

MARY A. JENSEN,
Appellant,

v.

**Superintendent, DEPARTMENT OF
PUBLIC INSTRUCTION,**
Respondent.

INTERIM
DECISION
AND
ORDER

Case No. 99-0070-PC

This case arises from a decision not to select the appellant for a vacant civil service position. The parties agreed to the following issue for hearing:

Whether respondent's decision not to select the appellant for the position of Teacher Assistant was illegal or an abuse of discretion.

The parties filed post-hearing briefs.

For the reasons set forth below, the Commission concludes that the appellant has sustained her burden of proof and rejects the respondent's decision not to select the appellant.

FINDINGS OF FACT

1. Respondent operates the Wisconsin School for the Deaf (WSD), a residential school for the deaf and hearing impaired.
2. Alex Slappey is Superintendent of WSD. Roger Claussen is Dean of Student Life at WSD. Mr. Claussen shares the supervision of the Child Care Counselors employed at WSD with Shari Decker, Assistant Dean of Students.
3. Tosha Drew was hired by respondent for the Teacher Assistant (TA) position that is the subject of this appeal. Ms. Drew and Roger Claussen are second cousins.

4. Brad Drew, the husband of Tosha Drew, had contacted Mr. Claussen on several occasions during or before the winter of 1998 and 1999 about vacant Child Care Counselor (CCC) positions at WSD.

5. Employees filling CCC positions are employed by WSD after normal school hours in the dormitories and are responsible for teaching independent living skills, arts and crafts, social development and communication skills. CCCs act as surrogate parents to the WSD students.

6. Both Brad and Tosha Drew were interviewed for two CCC vacancies in late winter. Mr. Slappey was on the interview panel. Roger Claussen was not. The panel recommended hiring Brad Drew, but not Tosha Drew, for one of the vacancies. Brad Drew accepted the offer.

7. These CCC interviews occurred before the interviews for the TA position that is the subject of this appeal.

8. During Tosha Drew's face-to-face interview for the CCC position, Mr. Slappey found her to be fluent in American Sign Language.

9. Connie Gartner is the elementary principal and the Adaptive Education Department principal at WSD. She served as the supervisor for the TA position in question. Ms. Gartner was hired in January of 1998. The TA hire that is the subject of this appeal was the first selection process for which she had primary responsibility.

10. At all times relevant to this appeal, Ms. Garner was unaware Ms. Drew was related to Mr. Claussen.

11. The standard procedures used by WSD for filling positions are to have the immediate supervisor serve as one member of the interview panel, to have the panel make a recommendation for hire to Mr. Slappey, and for Mr. Slappey and the Superintendent of Public Instruction to approve the final decision.

12. Many of the programs at WSD are carried out by using American Sign Language (ASL), a truly separate, though not spoken, language. ASL is not merely a code for another language.

13. In addition to its elementary, middle and high school programs, WSD includes an Adaptive Education Department (AED). Students in this program have multiple handicaps, and are not just deaf. Students in AED are not as fluent signers as in other areas of the school and WSD staff do not need as high a level of signing skills to work with AED students as compared to students in the elementary school and high school programs.

14. The most severely disabled students in the AED program are taught in Kastner Hall, where there are a total of 10 students enrolled in two classes. One class uses some ASL, but in the other, ASL use is minimal.

15. At all times relevant to this proceeding, appellant has worked in a WSD dormitory as a Child Care Counselor (CCC). In this capacity, appellant has worked with high school students, middle school students and AED students.

16. There are about 18 TA positions at WSD. The generic position description for these positions is Resp. Exh. 102, which includes the following key goals:

60% A. Provide assistance to individual students and/or groups of students in the prescribed educational programs as directed by professional staff.

30% B. Provide direction and/or assistance in non-classroom activities.

17 The TA position in Kastner Hall is not highly desired because the students are especially challenging, their progress is not as fast and the job is physically difficult. It is difficult to retain TAs in that position. ASL is not one of the prime functions of the AED program in Kastner Hall, and signing is minimal.

18. Several of the teachers in AED suggested to Connie Gartner that management consider adopting a policy of rotating the TAs in Kastner Hall to other TA positions in WSD to avoid burnout and to improve morale. Ms. Gartner is unclear whether this idea was floated before or after the hiring decision that is the subject of this appeal. Ms. Gartner mentioned this idea to Mr Slappey. However, WSD management has not taken any steps to rotate staff and they never informed AED staff they were considering or had adopted a rotation policy.

