STATE OF WISCONSIN PERSONNEL COMMISSION

RANDY OPPERMANN,
Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 98-0171-PC

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal of a hiring decision. A hearing was held on March 4, 1999, before Laurie R. McCallum, Chairperson. The parties provided final argument orally at the conclusion of the hearing.

FINDINGS OF FACT

1. Some time in 1994, appellant began employment as an Officer 1 for respondent. New Officer 1 hires are required to undergo seven weeks of training at the Corrections Training Center (CTC). Upon graduation from CTC, a new Officer 1 is headquartered at a correctional institution until a vacancy occurs in a permanent Officer position to which he or she can be appointed. Until this permanent appointment occurs, the headquartered Officer is considered an employee of CTC. New Officers are considered to be on probation for six months from the date of their initial hire by respondent.

2. Appellant began his employment as an Officer 1 for respondent on October 17, 1994, and graduated from CTC on December 9, 1994. During his tenure at CTC, appellant received two counselings and a warning. The warning had been reduced from a counseling because the subject incident occurred outside CTC. A warning is regarded as a less serious infraction than a counseling. The practice at CTC is to terminate an Officer who receives three counselings during training.

3. During a training exercise at CTC involving chemicals, appellant was required by Michael Paschke, then a Training Officer 2, to move to the front which was nearer to the source of the chemical. This was considered a less desirable location by appellant. The reason that appellant and certain other Officers were required to be in front was the fact that they were taller than the other Officers.

4. During a training exercise at CTC, Captain Ben Barber felt that appellant had used excessive force. In commenting on this, Captain Barber made a reference to appellant's large size. Using excessive force under the circumstances present during this training exercise could have caused injury to the trainee who was playing the role of the inmate being subdued.

5. After his graduation from CTC, appellant was assigned to Fox Lake Correctional Institution (FLCI) because future vacancies were anticipated at FLCI. Once appellant had been there for about a month, it became apparent that such vacancies would not be occurring, and appellant was transferred to Kettle Moraine Correctional Institution (KMCI). Appellant has requested transfer to KMCI if there were no vacancies at FLCI.

6. During appellant's assignment to KMCI, Ben Barber, the Training Captain, was responsible for evaluating appellant's performance and forwarding his evaluation to CTC.

7. In a memo to appellant dated February 21, 1995, Captain Barber stated as follows, in relevant part:

> This is to inform you that your work performance has not been acceptable. You were transferred to KMCI on January 31, 1995, and assigned to a three week training schedule. I informed you at orientation that you must return your signed training schedule to me at the end of the training period. In our conversation yesterday (Feb. 20, 1995), you stated that you did not know were your schedule was, but you could write one up if I needed it. I informed you to look for the schedule, and yes, I do need it.
>
> As the Training Officer at KMCI, I have talked to various officers about your job performance. Every Officer I have talked to told me that your performance was poor, at best. Instead of listening to the Officers that were trying to teach you the job, you were telling them that you were a professional fisherman, football player, etc. You give people the

> impression that you know all there is to know about everything. This has a very negative effect on people. Especially when they are trying to do their jobs, and trying to teach you the job, at the same time.
>
> I have talked to various Officers who you have worked with during your training. None of the Officers gave me a positive evaluation of your performance. (See attached Evaluation).
>
> This type of behavior will not be tolerated at this Institution, nor will it be tolerated within the DOC. Your performance will be monitored over the next 30 days, at which time you will receive another Performance Evaluation. If you have not met the requirements, I will be contacting Mr. Fergot at CTC.

A copy of this memo was sent to Mr. Fergot at CTC, and the other Captains and Lieutenants at KMCI, among others.

8. The following summary of appellant's involvement in four incidents subsequent to his receipt of the memo from Captain Barber described in Finding 7, above, was prepared at KMCI on or around March 15, 1995:

