STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

C.J., Appellant,

vs.

Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 41
No. 64827
PA(sel)-19

Decision No. 31491-A

Appearances:

Mr. Scot Galligan, appearing on behalf of **C.J.,** who also appeared on his own behalf.

Ms. Gloria Thomas, Assistant Legal Counsel, Department of Corrections, 3099 East Washington Avenue, P.O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the Department.

DECISION AND ORDER

This case is before the Wisconsin Employment Relations Commission on an appeal by C.J. (herein the Appellant) [1] of a failure by the Wisconsin Department of Corrections (herein the department) to award him a discretionary pay increase in April 2005, prior to his transfer into a Supervisory Officer 2 position. Prior to hearing, the Department filed a motion to dismiss the appeal on the basis that the Commission lacked subject matter jurisdiction over an issue of optional market adjustments relating to wages. On October 24, 2005, the Commission issued an Order denying the motion to dismiss, in which it held that the Appellant had raised a cognizable issue as to whether the Department had acted illegally or abused its discretion in setting the Appellant's wage rate in the SO2 position and whether, based on its actions, the Department should be equitably estopped from denying the Appellant the increase. In a subsequent pre-hearing conference conducted on December 1, 2005, the parties stipulated to the following formulation of the issue:

> Did the Respondent act illegally or abuse its discretion when it set the Appellant's pay rate at $28.455, instead of at $29.955, upon his transfer to a Supervising Officer 2 position on April 10, 2005?

The issue incorporates the question of whether the Respondent should be equitably estopped from setting the Appellant's wage rate at $28.455 upon his transfer to a Supervising Officer 2 position.

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[1] Due to his position in the Department of Corrections, the Appellant requested that his name and personal information be redacted from the published decision, which was granted.

A hearing was conducted on February 15, 2006, before Examiner John R. Emery, a member of the Commission's staff. The hearing was tape-recorded. The parties established a briefing schedule, which was completed by April 10, 2006, whereupon the record was closed.

The hearing examiner issued a proposed decision on November 1, 2006. No objections were filed by the requisite due date of December 1, 2006.

Being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The Appellant has been employed by the Wisconsin Department of Corrections since 1982. During his employment he has held, successively, the positions of Officer 1 and 2, Sergeant, Supervising Officer 2, Corrections Unit Supervisor and Corrections Program Supervisor. Prior to April 10, 2005, he was employed as a Corrections Program Supervisor (CPS) at Waupun Correctional Institution (WCI). At all times pertinent hereto the Appellant's wage rate was $28.455 per hour.

2. The Appellant had heard rumors that the Department was considering eliminating CPS positions for budgetary reasons and became concerned about job security.

3. In early 2005, the Appellant learned that a Supervising Officer 2 (Captain) position would be opening at WCI. On January 25, 2005 he sent a letter of application to Jeff Smith, Human Resources Director at WCI, expressing interest in reinstating into any available SO2 position and noting that both positions were within the same broad-banded pay range. As a lateral transfer, the Appellant would retain his last CPS pay rate upon moving into the SO2 position.

4. Shortly after filing his letter of interest, the Appellant was offered an SO2 position at WCI. He was given a start date of March 20, 2005, contingent upon his passing a physical examination.

5. On March 8, 2005, the Appellant was informed by a co-worker that the CPS employees were eligible for an optional market adjustment of $1.50 per hour, effective April 3, 2005. The co-worker encouraged him to move his transfer date past that point, if possible, in order to be eligible for the increase.

6. On March 9, 2005, the Appellant confirmed the market adjustment with Stacey Rolston, a Classification and Compensation Chief with the Department, at which time Rolston explained that no decision had been made as to how the adjustment would be distributed and that she could not predict if it would be distributed across the board or in a fashion to create more pay equity within the classification. Later that day, Rolston had an e-mail exchange with Jeff Smith in which she reiterated the same information she gave to the Appellant.