19. The particular vacancy in question was for a half-time TA position serving the more severely handicapped of the two classes of AED students in Kastner Hall. The previous incumbent was Laura Black.

20. The job announcement, Resp. Exh. 103, was titled "TEACHER ASSISTANT (44%)" and provided, in part:

The current vacancy is a part-time school year position.
KNOWLEDGE REQUIRED: Basic instructional considerations for the hearing impaired child; basic behavior management principles and techniques; daily independent living skills and needs; communication skills which include English language and basic grammar, sign language and fingerspelling, and understanding of language development problems associated with deafness; planning and organizing leisure time/recreational activities. Knowledge of age and functioning level appropriate games and activities. Knowledge of safety and health issues and measures.
SPECIAL REQUIREMENTS: . **Must possess effective signing skills. Fluency in American Sign Language preferred.** (Emphasis in original.)

21. In a memo (App. Exh. 103) dated January 28, 1999, Dotti Krieger, a Human Resources Specialist for respondent, gave Ms. Gartner the following instructions for filling the TA position vacancy:

You will need to develop the interview questions that each applicant will respond to. Each question should be accompanied by specific rating criteria that will enable raters to evaluate candidates responses on the same basis. . Prior to scheduling interviews, the questions and rating criteria will need to be reviewed and approved by Human Resource Services to ensure they are job related and bias free.

Please inform all applicants that before employment can be offered, reference checks will be made and their employer may be advised of their interest. Attached is a telephone reference audit form to be used as a guide in making the reference check for those recommended for appointment. You may wish to contact references other than those recommended by the candidate.

Applicants should be requested to bring a resume to the interview or complete an Education/Experience Summary form at the time they report for interview.

Include with your recommendation the following materials:

5. Reference Audit form(s) completed for person recommended for appointment.
22. Members of the interview panel for the TA vacancy were
 - a. Tom Armato, who had been employed as a TA at WSD for approximately 15 years;
 - b. Connie Gartner, AED principal; and
 - c. Rene Ambrose, an AED teacher. Ms. Ambrose job-shares with Maryann Barnett. The vacant TA position was in Ms. Ambrose's classroom. This was the first time Ms. Ambrose had served on an interview panel. She is not an ASL signer Ms. Ambrose did not know she was on the panel until she arrived at work on February 24th at 7:45. At that time, she saw she had a substitute scheduled for her position.
23. The panel conducted interviews for two candidates, Carla Clark and Teresa Harper, on February 24th while appellant was interviewed on March 3rd
24. The panel first interviewed Teresa Harper. Ms. Harper was a native signer
25. One or more of the panel asked at least six interview questions of the candidates. Each panelist had a copy of the six questions and a list of desirable responses. These six questions were generic to TA positions at WSD and did not relate to the specific vacancy.
26. After the first interview, Rene Ambrose asked Ms. Gartner if it was all right to ask additional questions pertaining specifically to AED students. Ms. Gartner said that Ms. Ambrose could ask any questions she wanted. For the interviews of both Carla Clark and appellant, Ms. Amrose added some questions relating to Ms. Ambrose's classroom. Those questions included whether candidate preferred a half or full-time position and whether they liked working with AED students.
27. Carla Clark was also interviewed on February 24th. Ms. Clark was a native signer Ms. Ambrose knew Ms. Clark better than any of the other candidates.

28. Later on February 24th, Connie Gartner interviewed Tosha Drew by using a TTY device. This device allows the participants to converse by typing messages and exchanging them via a telephone connection. Ms. Ambrose and Mr. Amato did not participate in Ms. Drew's interview. Ms. Gartner had told them they did not have to be involved in the TTY interview because it would be taking place at 3:30, after school.

29. The interview panel reconvened on March 3, 1999, and conducted a face-to-face interview of appellant on that date.

30. Appellant signed for herself during the interview. The panelists had no difficulty understanding complainant's signing and everyone communicated well. Ms. Ambrose concluded that appellant's ASL skills were more than adequate for the Kastner Hall position.

