STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**DEMETRIUS L. WILLIAMS,** Appellant,

v.

**Secretary, DEPARTMENT OF REVENUE (STATE OF WISCONSIN),** Respondent.

Case 4
No. 65091
PA(sel)-23

# Decision No. 31566

**Appearances:**

**Rocky L. Coe**, Attorney, Coe Law Offices, 3873 North Sherman Blvd., Milwaukee, Wisconsin 53216, appearing on behalf of Mr. Williams.

**Mark S. Zimmer**, Attorney, P. O. Box 8907, Madison, Wisconsin 53708-8907, appearing on behalf of the Department of Revenue.

## ORDER GRANTING MOTION TO DISMISS

This matter is before the Commission on Respondent's motion to dismiss the appeal as untimely filed. The final written submission relating to the motion was received by the Commission on November 25, 2005.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

## FINDINGS OF FACT[1]

1. Prior to May, 2005, Demetrius L. Williams was employed by the Department of Justice where he worked under the supervision of Dave Wolfe. Williams never received a negative performance evaluation from DOJ.

2. Mr. Williams applied for an IS Systems Development Services Specialist – JAVA position at the Department of Revenue (DOR).

3. Peter Eisch is the Application Development Chief at DOR and he had an important role in the hiring process to fill the JAVA vacancy. The Department's Chief Information Officer is Oskar Anderson.

[1] For the purpose of ruling on the motion to dismiss, the facts appear to be undisputed.

4. In an e-mail dated April 19, 2005, Mr. Eisch asked Mr. Williams to identify two or three references and a date when Williams could start in the position.

5. By e-mail dated May 2, Mr. Williams provided the names of three references (Kate Nolan, Peter Robert Hegarty and Eric Knapp) and noted that a "potential start date would be May 23rd." None of these three references were from DOJ.

6. On May 4, Mr. Eisch sent Mr. Williams an e-mail that read, in part:

> We finished up talking with Kate, Peter and Eric yesterday. You have quite a set of admirers! I've just asked Oskar's executive assistant to draft an offer letter for you that I think you'll find quite attractive. Because employment must start on a pay period boundary, I took the liberty of modifying your suggested start date to May 29 in the letter. Upon acceptance, your first day reporting here would be Tuesday May 31.

7. Mr. Williams and DOR never reached agreement on a start date, he did not commence work on May 31 and he exchanged additional e-mails with Mr. Eisch on May 31, June 2 and June 13.

8. In an e-mail to Oskar Anderson on June 16, Mr. Eisch indicated that a start date had still not been established for employing Mr. Williams and that he was "starting to get uneasy about how this is going."

9. Oskar Anderson sent an e-mail to Mr. Eisch on June 21 that described information he had obtained as follows:

> I received some unsolicited advice on Demetrius [Williams] today. Last Friday I received a call from Matt Miszewski regarding our shared server environment. As a side note, he commented that he heard we were talking to Demetrius regarding employment and urged me to talk to Frank Ace (DOJ CIO) before we finalized anything.
>
> I called Frank yesterday and he referred me to Dave Wolfe, to whom Demetrius reported. I connected with Dave this morning, and he offered the following:
>
> - Demetrius left DOJ about a month ago. Dave and he had a disagreement on Demetrius' value to the organization. In Dave's opinion, when Demetrius was hired at DOJ a couple of years ago he was brought on at a salary too high in the salary range of senior compared to the other DOJ developers.

> As a consequence, he has not received any DCA recognition while other programmers have. This was a point of contention between the two, which Dave documented in some form of letter to Demetrius, and shortly after that Demetrius resigned and left without telling anyone where he was going.
>
> - Again in Dave's opinion, Demetrius is a slow developer compared to the other DOJ programmers. Dave attributes some of the slowness to extended analysis times before starting development. Dave said that the final code is good quality, but the output is low compared to his other developers.
>
> - Dave was very surprised that Demetrius had applied for another state job; since he seemed determined to return to the private sector.
>
> - I would suggest that you sit down with Pat [Jackson-Ward] and discuss your whole experience in recruiting Demetrius, step by step, and get her advice on what to do next. We didn't ask for this additional information, but now that we have it I wanted Pat to know about it and to give us some advice on how to react. I think that you have other, positive references, on Demetrius, so we need some advice on how to call this one.

