

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SUSAN RAKOWSKI, Appellant,

vs.

Secretary, WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent.

Case 19
No. 70528
PA(sel)-82

Decision No. 33231-B

Appearances:

Susan Rakowski, appearing on her own behalf.

Howard Bernstein, Legal Counsel, Wisconsin Department of Workforce Development, P.O. Box 7946, Madison, Wisconsin 53707, appearing on behalf of Respondent.

FINAL DECISION AND ORDER

On January 14, 2011, Appellant Susan Rakowski filed a timely appeal invoking the jurisdiction of the Wisconsin Employment Relations Commission (Commission) under Sec. 230.44(1)(d), Stats., alleging that Respondent, Department of Workforce Development (DWD) committed an illegal act or an abuse of discretion by not hiring her for one of three Lead Worker positions. The Commission designated Matthew Greer, a member of its staff, to serve as hearing examiner on the appeal.

Hearing on the appeal was held at DWD's facility on Teutonia Avenue in Milwaukee, Wisconsin on June 28, 2011. During a pre-hearing conference, the Parties agreed to the following issue for hearing:

Whether the Respondent committed an illegal act or an abuse of discretion in not appointing the Appellant to any of three Lead Worker positions.

The Parties submitted post-hearing briefs, the last of which was received on September 13, 2011, thereby closing the record. The Examiner issued a proposed decision on November 23, 2011. Any objections were due by December 23, 2011, but none were filed.

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For the reasons set forth below, the Commission concludes that Respondent did not commit an illegal act or an abuse of discretion when it did not appoint Appellant to one of three Lead Worker positions.

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

FINDINGS OF FACT

1. Respondent Department of Workforce Development (DWD) is an agency of the State of Wisconsin. DWD includes the Division of Unemployment Insurance that processes claims for unemployment benefits. The Division in turn operates the Milwaukee Benefit Center, a facility that handles phone calls from claimants and otherwise processes claims for unemployment benefits.

2. There are approximately ninety employees at the Milwaukee Benefit Center. Six employees are supervisors. Each supervisor directs a unit consisting of one Employment Security Assistant 4 – Claims Lead Worker and a number of Employment Security Assistant 3 – Claims Specialists. Although not a supervisory position, Lead Workers monitor the work of Claims Specialists. The Call Center Director oversees the operation and is the highest level DWD employee at the Milwaukee Benefit Center.

3. Appellant Susan Rakowski is employed by DWD at the Milwaukee Benefit Center as a Claims Specialist and had worked in that position for fifteen years at the time she interviewed for the Lead Worker positions at issue here.

4. In Fall 2010, DWD announced that it was recruiting internal candidates to fill three Lead Worker vacancies at the Milwaukee Benefit Center and set an application deadline of November 30, 2010. Applicants were given an exam, and five candidates were determined to be qualified for the Lead Worker position.

5. Rakowski applied for the position, took the exam, was determined to be qualified, and was subsequently interviewed by a three member panel of interviewers on December 16, 2010. The interview panel consisted of the three supervisors who had Lead Worker vacancies in their units. The four other qualified candidates were also interviewed by the same panel on December 16, 2010.

6. In preparation for the interview process, the Call Center Director developed five job-related interview questions that would be asked of all candidates. Included with the questions were lists of target responses that each interviewer could check as the interviewee responded and a benchmark that indicated, based on the number of target responses provided by the interviewee, whether the interviewee was “well qualified,” “qualified,” or “minimally qualified.”

7. The total benchmark tallies for the five candidates are as follows:

	WELL QUALIFIED	ADEQUATELY QUALIFIED	MINIMALLY QUALIFIED
CANDIDATE 1	10	4	1
CANDIDATE 2	12	3	0
CANDIDATE 3	0	14	1
RAKOWSKI	2	6	7
CANDIDATE 5	0	8	7

8. During the interview, Rakowski made comments that all three interview panel members interpreted to indicate she did not consider Lead Workers and supervisors as being on the same team.

9. Following the interviews, the interview panel met with the Call Center Director to compare their notes and ratings for each candidate. The panel came to a consensus regarding the three candidates that the panel would recommend for hiring. The Call Center Director submitted the recommendations to the hiring authority at DWD for approval and those recommendations were subsequently approved.

10. The appointed candidates were, as identified in Finding of Fact 7, Candidate 1, Candidate 2, and Candidate 3. Rakowski was not one of the top three candidates and was not appointed to one of the three Lead Worker positions.

11. Respondent did not commit an illegal act or abuse its discretion in deciding not to appoint Rakowski to one of the three Lead Worker positions.

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

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over these appeals pursuant to Sec. 230.44(1)(d), Stats.

2. Appellant has the burden to demonstrate that Respondent committed an illegal act or abused its discretion in not appointing the Appellant to any of three Lead Worker positions.

3. Appellant has not met the burden of proof.

4. Respondent did not commit an illegal act or an abuse of discretion in not appointing Appellant to a Lead Worker position.