> 3-2-95 Officer Opperman was instructed by Cpt. Jones to relieve the Officer in Unit 5 after he completed his duties on Visit Patrol. He left his post prior to completely searching the area and left the work for another officer. It was necessary for Cpt. Jones to call him back to the Visit Room, so he could finish his duties.
>
> 3/2/95 Officer Oppermann was instructed by the Seg. Sgt. to make sure he put away the cuffs after the seg. visit was over. The cuffs were found still attached to the restraint belt, and not secured in the bubble as previously instructed.
>
> 3-11-95 At approximately 8:25 pm, Lt. Ryskoski was at unit 14, placing an inmate in TLU. While walking past the officers office, he noticed a deck of cards on the desk. He asked the Sgt. and the officers working the unit whose cards they were. Officer Oppermann said they were not his, but he was playing with them. He was then counseled by Lt. Ruskoski for playing cards while on duty.
>
> 3-12-95 On this date Officer Oppermann was working in unit 4, 2nd shift. At the start of the shift his shift he had a false body alarm. At approximately 10:15 pm, Cpt. Arntz was informed by staff that Oppermann had taken the body alarm off and put it in a drawer. He did this because he did not know how to shut

> off the alarm at the start of the shift, when he had the false alarm. Cpt. Arntz called him at the above time, and asked him if he had taken the body alarm off earlier in the shift and was not wearing it. Officer Oppermann stated that he had. He was instructed by Cpt. Arntz that he would wear the body alarm at all times during his shift. It is part of the officers post orders to wear the body alarm at all times during their hours of work, in those areas were body alarms are provided. Because this violates the post orders, a employee conduct report has been written.

9. Unit 14 at KMCI is a maximum security segregation building and is considered a very high security area of the institution.

10. The post orders for the post to which appellant was assigned on March 12, 1995, indicate that the Officer is required to wear a body alarm on his or her belt at all times, and gives specific instructions on the procedure to follow if there is a false alarm.

11. On or before March 15, 1995, Captain Barber prepared an evaluation of appellant's work performance at KMCI. This evaluation rated appellant as exceeding standards on none of the factors, as meeting expectations on 10 factors, and as not meeting standards on 10 factors. This evaluation also cited appellant's unprofessional interactions with inmates and co-workers. This evaluation was forwarded to CTC. CTC offered the appellant the option of resigning or being terminated. Appellant chose to resign and his resignation was accepted by respondent effective March 17, 1995.

12. Some time in October of 1998, appellant applied for permissive reinstatement to DOC as an Officer. Appellant was interviewed by respondent in November of 1998. The interview panel recommended appellant for further consideration and referred his name to the final selection panel.

13. This final selection panel considers the candidate's recruitment file which includes, among other things, the candidate's state application and interview results; the content of reference checks; and the result of criminal background checks. It is respondent's practice to request that a reference form be completed by CTC for those candidates for Officer positions applying for reinstatement who had undergone training at CTC in the past. This final selection panel typically consists of Mr. Paschke, who,

since 1997, has been the Pre-Service Director at CTC, or his representative; a representative from respondent's affirmative action unit; and a representative from respondent's human resources unit. Pursuant to the final selection panel's typical practice, a candidate is not selected for hire unless all three panel members so agree. When a candidate has previously been a trainee Officer at CTC, Mr. Paschke or his representative does not participate in the final selection panel's decision.

14. One of the reference checks which the final selection panel reviewed in assessing appellant's candidacy was completed by Mr. Paschke. Mr. Paschke relied on documents in appellant's training file in completing the reference form. This form indicated, among other things, that appellant did not respond positively to constructive criticism and supervision; that there had been disciplinary problems encountered with appellant; that appellant had not demonstrated the ability to develop positive relationships with co-workers, supervisors, or peers; that appellant demonstrated poor judgment, quality of work, quantity of work, dependability, initiative, and learning ability; that appellant left employment with DOC because he had been terminated; and that, if given the opportunity, Mr. Paschke would not rehire appellant.

15. The application submitted by appellant at the time of this 1998 recruitment included an employment history. This history showed that, after he left employment with respondent in March of 1995, complainant was unemployed from March of 1995 to March of 1996; was employed as a delivery driver from March to September of 1996; was employed in a temporary job from September of 1996 to January of 1998; was employed by a security company from March to July of 1998; and was currently employed as a laborer in a position he had held since July of 1998. This application also indicated that appellant had been attending Mt. Scenario College during this time period and had earned 72 credits in criminal justice administration.

16. It is respondent's practice to reinstate former Officers who have been terminated for poor work performance if a significant period of time has passed and if, during this period of time, the individual has demonstrated a steady and exemplary work record. It would be unusual for respondent to reinstate an Officer who had

continuing performance problems during the training period and who had had an opportunity to improve his or her performance during this period but failed to do so.