10. Mr. Williams was advised via e-mail from Mr. Eisch dated June 22, 2005 that DOR's offer of employment had been rescinded. The e-mail read:

> Thank you for considering employment with the Wisconsin DOR. I regret to inform you of our decision to withdraw the previous offer of employment. We have recently received a late-arriving negative reference that compels us to rescind our offer. In addition, considering the lengthy course of negotiations that have transpired since May 6 when I originally presented the offer letter to you, we believe your interest in this position is not at a level that would allow you to be successful here. Best wishes in your search for a more suitable position.

The message did not identify the source of the reference or provide Williams with an opportunity to respond.

11. Mr. Williams was never employed by DOR.

12. On or about July 15, 2005, Mr. Williams heard that a DOJ employee had been the source of the negative reference.

13. Mr. Williams e-mailed a letter of appeal to the Commission on August 8, 2005. The Commission received a hard copy of the letter on August 10. In the letter, Williams specifically identified the "late-arriving negative reference" language as the basis for his appeal

and wrote: "This was said after I provided all of my references, which all came back as good references. I was never provided the name or place of where this negative document/conversation arrived."

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 of establishing that his appeal was timely filed.

2. He has failed to sustain that burden.

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

## ORDER

This matter is dismissed as untimely filed.

Given under our hands and seal at the City of Madison, Wisconsin, this 29th day of December, 2005.

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

Parties:

Demetrius L. Williams
1342 Glacier Hill Drive
Madison, WI 53704

Michael Morgan
Secretary, DOR
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**Department of Revenue (Williams)**

## MEMORANDUM ACCOMPANYING ORDER DISMISSING THE APPEAL

The issue in this matter is whether Mr. Williams timely filed his appeal of the action by the Department of Revenue to rescind its offer of employment.

Someone who is dissatisfied with a State civil service hiring decision has 30 days to file an appeal pursuant to Sec. 230.44(1)(d), Stats. This time limit is found in Sec. 230.44(3), Stats., which reads, in relevant part:

> Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later . . . .

The "effective date" of the decision that is the subject of the present appeal is no later than June 22, 2005, the date of the e-mail rescinding the employment offer. COZZENS-ELLIS V. WIS. PERS. COMM., 144 WIS. 2D 271, 455 N.W.2D 246 (COURT OF APPEALS, 1990). (If a person is denied a promotion, the "action" appealed from is the denial and not the simultaneous or subsequent decision to promote someone else.) Therefore, the 30 days is calculated based upon when Mr. Williams was notified that the offer had been rescinded. Nothing in the case file suggests that he received the notice on a date later than the day it was transmitted, June 22.[2] Thirty days after June 22 was Friday, July 22. Whether the Commission relies upon the date it received Mr. Williams' electronic appeal (August 8, 2005) or letter (August 10), the appeal was clearly filed with the Commission more than 30 days after the date he learned the offer of employment had been rescinded.

Appellant contends that his appeal should be considered timely because DOR's conduct had prevented him from filing an earlier appeal. Under certain circumstances, conduct by the employing agency that causes reasonable reliance by an appellant to her detriment may serve as the basis for estopping a respondent from claiming an appeal was untimely filed. DOC (BIGGAR), DEC. NO. 31388 (WERC, 7/05), citing AUSTIN-ERICKSON V. DHFS & DER, CASE NO. 97-0113-PC (PERS. COMM. 2/25/98).

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[2] Mr. Williams has the burden of establishing that his appeal was timely filed. UW & OSER (KLINE), DEC. NO. 30818 (WERC, 3/04). Compare DPI (HER), DEC. NO. 31170 (WERC, 1/2005) where the employee established at hearing that she did not receive the notification letter that had been sent to the other unsuccessful applicants.

Mr. Williams first learned that DOR was withdrawing the previous offer of employment in a letter from Mr. Eisch dated June 22 that listed two reasons for the employer's action:

> We have recently received a late-arriving negative reference that compels us to rescind our offer. In addition, considering the lengthy course of negotiations that have transpired since May 6 when I originally presented the offer letter to you, we believe your interest in this position is not at a level that would allow you to be successful here.