7. Later on March 9, the Appellant spoke to Marc Clements, Institution Security Director at WCI, and requested that his transfer date be moved back until after the wage adjustment. Clements observed that the adjustment would make the Appellant the highest paid Captain in the Department and said they would not hold the position open until April just so he could get it. The Appellant indicated that a $1.50 per hour raise was too much to pass up and if the Department wouldn't accommodate him he would decline the transfer. He asked Clements to discuss the matter with Deputy Warden Michael Thurmer.

8. On March 10, 2005, at 11:36 am, the Appellant sent an e-mail to Clements, as follows:

> Marc,
>
> I was wondering if you had a chance to talk to Mike about my start date for the Captain position being after April 3rd. I would be able to start training before that but my official start date needs to be after Sunday, April 3rd.
>
> I am not here tomorrow and if I don't hear I will have to reschedule my appointment. Thanks.
>
> C J

At 3:37 pm the same day, Clements responded, as follows:

> The SO2 position you accepted has an effective start date of March 20, 2005, contingent on you passing your physical. Please let me know prior to Monday, March 14, 2005, if you have changed your mind about the position.

At 4:09 pm, the Appellant replied, as follows:

> Marc,
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> Can you state why you can not let me start after April 3rd? Up until this point I did not believe the starting date was a main concern.

At 4:18 pm, the Appellant sent a further message, as follows:

> Marc,
>
> I am off tomorrow. Can you e-mail me at home with a response and I will then let you know. Thanks.
>
> C J

At 4:41 pm, Clements responded, as follows:

> The offer was made to you and you accepted it. As I said below, the starting date is March 20, 2005. If you have changed your mind about accepting the position I need to be notified prior to Monday, March 14, 2005.

On March 11, 2005, at 10:18 pm, the Appellant replied, as follows:

> Marc,
>
> It seems that since I have requested to reinstate into the SO2 position there has been one thing after another arising in order to deter me from taking the position. Although I have not received any written confirmation or approval regarding me being offered this position, I have followed all verbal directions given to me. Now when I have requested an official start date for the position after April 3, 2005 in order to possibly receive a $1.50 wage adjustment that could be distributed to Correction Program Supervisors, I am NOW being told that I need to start March 20th or the offer of this position is withdrawn. From what you informed me yesterday, "We are not going to allow you to get a dollar fifty raise April 3rd and still be a Captain" that this decision is not being made for the betterment of the institution but for apparent bias reasons. As I have stated to you I would like to reinstate into the vacant SO2 position, but I would need a starting date after April 3, 2005. Although I don't understand why this cannot be accomplished, this is the position I must take.
>
> CJ

Copies of the e-mails were also sent to Warden Philip Kingston, Deputy Warden Thurmer and Human Resources Director Smith.

9. At some point on March 11, Clements spoke to the Appellant by telephone and confirmed Thurmer's approval of an April 10 start date, contingent upon the Appellant successfully completing his physical exam.

10. On the morning of March 16, 2005, Appellant sent another e-mail to Clements, as follows:

> Marc,
>
> Per you [sic] phone call Friday, I am just checking to see if I will be getting a letter this week with a start date of April 10th? Once I get the letter I can schedule my stress test with my doctor.
>
> Thanks
>
> CJ

Clements forwarded the e-mail to Warden Philip Kingston and Deputy Warden Thurmer for their consideration.

11. Later on March 16, the Appellant had a stormy confrontation with Thurmer regarding the transfer. Thurmer discussed the string of e-mails between the Appellant and Clements and criticized the Appellant's attitude. He further stated that he was opposed to the

Appellant receiving the adjustment because it would elevate him above more senior officers and create budget and morale problems, but it wasn't up to him to decide. He told the Appellant that his start date would be determined and appointment letter would be issued once he passed his physical exam.

12. March 17, 2005, the Appellant met with Warden Kingston wherein the Appellant reiterated his desire to have his start date pushed back. Kingston, after consulting Thurmer, Clements and Smith, agreed to a start date of April 10, 2005 in order to avoid having the Appellant turn down the SO2 position and having to repost it, thereby losing additional time filling the position and incurring more overtime costs. At that meeting, Kingston told the Appellant he expected him to receive the market adjustment. Upon confirmation of the April 10 start date he had requested, the Appellant completed his physical exam and continued the process toward transitioning to the SO2 position.

