraph to clarify the elements of an equitable estoppel claim raised against the State.

[E] This paragraph was changed to reflect the Commission's rationale.

Finally, appellant takes issue with the manner in which the withdrawal of the offer was handled, i.e., that the subject position was offered to Ms. Post before appellant had received notice that the offer to her had been withdrawn. This allegation appears to raise concerns about the quality of respondent's personnel practices. It is not the Commission's r ole to review or comment on these practices here.

ORDER

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

Dated: February 25, 2002

STATE PERSONNEL COMMISSION

LRM:000177Adec2

JUDY M. ROGERS, Commissioner

ANTHONY J. THEODORE, 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