Williams offers a number of inter-related arguments to support his estoppel theory. He writes:

> Williams, relied on [Eisch's e-mail] and within the next few days, checked his references, all of whom told him they had sent in positive reports. Obviously someone was lying, but Williams under the Open Records Law Sec. 103.13(6)(b), which makes an exception that references do not have to be revealed, had no way to access the negative reference that Anderson claimed existed.
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> Thus, [Eisch] had placed Williams at [Eisch's] mercy since there was no way for Williams to check the truthfulness of [Eisch] and [Eisch] had done nothing to indicate that he was acting in bad faith. So, one of Williams references must have been lying to him.
>
> A few weeks after Williams had been fired from State government, around July 15, he learned from the Union's Bill Franks that someone from his old DOJ job was the source of the negative reference. Williams then knew that some skullduggery was at play, because he had not used anyone [from] DOJ as a reference. Further, the potential reference he had from Frank Ace, Chief Information Officer of the Department of Justice was excellent.
>
> This is when Williams acted swiftly to find out [his] rights and filed this charge on August 9 [sic].
>
> During the process of trying to ascertain the facts to settle this matter, Williams by his attorney requested the alleged reference that [Eisch] had acted upon. It was discovered that it was not a secret reference, but an unsolicited June 21, "black ball" conversation between David Wolfe of DOJ and [DOR's Chief Information Officer Oskar] Anderson. Wolfe was the very supervisor that Williams had been trying to escape from to advance his career and therefore had not used as a reference.

> Moreover, the DOR knew that it had intentionally lied to and mislead Williams, because it would not produce any other reference due to Open Records laws against revealing references. Thus, Anderson had disguised Wolfe's "black balling" of Williams as reference which he knew Williams could not question and thereby intentionally gave false information to Williams in an effort to prevent him from pursuing his rights against State government. (Initial Brief, page 2)

To the extent Mr. Williams is suggesting that Wolfe was "deceptive" because he provided Anderson with information that was arguably inconsistent with the performance evaluations Wolfe had completed for Williams when he was at DOJ, the conduct of Wolfe is not attributable to DOR for purposes of applying the doctrine of equitable estoppel. BRADY V. DER, CASE NO. 91-0085-PC (PERS. COMM. 9/19/91) (Alleged misconduct by the Department of Natural Resources cannot serve as the basis for an equitable estoppel theory when it is undisputed that the underlying action of reallocating the position was taken by a department other than DNR.)

Mr. Williams also appears to contend that phrase "late-arriving *negative reference*" found in Mr. Eisch's June 22 e-mail did not accurately describe what Mr. Wolfe told Mr. Anderson and that Eisch's e-mail "disguised" what occurred so as to mislead Williams into not filing an appeal. The undisputed facts do not support the Appellant's contention. While it is true that Wolfe was not one of the three names supplied by Williams to Eisch in his May 2nd e-mail, Wolfe's comments to Anderson still fall within the scope of the term "reference." The word is defined, in part, as:

> **3 :** something that refers: as a : ALLUSION, MENTION **b:** something (as a sign or indication) that refers a reader or consulter to another source of information (as a book or passage) **c :** consultation of sources of information **4 :** one referred to or consulted: as **a :** a person to whom inquiries as to character or ability can be made **b :** *a statement of the qualifications of a person seeking employment or appointment given by someone familiar with him . . .* WEBSTER'S NEW COLLEGIATE DICTIONARY (1977). (Emphasis added).

Appellant's contention is further undermined by the fact that Eisch informed Williams in an e-mail dated May 2 that by May 3 DOR had contacted all three of the persons whose names were supplied by Williams as references and that the three were "quite a set of admirers" of Williams. The mention more than 45 days later to a "late-received negative reference" clearly differentiates the earlier contacts with Kate Nolan, Peter Robert Hegarty and Eric Knapp.[3]

[3] It is not unreasonable for a prospective employer to seek input from a candidate's most recent employer before making a final hiring decision, especially where a third party with no apparent stake in the decision suggests that the input would be beneficial.