13. On March 23, 2005, John Bett, Assistant Administrator of the Division of Adult Institutions, sent the following e-mail to the top management personnel at all the state correctional institutions, including Kingston and Thurmer:

> CONFIDENTIAL
>
> Here is a cut and paste E-mail combining an explanatory message from Stacey Rolston, and a chart from Marsha.
>
> Please review the message, then review the chart, which includes Program Supervisor locations and their seniority date. We are already aware of two of these people who will either be leaving state service shortly, or will be taking another position. We intend to use the $1.50 generated by those positions for equity or other purposes for other incumbents.
>
> Please advise if you feel there are reasons or circumstances to discretionarily increase your Program Supervisor's pay by the $1.50/hr. or to not increase it, for whatever reason. Seniority date and scope of responsibility can be considered in your recommendations. Also, advise us if you are aware of someone leaving the position soon, so that the $1.50 for that position could potentially be more effectively utilized elsewhere. Any diversion of this increase would need to be only within the ranks of these positions.
>
> Do not discuss this with the incumbents at this time. Get back to Marsha with cc's to Denise or I as appropriate, by the end of tomorrow, as this is due to Jean Nichol's shop by Friday.

The e-mail was accompanied by a chart listing the wage rates of all the incumbent Program Supervisors. The wage rates ranged from $19.70/hr. to $28.46/hr. The Appellant was listed as the highest paid Program Supervisor in the Department at $28.46/hr.

14. On March 24, 2005, Kingston responded, as follows:

> WCI's C J (Program Supervisor) has requested to return to a Captain's position at WCI. We have approved the transfer request dependent on his passing a physical exam to include a stress test. The stress test is scheduled for 3/29/05. If he passes the physical we expect him to start his new assignment as Captain on 4/10/05.

In accordance with Bett's instructions, Kingston did not discuss Bett's e-mail or his reply, with the Appellant.

15. The Appellant was not awarded the $1.50 optional market adjustment on April 3, 2005.

16. On April 6, 2005, Kingston issued an appointment letter to the Appellant, as follows:

> This confirms your reinstatement to the Supervising Officer 2 position, pay range 81-03, in the Department of Corrections, Waupun Correctional Institution. This appointment is effective April 10, 2005.
>
> In accordance with the State Compensation Plan, when an employee is reinstated the base pay may be set at any rate that is not greater than the last rate received plus intervening adjustments pursuant to s230.12, Wis. Stats. Your rate of pay will be $28.455 per hour. Any further pay adjustments will be in accordance with the provisions set forth in the State Compensation Plan.
>
> You will not be required to serve a probationary period.
>
> Your position is classified as "non-represented" and therefore not included in any certified bargaining unit.
>
> If you should have any questions regarding your new duties and responsibilities, please contact Marc Clements.
>
> We hope that you will find your new work both challenging and rewarding.
>
> Sincerely,
> Phil Kingston
> Warden

17. The Appellant first learned that he did not receive the optional market adjustment upon receiving his first paycheck after transfer into the SO2 position, which listed his rate of pay as $28.455 per hour.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The Appellant has the burden to show, by a preponderance of the credible evidence, that the Respondent acted illegally or abused its discretion in failing to set his pay rate at $29.955 per hour upon his commencement as a Supervising Officer 2.

2. The Appellant has the burden to show by clear and convincing evidence that the Department should be equitably estopped from setting his pay rate as a Supervising Officer 2 at $28.455 instead of $29.955.

3. The Appellant has not met his burden as set forth above.

4. The Respondent's actions in setting the Appellant's wage rate upon transfer at $28.455 were not illegal, nor an abuse of discretion.