17. The final selection panel did not recommend that appellant be reinstated. Appellant received notice of this in a letter dated December 3, 1998.

18. Appellant filed a timely appeal of this non-selection with the Commission on December 10, 1998.

CONCLUSIONS OF LAW

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

2. The appellant has the burden to prove that the subject hiring decision was illegal or an abuse of discretion.

3. The appellant has failed to sustain this burden.

OPINION

The issue in this case is whether respondent's decision not to select appellant for the position of Officer 1 in December of 1998 was illegal or an abuse of discretion within the meaning of §230.44(1)(d), Stats.

Appellant does not specify what type of illegality he may be alleging nor is any illegal action in regard to this hiring decision apparent from the record. Due to his resignation from employment with respondent, appellant was not entitled to mandatory restoration to an Officer position by respondent but simply to permissive reinstatement at the discretion of the appointing authority. This is consistent with the process followed by respondent here. Although appellant points to Mr. Paschke's membership on the final selection panel as improper given the fact that he had completed a reference form relating to appellant's candidacy, appellant does not indicate what statute or administrative rule this practice violated. Furthermore, the record shows that Mr. Paschke did not vote on appellant's candidacy but left the decision to the two other members of the final selection panel. Appellant has failed to demonstrate that respondent's actions in regard to his candidacy were illegal.

The remaining question then is whether appellant has demonstrated an abuse of discretion by respondent. In *Lundeen v. DOA*, 79-208-PC, 6/3/81, the Commission defined abuse of discretion as "a discretion exercised to an end or purpose not justified by and clearly against reason and evidence." The question before the Commission is not whether it agrees or disagrees with the appointing authority's decision, in the sense of whether, based on the record, 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, based on the record, the appointing authority's decision was "clearly against reason and evidence." *Harbort v. DILHR*, 81-74-PC, 4/2/82. *See, Kesterson v. DILHR & DMRS*, 85-0081-PC & 85-0105-PC-ER, 12/29/86.

Here, as a former employee, appellant had a record of performance with respondent. This record showed that appellant had experienced difficulties completing his training at the CTC in a satisfactory manner; had experienced difficulties carrying out the duties and responsibilities of an Officer at KMCI in a satisfactory manner and, even though he had been given an opportunity to improve his performance, had continued to fail to meet probationary standards in significant ways; and had, as a result of these performance difficulties, resigned in lieu of being terminated. For respondent to conclude that this was not an individual who was likely to be successful as an Officer was not "clearly against reason and evidence."

Appellant at hearing attempted to question the reliability of the evaluations of his performance. Specifically, appellant attempted to show that Captain Barber did not like appellant and that this was exemplified by Captain Barber's statement about appellant's size during a training exercise. However, the record shows that Captain Barber's statement about appellant's size was made in reaction to appellant's excessive use of force during a training exercise and amounted to a caution to him about the harm he was capable of inflicting due to his size and strength. Moreover, the record shows that Captain Barber based his evaluation of appellant's performance primarily on reports from other Officers at KMCI, not on his personal assessment. As a consequence, the record does not show that any personal feelings Captain Barber may have had about appellant had any significant influence on the content of the probationary evaluation. In

addition, appellant attempted to show that Mr. Paschke did not like him and that this was exemplified by Mr. Paschke requiring him to stand nearer to the source of a chemical during a training exercise. However, the record shows that the other taller trainees were also required to be in front. In addition, the record shows that the reference form completed by Mr. Paschke relied for its content on information provided by other Officers and trainers and was consistent with the information.

Appellant contends that the hiring process was flawed because there were individuals from KMCI on his interview panel. However, the interview panel recommended appellant for hire so the presence of KMCI staff on the interview panel could not have lead to the decision not to reinstate appellant to an Officer position.

Finally, appellant takes issue with respondent's failure to give him a second chance. However, the record shows that it is not respondent's practice to reinstate former employees whose work performance was unsatisfactory during their training period and who did not improve their performance when given the opportunity to do so. Once again, it is not clearly against reason and evidence for respondent to conclude that such an individual was not likely to be successful if re-employed as an Officer. The record further shows that such an individual would be seriously considered for reinstatement only if they showed a steady and exemplary work record over a significant period of years. Here, the application materials submitted by appellant did not show this.

Appellant has failed to show that respondent abused its discretion as alleged.

ORDER

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

Dated: May 7, 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