31. Appellant gave Ms. Gartner a copy of her resume at the time of the interview.

32. Ms. Gartner did not share candidate resumes with the other panelists.

33. Appellant's resume (App. Exh. 108) shows she had worked as a Child Care Counselor at WSD since 1985 and was also employed as a deaf-blind specialist at the Center for Deaf-Blind Persons in Milwaukee. She had taken an interpreter training program at the Milwaukee Area Technical College over a 2-year period ending in 1995. She listed three references: 1) Pat Ostergren, Program Director for the Center for Deaf-Blind Persons; 2) Peggy Stachowiak, a teacher at WSD; and 3) Mary Ann Barnet, another WSD teacher

34. Each panelist scored each interview question using a scale of 0 through 3 for the three in-person interviews. The results were as follows:

<u>Candidate Name & Question</u>	<u>Ambrose</u>	<u>Amato</u>	<u>Gartner</u>	<u>Combined</u>
Harper 1	1	1	1	3
Harper 2	1	1	1	3
Harper 3	3	3	2	8

Harper 4	1	1	3	5
Harper 5	2	2	2	6
Harper 6	No score	2	No score	2
Harper TOTAL	8	10	9	27
Clark 1	2	2	2	6
Clark 2	2	2	3	7
Clark 3	3	2	2	7
Clark 4	2	2	2	6
Clark 5	2	2	3	7
Clark 6	3	3	No score	6
Clark TOTAL	14	13	12	39
Jensen 1	3	2	3	8
Jensen 2	3	3	3	9
Jensen 3	2	3	2	7
Jensen 4	3	3	3	9
Jensen 5	3	3	3	9
Jensen 6	3	3	No score	6
Jensen TOTAL	17	17	14	48

35. When the panel reconvened on March 3rd, Ms. Gartner brought a transcript of her TTY interview with Ms. Drew. Ms. Ambrose asked Ms. Gartner if she had asked the additional questions, relating to the AED program, that Ms. Ambrose had posed to Ms. Clark and to the appellant. Ms. Gartner said she had not. Ms. Gartner told the other two panelists that Ms. Drew was at the Missouri School for the Deaf and did not have the necessary AED experience. For that reason, Ms. Ambrose did not bother to read the TTY. Mr. Armato also did not read the TTY of Ms. Gartner's in-

interview of Ms. Drew. Mr. Amato knew Ms. Drew was deaf and assumed she was competent in ASL.

36. None of the panelists scored Ms. Drew's TTY interview.

37 The TTY tape, App. Exh. 111, includes the following exchange:

[Connie Gartner:] did you mean that you worked at missouri deaf school or were student there

[Tosha Drew:] I WAS A STUDENT THERE FOR SIX YEARS BEFORE I GRADUATED HURING MY SENIOR YEAR I WAS A TEACHER SSISTANT ECAUSE I HAD YO MANY CREDITS AND THEY GAVE ME A OPPORTUNITY TO BE AN TA FOR ONE SEMESTER TO SEE IF THAT IT IS THE PATH I WANTED TO ^;ITH MY 1AREER

please describe your training and or experience working with deaf children.

OKAY LET'S SEE WHERE I START SMILE OKAY I WAS A PEER TUTOR DURING MY HISH SCHOOX YEARS AT MISSOURI SCHOOL F/T DEAF AND I WAS IN A WORK SHOP CALLED BEHXVIOR WONFLICT DEVOLPMENT WHICH ISTO FIND THE SOLUTIONS TO BEHAVIOR SOITUATIONS AND HOW TO SOLVE CKNFLICTS IN MOSFORMAT WAY AND ALSO I WAS IN AMILY FUN LEANING RETREAT LAST SUMMER FOR ONE WEEK T M.S.D. TEACHING CHILDREN HOW TO COMMUNICATE AND HOW MANY WAYS PHERE ARE TO COMMUNICATE WITH OOUR PEERS.

do you have any formal training from a college or university

I WAS IN UNIVERSITY OF ARKANSAS AT LITTLE ROCK FWR TWO SEMESTERS I THEN TRANSFERRED TO MINERAL AREA COLLEGE HERE FOTWO SEZESTERS . AND I WAS MAJORING IN DEAF/MPECIAL EDUCATION.

i need to ask you, tosha, do you have a fax machine

I HAVE ONE AT MY WORK BUT NWT IN MY RESIDEUCE.

could i send you a fax at your office i need to get a list of refer-
ences from you

SURE I WOULD FAX IT BACK TO YOU WITH MY ANSWERS ON IT WOULD YOU NEED THE NBR FOR THE FAX IM NOT WORKING TODAY BUT I CAN HAVE IT FAXED BACK TO YOU FIRST THING IN THE MORNING IF YOU WANT

sure that would be great. what is the fax number

578834303 OF CHATEAU CARE THAT NBR IS ALSO A PHONE NBR I THINK IT DOES WORK BOTH WAY \$ HAVE NEVER USED THEIR FAX YET BUT I THINK FOR SURE THE NBR IS SAME

Ms. Drew also stated that she had fully used ASL since the age of 13.