5. The Respondent's actions do not constitute grounds for imposition of equitable estoppel.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER[2]

The appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of January, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

[2] Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

Wisconsin Department of Corrections (C.J.)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This matter arises under Sec. 230.44(1)(d), Wis. Stats., which provides:

> 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 preliminary proceedings in this matter, we denied a Motion to Dismiss by the Respondent, but held that our jurisdiction was limited to issues surrounding the Appellant's initial rate of pay upon transfer into the position of Supervising Officer 2. DEPARTMENT OF CORRECTIONS (C.J.), DEC. NO. 31491, (WERC, 10/05). In the Memorandum accompanying its Order, we stated:

> The scope of the Commission's authority under 230.44(1)(d) extends to the determination of starting pay upon hire, including starting pay on restoration and reinstatement. DUSSO V. DER & DRL, CASE NO. 94-0490-PC (PERS. COMM. 12/22/94) (pay on restoration), citing SIEBERS V. DHSS, CASE NO. 87-0028-PC (PERS. COMM. 9/10/87) and COULTER V. DOC, CASE NO. 90-0355-PC (PERS. COMM. 1/24/91). ID AT 4.

Thus, the question of whether the Respondent was required to give the Appellant the optional market adjustment on April 3, 2005 is not before us. Rather, there are three primary issues to be determined in addressing this case: (1) was the Respondent's action in setting the Appellant's initial wage rate as a Supervising Officer 2 at $28.455 illegal; (2) was the Respondent's action an abuse of discretion; and (3) does the doctrine of equitable estoppel otherwise require that the Respondent's action be rescinded and the Appellant's wage rate as of his transfer be raised to $29.955?

Legality

As the Appellant made clear in his January 25, 2005 letter to Jeff Smith, Human Resources Director at Waupun Correctional Institution, he was seeking a reinstatement to the position of Supervising Officer 2 from the position of Corrections Program Supervisor. Likewise, the appointment letter issued by Warden Philip Kingston on April 6, 2005 confirms that the position change was a reinstatement. The rules governing establishment of wage rates upon reinstatement are set forth in Sec. 4.07 of the State Compensation Plan for 2003-2005, promulgated by the Department of Employment Relations under the authority of Sec. 230.12, Wis. Stats. That section provides, in pertinent part:

> (3) Except as otherwise provided in 4.07 of this Section (Section I), an employee may be granted a base pay rate which is not greater than the last rate received plus intervening adjustments pursuant to s. 230.12, Wis. Stats., or the applicable collective bargaining agreement, subject to the pay range maximum. When intervening adjustments are

discretionary, the amount shall be limited to the amount that would have been generated by the employee. The intervening adjustments applied shall be those of the appropriate pay schedule and classification from which reinstatement eligibility is derived, subject to the applicable pay range maximum.

(a) "Last rate received" for an employee who is reinstated based on reinstatement eligibility earned **prior** to July 5, 1998, means the highest base pay rate received in any position in which the employee had previously held permanent status in class within the last 3 years.

(b) "Last rate received" for an employee who is reinstated based on reinstatement eligibility earned on or **after** July 5, 1998, means the highest base pay rate received in any position in which the employee had previously held permanent status within the last 5 years.

(4) If the appointment maximum corresponding to the position to which the employee is reinstating is greater than the last rate received plus intervening adjustments, as determined by (3) above, the appointing authority may set the employee's base pay at a rate not to exceed the appointment maximum.

The Appellant's wage rate as a Corrections Program Supervisor was $28.455 on April 9, 2005. As set forth in Kingston's April 6, 2005 letter, the Appellant's starting wage rate as a Supervising Officer 2 would be $28.455 as well. It is clear from the above provision that the discretion of the appointing authority to set wages rates upon reinstatement encompasses the power to keep an employee's wage rate the same when he reinstates into another position within the same broadband pay range. That is what was done here. Further, it is clear from the record that the Appellant understood that his wage rate as an SO2 would stay the same as his final wage rate as a CPS, which is why he took the action he did. By postponing his reinstatement until after April 3, 2005, he hoped to reap the benefit of the optional market adjustment, which was available to those in CPS positions but not those in SO2 positions, and thereby increase his base of pay prior to the reinstatement. In this way, he hoped to gain the advantage of a $1.50 per hour wage increase that would not be available if he reinstated prior to April 3, because his final wage rate as a CPS would be his starting wage rate as an SO2.