Williams offers the argument that his August appeal was timely filed because it was received by the Commission within 30 days of the date he learned that the negative reference came from someone at DOJ. Implicit in this argument is the contention that the June 22nd notice was deceptively incomplete because he was not told the rescission of the offer was based in part on "a late-arriving negative reference *from a DOJ employee*." The Commission declines to find that DOR misled Williams when it failed to identify the agency that employed the individual who supplied the final reference. Mr. Eisch's June 22nd e-mail not only notified Williams that his employment offer had been rescinded, it clearly identified two reasons for the action. The Commission is unaware of any requirement that DOR supply Williams with information about the rationale for its decision. Respondent more than fulfilled its obligation when it accurately informed Williams that one reason for the decision was a late-arriving negative reference. Appellant's argument suggests that DOR should be estopped because it failed to supply even more information to Williams that it was not required to supply to him. The Commission cannot ascertain a basis for Appellant's theory.

Appellant's assertions warrant comparison to the facts in DESROSIERS V. DMRS, CASE NO. 87-0078-PC (PERS. COMM. 8/5/87), MOTION FOR RECONSIDERATION DENIED, 9/10/87. In that matter, Mr. Desrosiers was informed by letter that his name had been removed from a register of eligible candidates because he had been considered for appointment three times and not selected. The letter, dated April 2, stated that he had 10 days to request a statement of the exact cause of the removal and 30 days to appeal the action in order to obtain review pursuant to Sec. 230.44(1), Stats. Mr. Desrosiers asked for the statement of exact cause. The response was dated April 30 and explained that in addition to the reason for removal listed in the April 2 letter, Desrosiers' name had been removed because of unsatisfactory interviews and work references. Desrosiers subsequently appealed the removal in a letter dated May 28 that was received on June 1. The appeal letter was directed solely at the alleged reliance on unsatisfactory employment references. Respondent raised a timeliness objection, contending that the letter of appeal had not been received within 30 days of the April 2 letter but the objection was overruled on an estoppel theory. After emphasizing that the letter of appeal ran strictly to the agency's reliance on an employment reference from one of Desrosiers' former employers, the Commission wrote:

> If respondent's initial letter informing appellant of his removal from the register had not given a reason, but had simply advised appellant of his right to request one, as well as of his right to appeal the removal, there would seem to be little question but that appellant's time for appeal would run from the date he received that letter. However, where appellant was given one reason for the removal in the initial letter, and only subsequently given a different, additional reason (with which he took issue), it would be inequitable to permit respondent to argue the period of limitations should run from the date of receipt of the first letter. Appellant obviously relied on the information contained in the first letter to his detriment, as there not only was nothing in that letter which indicated his removal from the register had been caused by a poor reference, but also a different reason was cited. Given the nature of appellant's appeal, there was no reason for him to have pursued an appeal after he got the first letter.

The facts in the present matter contrast sharply with those of DESROSIERS because Mr. Eisch accurately informed Mr. Williams that it was rescinding its employment offer and was doing so for two reasons, one of which he accurately described as a "late-arriving negative reference." In contrast to the facts in DESROSIERS, DOR has not offered a new reason for its action and Williams' appeal relates solely to whether DOR acted illegally or abused its discretion when it relied on a late-arriving negative reference.

For the reasons set out above, the doctrine of equitable estoppel does not apply to the instant appeal and the matter is dismissed because it was filed more than 30 days after DOR informed Mr. Williams of its decision to rescind the employment offer.[4] Merely learning a fact that led him to believe the previous rescission action was unfair does not start a new 30-day filing period. GRIMES V. WIS. LOTTERY, CASE NO. 91-0158-PC (PERS. COMM. 10/31/98). (Once the appellant learned he had not been selected to fill certain vacancies, he had an obligation to determine whether the decisions were proper and to promptly file an appeal if he wanted to obtain review. His appeal, filed nearly three years later and resulting from having read a newspaper article regarding personnel disputes within the respondent agency, was untimely.)

Dated at Madison, Wisconsin, this 29th day of December, 2005.

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] Contrary to an argument in Mr. Williams' November 25 brief, he had a "cause of action" against DOR for rescinding its offer once he received the June 22nd notice.

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