38. Despite Ms. Drew's statement in the TTY interview that she was a teaching assistant at Missouri School for the Deaf *as a student*, Ms. Gartner was unclear whether Ms. Drew had been *employed* as a TA at school.

39. Appellant's performance evaluation (Performance Improvement Plan, App. Exh. 120) for the period from June of 1998 to June of 1999, was signed by appellant and Ms. Decker, her co-supervisor, on July 14, 1999. Appellant met all goals established for her. The evaluation included the following comments by Ms. Decker:

Kelly is creative in finding ways to meet the needs of our students. She is very conscientious and puts effort into her daily routine. Kelly is a positive addition to the dorm staff.

Mr. Claussen agreed with the evaluation, in general.¹

40. Had respondent checked any of the references listed by the appellant, the references would have been very positive.

41. The panel discussed the various candidates and identified appellant as their clear and unanimous choice. Appellant had worked on two occasions, on a substitute basis, with Ms. Ambrose in the AED program. Her work performance on those occasions was fine.

42. The panel did not select a second choice candidate.

¹ A sentence was added to this finding in the proposed decision to more completely reflect the record.

43. Appellant's love of working with AED students and her excellent experience were key factors in the recommendation.

44. After the panel made their recommendation, it was never reconvened.

45. Later on March 3rd, Ms. Gartner prepared a memo (App. Exh. 112) to Mr Slappey recommending appellant for the vacancy. The memo states, in part:

Based upon the results of the interviews, I would like to recommend Mary Jensen be hired to fill this position.

Mary (Kelly) has worked as a dorm supervisor at WSD for the past thirteen years. She is currently working on G-3 where she works with some of the students in the Kastner building, as well as high school aged girls. Kelly has some training and experience from MATC in the interpreter training program, and much on-the-job training as a dorm supervisor. She shows a strong commitment to working with AED students, and is familiar with techniques used in that program (i.e. assertive discipline, time-out, and physical management). References solicited indicated that she is creative team player who keeps the best interests of children as her highest priority. Her signing skills are at the intermediate level.

Not recommended to hire at this time:

Carla Clark: Carla is presently employed as an LTE at WSD. She has no formal training after high school and her experience with deaf children are limited to her work here at WSD. She has served as an LTE for approximately one year. Her signing skills are above average. Carla would be the second choice should Kelly decline the position.

Tosha Drew: Tosha is currently working at the Missouri School for the Deaf as a teacher assistant and has been there since the beginning of this school year ('98-99). Tosha has a total of two semesters of course work from community colleges and Gallaudet. We were not able to assess her signing skills at this time because her interview was through TTY.

Theresa Harper: Theresa has no training, background, or experience working with deaf children in a school setting. Her signing skills are excellent.

The last sentence in the second paragraph ("*References solicited* indicated that she is creative team player who keeps the best interests of children as her highest priority") is a reference to Rene Ambrose and Ms. Ambrose's experience working with appellant.

46. Ms. Gartner sent a copy of the March 3rd memo to Kay Waelti of Human Resources.

47 Normally a recommendation letter will rank the candidates, rather than just list one as qualified and all others not qualified.

48. Based on the March 3rd memo, Kay Waelti of Human Resources began to process the paperwork for hiring appellant into the TA position, even though Mr. Slap-
pey was out of town and had not approved the hire.

49. Mr Slap-
pey returned to WSD and saw that appellant had been recom-
mended for the TA vacancy. Mr. Slap-
pey had concerns about the recommendation.
He spoke with Roger Claussen, appellant's co-supervisor and Ms. Drew's second
cousin. At the time, Mr Claussen was aware that Ms. Drew was an applicant for the
TA vacancy. Mr. Slap-
pey also spoke with Ms. Gartner on Sunday, March 7th and ad-
vised her that appellant's ASL skills had reached a plateau and that he wondered
whether appellant was a team player

50. Mr Slap-
pey suggested that Ms. Gartner speak with Mr Claussen and
then sat in on that meeting. Sheri Decker, appellant's other co-supervisor, was ill and
was not at work.