Thus, with respect to the issue of legality, the inquiry is whether the Respondent acted within its statutory mandate and authority in setting the Appellant's wage rate upon reinstatement to an SO2 position. We find that it did.

Abuse of discretion

In DEPARTMENT OF CORRECTIONS (ZEILER), DEC. NO. 31107 (WERC, 12/04), the Commission adopted the following interpretation of an "abuse of discretion":

> An "abuse of discretion" is "a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." As long as the exercise of discretion is not "clearly against reason and evidence," the commission may not reverse an appointing authority's hiring decision merely because it disagrees with that decision in the sense that it would have made a different decision if it had substituted its judgment for that of the appointing authority.

Here, the Respondent had discretion, according to the provisions in the State Compensation Plan cited above, to set the Appellant's wage ". . .not greater than the last rate received plus intervening adjustments. . . ." unless the appointment maximum rate for the position is greater, in which case the reinstatement rate could be set at the appointment maximum. No evidence was offered regarding the applicable appointment maximum for the SO2 position, so we assume the Respondent's discretion was confined to setting the Appellant's rate no higher than his outgoing rate as a CPS, which is what it did. Given that, we can find no abuse of discretion to the Appellant's detriment in the Respondent's determination. In fact, the evidence revealed that the Appellant was the highest paid CPS in the Department before he reinstated and was the highest paid SO2 after the reinstatement. Had the Respondent exercised its discretion to set his beginning rate as an SO2 even higher, it would have made the disparity even greater, leading to potential morale issues among other SO2s, some of whom were more senior than the Appellant, as testified to by both Kingston and Thurmer. Even if the Respondent had latitude to start the Appellant at a higher rate, had it not done so it would be difficult to view such action as an abuse of discretion.

Equitable Estoppel

This is the question on which the Appellant places the greatest emphasis. The standard for application of the doctrine of equitable estoppel is a three part test to discern whether (1) an action or inaction by the Respondent, (2) induced reasonable reliance on the part of the Appellant, (3) causing him to act to his detriment. Further, the Appellant must prove this claim by clear and convincing evidence. CITY OF MADISON V. LANGE, 140 WIS. 2D 1, 6-7, 408 N.W. 2D 763 (CT. APP. 1987). Here, the Appellant contends that he was assured by his superiors that he would get the optional market adjustment for CPSs being given on April 3, 2005, and that in reliance thereon he agreed to start in an SO2 position on April 10 with the understanding that he would start at his newly increased CPS rate. After the start date, he contends, he discovered that he did not receive the market adjustment, which he would have received had he stayed in the CPS position, thus costing him at least $1.50 per hour. As a result, the Appellant argues he should be entitled to an adjusted wage rate of $29.955 per hour from his start date as an SO2.

The Appellant had originally applied for an SO2 position on January 25, 2005. At that point he did not know of the optional market adjustment coming through on April 3. We assume, therefore, that his expectation at that time was that he would retain his existing rate of pay of $28.455.[3] His primary consideration for applying was job security.

On March 8, 2005, the Appellant learned from another CPS of the optional market adjustment being given on April 3. The Appellant then confirmed the optional market adjustment with Stacey Rolston, a Classification and Compensation Chief with the Department. Rolston explained, however, that the adjustment was discretionary and that no decision had been made as to how it was to be distributed. She could not guarantee, therefore, that the Appellant would receive the adjustment. Later that day Rolston shared the same information with WCI Human Resources Director Jeff Smith. On March 9, the Appellant met with Marc Clements, Institution Security Director at WCI, and informed him he would need a start date after April 3 to allow him to qualify for the market adjustment. Clements expressed doubt that the Department would push back the start date to allow the Appellant to get a raise when he was already making significantly more than the other Captains. The Appellant then indicated that he would have to reconsider his decision because a $1.50 per hour raise was too much to pass up. Clements agreed to discuss the matter with Deputy Warden Thurmer.

On March 10, the Appellant e-mailed Clements to inquire about his start date being after April 3. Clements replied that he would start on March 20 and had until March 14 to decide whether he was taking the position. The Appellant responded on March 11 and questioned why a start date of March 20 was established only after he had requested to start after April 3 ". . . in order to possibly receive a $1.50 wage adjustment that could be distributed to Correction Program Supervisors." The Appellant indicated he would not proceed with the mandatory stress test until the start date issue was resolved. Later that day, Clements again spoke to the Appellant and told him his start date as an SO2 would be April 10 and that he would get a confirmation letter to that effect.

The next week, the Appellant had meetings with Thurmer on March 16 and Kingston on March 17. Thurmer would not commit to a start date for the SO2 position and indicated he was opposed to the market adjustment for a number of reasons. At his meeting with Kingston, the Appellant indicated his principal reason for seeking the reinstatement was job security. Kingston advised the Appellant to take the position and told him that his start date would be April 10. The Appellant testified that at these meetings both Thurmer and Kingston told him he would be getting the market adjustment. Thurmer and Kingston denied making such statements. The Appellant completed his stress test on March 29, began training for the SO2

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[3] Although we are not certain this is a correct interpretation, both the Appellant and Department appear to have proceeded on the assumption that the State Pay Plan permits a reinstatement to a former position at an employee's existing wage rate, plus intervening adjustments. For the purposes of our decision, however, this is a moot point. Further, the parties at different times refer to the Appellant's change of position from CPS to SO2 variously as a transfer or as a reinstatement. Although those two terms have distinctly separate meanings, again, for our purposes, the distinction is unimportant and we will not address it herein.

position on April 5, received his appointment letter on April 7 and reinstated into the SO2 position on April 10. His reinstatement letter stated: "Your rate of pay will be $28.455 per hour. Any further pay adjustments will be in accordance with the provisions set forth in the State Compensation Plan." As set forth above, the Appellant did not receive the market adjustment.

The first element of the equitable estoppel analysis is whether the Respondent took action on which the Appellant was induced to rely. We find that it did, but only insofar as the Department, at the Appellant's request, agreed to move his start date past April 3, 2005 as a condition of his accepting the position. The Appellant asserts that he took the position because he was assured of receiving the market adjustment on April 3, but the evidence of a guarantee of the adjustment is equivocal, at best, and does not meet the burden of proof by clear and convincing evidence. Both Kingston and Thurmer denied making such a promise and both knew that such decisions were made at higher administrative levels, as did the Appellant from his communications with DOC staff in Madison. Further, the e-mail from Stacey Rolston to HR Director Smith on March 9 made it clear that no decision as to distribution of the adjustment had as yet been made. It may be that all parties expected the adjustment to be across the board from past experience and that Kingston and Thurmer merely assumed that the adjustment would be across the board so that if the Appellant was a CPS on April 3 he would receive it. As late as March 23, however, the DOC had not made a definitive decision, as revealed by the e-mail to Kingston from Assistant Administrator John Bett on that date to the effect that the Department was considering something other than an across the board distribution.

We find it improbable that Kingston or Thurmer would make such an unequivocal guarantee of the adjustment as that described by the Appellant under these circumstances. All the Appellant had requested was a start date qualifying him for the adjustment, not a guarantee of the adjustment itself, as the precondition for his willingness to move into the SO2 position. Given that reality, it seems improbable that Kingston or Thurmer would give the additional assurance of the adjustment when 1) the Department, not they, would ultimately make the distribution decision; 2) they knew the Department had not yet made a distribution decision; 3) they had concerns about the budget and morale situations at WCI should the Appellant have gotten the adjustment; and 4) if the Appellant did not get the adjustment after it had been promised they would at least have to contend with a disgruntled employee and possibly with liability issues, as well.