51. Both Mr. Slap-
pey and Mr. Claussen reported that appellant had some
problems in terms of working relationships with other employes in the dorm. One or
more investigations about the appellant's conduct concluded that appellant should not be
disciplined.

52. When Mr Slap-
pey saw the statement in the March 3rd memo that "We
were not able to assess [Tosha Drew's] signing skills" he understood that to be the rea-
son Ms. Drew was not recommended for hire. Mr. Slap-
pey indicated to Ms. Gartner
that he had interviewed Ms. Drew for the CCC vacancies, that he was familiar with her
signing skills and that she was fluent.

53. Mr. Slap-
pey and Ms. Gartner also talked about the other candidates
mentioned in the March 3rd memo. Ms. Gartner mentioned she had concerns about Ms.
Clark's work experience at WSD in terms of Carla's "maturity "

54. During this period, neither Mr Slappey nor Ms. Gartner ever contacted: 1) any of the employment references listed on appellant's interview materials; 2) any of the candidates for the position; 3) any of Ms. Drew's references; or 4) either Ms. Arm-brose or Mr. Armato.

55. Mr. Slappey re-wrote the March 3rd memo for Ms. Gartner. The re-sulting memo is dated March 17, 1999 (Resp. Exh. 101 and App. Exh. 114). Although the memo format indicates it was prepared by Ms. Gartner, Mr. Slappey actually wrote the memo. It recommends Tosha Drew for the position in question, and places appel-lant in the "not recommended" category. The document reads, in relevant part:

Based upon the results of the interviews, I would like to recommend To-sha Drew be hired to fill this position.

"Tosha Drew: Tosha is currently working at the Missouri School for the Deaf as a teacher assistant and has been there since the beginning of this school year ('98-99). Tosha has a total of two semesters of course work from community colleges and Gallaudet University. Her commitment to, and knowledge of, deafness and the education of deaf Students and special needs deaf students is strong. While our interview was a phone interview and thus we were unable to assess her signing skills at the time, Tosha interviewed in person for a child care counselor position at WSD about a month ago. Discussions with the interviewers for that po-sition indicated that Tosha is a very fluent signer. Tosha is Deaf and at-tended a residential school for the Deaf and so I am confident that her signing skills will be fluent.

"Not recommended to hire at this time:

Mary (Kelly) Jensen is currently working as a child care counselor at WSD. Kelly has some training and experience from MATC in the inter-preter training program. Despite this, her signing skills are no better than the beginning level. Ms. Jensen's references indicated some sig-nificant interpersonal problems with her co-workers. Her lack of signing skills limit her potential classroom assignments to a small group of low functioning students.

Carla Clark: Carla is presently employed as an LTE at WSD. She has no formal training after high school and her experience with deaf chil-dren [is] limited to her work here at WSD. She has served as an LTE for approximately one year. Her signing skills are above average.

Theresa Harper: Theresa has no training, background, or experience working with deaf children in a school setting. Her signing skills are excellent.

Mr Slappey initialed his approval of the memo on March 24th

56. Respondent issued an appointment letter (App. Exh. 115) to Tosha Drew on March 17th, the same day as the second recommendation memo. Ms. Drew's appointment was effective March 29th. The appointment letter was issued under the signature of the State Superintendent.

57 WSD was on spring break from March 19th to March 27th

58. On Tuesday, March 28th, Ms. Ambrose learned from Connie Gartner that appellant was not being recommended for the TA vacancy and that Ms. Drew was going to start the next day.

59. Before this panel, Mr Armato had served on 3 hiring panels, and in all of those instances, the panel's hiring recommendation had been followed.

60. Respondent failed to notify appellant, Ms. Clark or Ms. Harper that someone else had been selected to fill the vacancy

61. Before she started working on March 29th, Ms. Drew had no experience working with students comparable to those enrolled in the AED program.

62. As of November of 1999, Ms. Drew was still in the part-time TA position for the AED program and the AED teachers were still having to provide her with substantial guidance. She had not been rotated to another TA position.

63. Appellant was the best qualified of all the candidates for the position.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §230.44(1)(d), Stats.