There is no question, however, that the Appellant wanted the chance to receive the market adjustment and was willing to forego the taking of the SO2 position if it meant passing up the opportunity. The Appellant made this abundantly clear in his March 10 e-mail to Clements and it was his intransigence on this point that led to the confrontation with Thurmer on March 16. Further, the e-mail traffic between Clements, Thurmer and Kingston focuses on whether to push the Appellant's start date past April 3 in order to obtain his willingness to take the position and, ultimately, despite concerns for the delay in getting the position filled, the

request was granted. The record, therefore, establishes that the Appellant made a post-April 3 start date the only condition precedent to his agreement to take the SO2 position and the Department granted the request.

The second element of reasonable reliance is problematic, because the Appellant takes the position that his reliance was not on the promise of the April 10 start date, but on the promise of the adjustment, itself. We are of the view that whether or not a promise of the adjustment was made, such promise was not the precipitating factor in the Appellant's decision to accept the SO2 position and thus was not the basis of his reliance. What the Appellant sought as a condition of reinstatement was a start date that would allow him to qualify for the market adjustment. Once the Appellant learned of the optional market adjustment, he told his superiors that he would not reinstate to the SO2 position unless they would guarantee him a start date after the optional market adjustment on April 3 so that he would be eligible for it. Kingston acceded to the Appellant's demand and gave him a start date of April 10.

It was the opportunity to obtain the market adjustment, not the guarantee of it, that the Appellant was seeking and upon which he based his decision to reinstate, as is made clear by his e-mail to Clements on March 10, wherein he revealed awareness that the market adjustment was not a certainty and only wanted to be eligible for it. Prior to his discussions with Kingston and Thurmer, he advised Clements that he would reschedule his physical exam and move forward with the steps necessary to take the SO2 position once he received written confirmation of the April 10 start date. At that point, by all accounts, nothing had been said by anyone about a guarantee of the adjustment. Thus, the Appellant's decision was prompted by the guarantee of a start date after April 3 and while a subsequent assurance of the adjustment, even if given, may have been welcome news, it did not induce the Appellant to change his position and was not, therefore, the basis of his reliance or his action. The essence of the estoppel claim is that one party makes false representations which induce another party to do something other than he would otherwise have done to his detriment. [RASCAR, INC., V. BANK OF OREGON, 87 WIS. 2D 446 (CT. APP.1978); GRAHAM-WHITE SALES CORP. V. PRIME MFG. CO., 237 F. SUPP. 694 (E.D. WIS., 1964), AFF'D 343 F. 2D 534. Here, by the time the Appellant would have been told by Kingston he was getting the adjustment, he had already decided to reinstate to SO2 based on the assurance of the April 10 start date and was only awaiting written confirmation of the start date to continue the process. He did not, therefore, base his decision on Kingston and /or Thurmer's assurances of receiving the adjustment, even if made, and the claim of equitable estoppel does not lie.

Even if, however, the Appellant did rely on the assurance of the adjustment, such reliance must be reasonable for estoppel to apply. He knew that Kingston and Thurmer did not make such decisions and his communications with Department officials in Madison indicated that the decision about how to distribute the adjustment had not yet been made. After he spoke with Kingston on March 17 he made no further contact with the payroll department in Madison to determine the status of the adjustment, even though he knew the decision was being made there. Nor did he apparently make inquiries with Kingston about the source of his information,

even though he had been warned by fellow officer Scot Galligan that Kingston was not to be trusted. Given the importance that the Appellant attached to the adjustment, the fact that he was apparently well acquainted with the Department's chain of command and administrative processes and that he had been given reason to doubt Kingston's veracity by a trusted confidante, it was not reasonable to accept such representations on their face and rely on them without further inquiry.

In light of the Commission's conclusions, there is no need to address the final element of equitable estoppel.[4]

Dated at Madison, Wisconsin this 3rd day of January, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

[4] The Commission has deleted the final paragraph in the proposed decision as unnecessary to the resolution of the appeal.