2. The appellant has the burden of proving that respondent's hiring decision was illegal or an abuse of discretion.

3. The appellant has sustained her burden of proof with respect to an abuse of discretion.

4. The respondent's decision not to select the appellant for the part-time Teacher Assistant position in Kastner Hall in March of 1999 was an abuse of discretion.

OPINION

This matter is being reviewed pursuant to the Commission's authority under §230.44(1)(d), Stats.

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.

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

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 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." *Harbort v. DILHR*, 81-74-PC, 4/2/82.

Appellant does not contend that any particular statute or rule was violated. Appellant contends that respondent abused its discretion when selecting Ms. Drew rather than appellant for the vacant position.

There are numerous problems with the procedures used by the respondent and with the resulting hiring decision.

a. The candidate's resumes were not shared by Ms. Gartner with the other two panelists, Mr. Armato and Ms. Ambrose.

b. Only Ms. Gartner was present during the TTY interview of Ms. Drew. The other two panelists were not invited to participate and it was scheduled for a time after their normal workday. The existence of the TTY tape could have mitigated at least some of the problems associated with the fact that two of the three panelists were

not present. However, they never read the tape in order to assess Ms. Drew as a candidate.

c. Although the interview panel had a list of questions to ask the candidates, Ms. Ambrose received approval from Ms. Gartner to ask additional questions after the first interview had concluded. The additional questions related to the students in the Kastner Hall program and served as a basis for assessing the relative qualifications of the candidates. Neither the first candidate interviewed on February 24th nor Tosha Drew had an opportunity to respond to the questions.

d. The three panelists each scored the responses for the appellant, Ms. Clark and Ms. Harper. *None of the three panelists scored Ms. Drew's responses.*

e. The recommendation memo drafted by Ms. Gartner was either inaccurate or misleading with respect to the following:

1. The memo indicated that references for appellant had been solicited. However, none of appellant's listed references were contacted before or after the recommendation memo was drafted.

2. While the panel never identified a second place or runner-up candidate,² the memo indicated that Ms. Clark, though one of three persons "not recommended" for hire, was the second choice.

3. The memo states that Ms. Drew "is currently working at the Missouri School for the Deaf as a teacher assistant and has been there since the beginning of this school year ('98-99)." However, the TTY tape shows that Ms. Drew served as a teacher assistant for one semester when she was *in school* there, during her senior year. The tape indicates she then spent two semesters at the University of Arkansas at Little Rock, followed by two semesters at Mineral Area College. Nothing in the TTY translates into current employment as a TA at Missouri School for the Deaf. Other information in the TTY shows that Ms. Drew was currently employed by "Chateau Care."

4. The memo states that "Tosha has a total of two semesters of course work from community colleges and Gallaudet." The TTY has no mention of Gallaudet University but does reference two semesters at the University of Arkansas and two semesters at Mineral Area College.

f. Pursuant to App. Exh. 103 (Finding 21), reference checks were to be made "before employment can be offered" and a "telephone reference audit form" was provided "as a guide in making the reference check for those recommended for appointment." The form was not used for conducting references for either the appellant or Ms. Drew.

g. Pursuant to App. Exh 103 (Finding 21), applicants "should be requested to bring a resume to the interview or complete an Education/Experience Summary form at the time they report for interview." Ms. Drew did not supply either document.

h. No persons directly familiar with Ms. Drew's work or academic performance were contacted by respondent before she was hired. Mr. Slappey's familiarity with Ms. Drew was limited to his interview of her for an earlier CCC vacancy.³

i. Mr. Slappey and Ms. Gartner spoke with Roger Claussen about the candidates for the vacancy. Mr. Claussen did not disclose that Ms. Drew was his second cousin. Ms. Gartner was unaware of the family relationship. Mr. Claussen denigrated appellant's candidacy for the position.

j. Mr. Slappey rewrote the recommendation memo for Ms. Gartner without making any reference to the previous recommendation memo and wrote it in a way that suggested Ms. Gartner was the author.

² Both Ms. Ambrose and Mr. Armato testified the panel did not identify a runner-up candidate.

³ Ms. Gartner testified she relied on input from Mr. Slappey and Tom Harbison (ASL specialist at WSD) in deciding to select Ms. Drew rather than Ms. Clark. While Mr. Harbison also was on the CCC interview panel that considered Ms. Drew, Ms. Gartner never spoke with Mr. Harbison about the TA vacancy. Ms. Gartner was relying on Mr. Harbison's assessment of Tosha Drew from the CCC interview *as reported to Ms. Gartner by Mr. Slappey*, not by Mr. Harbison.

k. Ms. Drew had no experience with a program comparable to AED. This is confirmed by the teachers in the program who testified they still had to provide continuing and significant guidance to Ms. Drew nearly 8 months after the hiring decision.

l. The revised recommendation letter, dated March 17th, was either inaccurate or misleading in several areas:

1. The recommendation was not "based upon the results of the interviews" as stated in the memo. It ignored the results of the interviews and the opinions of two of the three panelists and it was based upon information from sources other than the interviews.

2. Tosha Drews' current employment, experience as a teacher assistant and education were, again, misstated.

3. Appellant's signing skills were inaccurately described as "no better than the beginning level." However, Ms. Gartner testified she did not have a problem understanding appellant during the interview. Mr. Armato said appellant's ASL skills were "good" although she is not a native speaker. Ms. Ambrose said she did not have difficulty understanding appellant's signing during the interview. The appellant's signing skills were better than the "beginning level."

m. The revised recommendation memo and the appointment letter for Ms. Drew (AE115) are both dated March 17th. The recommendation memo was not even marked as "approved" by Mr. Slappey until March 24th, one week after the date of the appointment letter. Respondent did not provide any explanation for the discrepancy in these dates. The dates of the documents do not allow for additional internal approvals and for a formal offer and acceptance of employment by Ms. Drew before the appointment letter.

n. ASL fluency was not a reasonable requirement for this position. Mr. Slappey testified that WSD has a campus-wide, ASL immersion philosophy. However, Arlene Whalen, a Kastner Hall teacher, testified that ASL is not taught to her students. She said she had never heard of ASL immersion and had never been told it was WSD

policy. The abilities of the AED students are such that requiring ASL fluency for the Kastner Hall TA position is incongruous. Even if WSD has immersion programs for its general student population, they do not apply to AED and Kastner Hall.

o. There was no "rotation" applicable to the Kastner Hall TA position. The alleged "rotation policy" is one of the key reasons cited by respondent as supporting the decision not to hire appellant for the vacancy. It rests on at least two legs -- that appellant's ASL skills were less than exemplary and that it was likely that anyone hired for the Kastner Hall TA vacancy would later be rotated to another TA position where ASL skills were crucial. Mr. Slappey testified that Ms. Gartner had a policy of rotating TAs throughout the institution. Despite this testimony, it is undisputed that respondent had never rotated TAs. It is also undisputed that there was no rotation during the months after Ms. Drew was hired for the position in question. The hearing record establishes that rotation was merely a briefly discussed concept that had been floated by some AED teachers to Ms. Gartner and that it arose out of the high turnover and burn-out in the Kastner Hall TA position. It is likely that Ms. Gartner mentioned the concept to Mr. Slappey, but it was never discussed at any length or depth, and it was never adopted. Ms. Gartner could not even recall if the topic was brought up by the teachers before or after the TA interviews here. Even if the Commission assumes that the concept was first mentioned before (rather than after) the March interviews, the fact that Ms. Gartner was unsure when it came up undercuts any contention that this was a part of the rationale for not hiring appellant. One of the AED teachers, Rene Ambrose, testified she was never told that a rotation policy was going to be implemented. Ms. Gartner acknowledged that Mr. Amato, the second panelist, had not been told of this rotation concept. The record supports the conclusion that respondent seized upon the "rotation policy" after making the decision to hire Ms. Drew for the TA position, in an effort to justify that decision, rather than as an actual basis for evaluating the merits of the candidates.

p. While ASL fluency was not a reasonable requirement for filling the Kastner Hall TA vacancy, respondent should have focused on experience and education

in educating multi-handicapped deaf students, and on a candidate's commitment to those students. The appellant's experience, training and attitude in these areas were superior to all the other candidates, including Ms. Drew.

q. Tom Armato was never told that Tosha Drew was selected instead of the appellant until after Ms. Drew was on the job.

r. The unsuccessful candidates were never sent rejection letters.

s. There was no effort to get additional input from the interview panel, even though Mr. Slappey and Ms. Gartner chose to jump over the candidate unanimously selected as number 1 by the panel as well as the candidate that Ms. Gartner had identified as the back-up candidate, for a third candidate who had not been scored by the panel. Ms. Gartner had previously informed the other panelists that the third candidate had lacked the necessary experience for the position.

Mr. Claussen told Ms. Gartner that appellant was a reliable worker but that she did not get along with her coworkers and that she had problems from time-to-time working with kids, that she had physically injured the children but there was "no evidence." At the time he made these comments, Mr. Claussen was aware Tosha Drew was seeking the TA position. Mr. Claussen's observations of appellant's work history need to be tempered by his status as Ms. Drews' relative. His stated opinions do not appear to be consistent with information in appellant's performance evaluation (Finding 39). Mr. Claussen testified he was satisfied with that evaluation and had agreed with it. Shari Decker, appellant's co-supervisor with Mr. Claussen, testified that working with AED students was one of appellant's strengths. She stated she felt appellant would make a better TA than a CCC because she worked better with small groups and worked well with AED students. Ms. Decker testified that because the accusations of misconduct by appellant were shown to be unfounded, she had no concern about them in terms of appellant's appropriateness for employment as a TA. The fact that Ms. Decker and Mr. Claussen were co-supervisors of the appellant yet have stated very different opinions as to the appropriateness of employing appellant as a TA for AED students indi-

cates that Mr. Claussen was improperly motivated by a desire to have Ms. Drew hired for the vacancy.

The Commission also notes that appellant had worked as a substitute for the AED program when Mr. Slappey was the principal of that program. Mr. Slappey admitted that appellant "did all right" in that capacity.

The Commission recognizes that minor arithmetic or other errors may occur during the evaluation of candidates without generating a conclusion that there has been an abuse of discretion. *Bloedow v. DHSS*, 87-0014-PC-ER, etc., 8/24/89; *Schmidt v. DHSS*, 88-0131-PC, 6/4/93; affirmed by Winnebago County Circuit Court, *Schmidt v. Wis. Pers. Comm.*, 93 CV 654, 4/28/94; affirmed by Court of Appeals, 94-1545, 7/19/95. However, in the present case, there were numerous inconsistencies and errors throughout the selection process. As a direct consequence of those errors and inconsistencies, Ms. Drew was hired to fill the TA vacancy. Among the key problems that serve as the basis for the Commission's conclusion that there has been an abuse of discretion are the following: 1) the hiring justification memo dated March 17th refers to "significant interpersonal problems" with appellant's co-workers even though the appellant was cleared of those allegations as a consequence of an investigation; 2) the same memo inaccurately characterizes appellant's signing skills as "no better than the beginning level"; 3) the memo inaccurately describes Ms. Drew's educational and work experience; 4) respondent failed to take into account the results of the interview panel; and 5) Ms. Drew lacked experience with a program comparable to AED. The appellant established it was "clearly against reason and evidence" for the respondent to conclude that Ms. Drew, rather than the appellant, was the better candidate for the vacant position.⁴

Remedy

In her final brief, appellant requests the following relief:

⁴ Language has been added to the end of this paragraph to better reflect the Commission's analysis.

- 1) A letter of apology from Mr. Claussen for lying and slandering Mary Jensen's name.
- 2) The same from Mr. Slappey, with a commitment to fair and quantifiable hiring practices using the hiring committee as the bar.
- 3) A similar TA position at WSD when it becomes available with appropriate back pay.

The Commission has no authority to require a letter of apology, so the Commission rejects appellant's first and second requests.

In previous cases in which an appellant has successfully contested a hiring decision, the Commission has held that it lacks the authority to remove an incumbent but has ordered the respondent to "appoint the appellant, if still qualified, to the disputed position (or comparable promotional position) upon its next vacancy." *Pearson v. UW*, 84-0219-PC, 9/16/85; affirmed by Dane County Circuit Court, *Pearson v. UW & Pers. Comm.*, 85-CV-5312, 6/25/86; affirmed by Court of Appeals District IV, 86-1449, 3/5/87. However, the Commission has rejected an appellant's request for back pay where the appointment decision did not have the "direct and immediate impact of removing her from employment." *Id.* Also see §230.43(4), Stats., *Seep v. Personnel Comm.*, 140 Wis. 2d 32, 409 N.W.2d 142 (Ct. App., 1987); *Pearson v. UW*, 84-0219-PC, 2/12/97 A.

In the present case the disputed position is the TA position in the AED program, rather than *any* TA vacancy.

ORDER

The action of respondent in not appointing appellant to the subject position is rejected and this matter is remanded for action in accordance with this decision.

Dated: August 28, 2000 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

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