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

ORDER¹

Respondent's action in not appointing Appellant to one of three Lead Worker positions was not an illegal act or an abuse of discretion. The appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of January, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

¹ 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.

DEPARTMENT OF WORKFORCE DEVELOPMENT (Rakowski)

MEMORANDUM ACCOMPANYING FINAL DECISION AND ORDER

Rakowski appeals DWD's decision not to appoint her to one of three Employment Security Assistant 4 – Lead Worker positions at DWD's Milwaukee Benefit Center. The Commission has jurisdiction over these appeals pursuant to Sec. 230.44(1)(d), Stats. which provides that “[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.”

Within the meaning of Sec. 230.44(1)(d), Stats., an illegal act is one that “is contrary to civil service statutes (subch. II, ch. 230, Stats.) or the administrative rules promulgated thereunder.” DEPARTMENT OF TRANSPORTATION (THIEL I AND II), DEC. NOS. 31725-A and 31726-A (WERC, 12/09), quoting PETTAWAY V. DPI, CASE NO. 01-0013-PC (PERS. COMM., 9/23/01). Rakowski does not cite any civil service provision to support a conclusion that DWD committed an illegal act.² Nor are we aware of any provision that might have been violated here. We conclude that DWD did not commit an illegal act when it did not appoint Rakowski to a Lead Worker vacancy. Therefore, the outcome of this appeal turns on whether DWD abused its discretion.

An abuse of discretion is “discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.” DEPARTMENT OF CORRECTIONS (ZEILER), DEC. NO. 31107-A (WERC, 12/04). If an 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.” ID. (Citations omitted.) Our responsibility is to “determine whether the criteria used by respondent were reasonably related to the duties and responsibilities of the position to be filled and were uniformly applied.” ROYSTON V. DVA, CASE NO. 86-0222-PC (PERS. COMM. 3/10/88). We “will uphold selection decisions unless there is a sufficient basis upon which to conclude that the selection criteria were unreasonable or not uniformly applied, that the selection criteria were not the actual criteria utilized, or that the interviewer’s assessments of the candidates were unreasonable in view of the candidates’ presentations during the interviews and in view of the selection criteria.” DEPARTMENT OF CORRECTIONS (SWEENEY), DEC. NO. 32775 (WERC, 6/10).

Rakowski does not contest the reasonableness of the interview questions as the selection criteria, nor does she argue that the questions were not uniformly applied to all candidates. She does argue, however, that “[i]t is a fallacy that I did not produce adequate interview results over

² Rakowski attached a lengthy law review article on the tort of intentional infliction of emotional distress to her initial brief and argues that one of the interview panelists had caused her emotional distress and prevented Rakowski from advancing in her career with DWD. The Commission does not have jurisdiction over a separate claim of intentional infliction of emotional distress and such an analysis is irrelevant to this matter unless the conduct alleged evidences a violation of civil service provisions or is an abuse of discretion. As discussed below, the evidence in this matter does not support such a finding.

others,” an argument that we understand to challenge the reasonableness of the panel members’ assessment of her interview presentation. We find that the evidence does not support her contention and instead conclude that DWD reasonably based its decision not to appoint Rakowski to a Lead Worker position on her interview presentation.

Each member of the interview panel credibly and consistently testified as to the interview process. All five candidates were interviewed on December 16, 2010. During the interviews, the panel members took as complete notes as they could during the interview, but, given the difficulty in writing everything down during the interviews, the panel members met after the interviews to help each other fill in gaps in their notes. They then individually compared their notes of the interview with the model responses for each question and evaluated where the candidate fell on the qualification scale, i.e., well qualified, adequately qualified, or minimally qualified. After the interviews and documentation were completed, the panel met with the Call Center Director to make a decision regarding the candidates who would be recommended for selection. The panel came to a unanimous conclusion that Candidate 1, Candidate 2, and Candidate 3 were the top three candidates. A review of the benchmark results, summarized in Finding of Fact 7, supports such a conclusion.

The panel members were also unanimous in their concern that Rakowski’s response to an interview question indicated that she did not view the Lead Worker and supervisor as being on the same team. In her response, Rakowski said that, as a Lead Worker, she would characterize a Claims Specialist going directly to the supervisor as going behind her back. The comment was troubling enough that two panel members noted on the cover sheet to Rakowski’s interview documents their concerns in this regard and the third testified as to having the same concern. Given that the supervisor and Lead Worker are the two employees that oversee the unit, it is reasonable that such a concern would diminish Rakowski’s candidacy in comparison to other candidates whose responses did not raise that concern.

Rakowski alleges that two of the panelists were biased against her, had caused her emotional distress, had previously “purposely blocked” her career path, and should not have been on the interview panel and concludes that the interview process was “flawed” because the individuals were included. She submitted documentation going back over a decade to demonstrate the history of what she views as contentious relationships with the two supervisors. Rakowski does not cite any authority to establish that it was an abuse of discretion for DWD to include interviewers she disliked on the interview panel. In contrast, DWD had good reason to include the interviewers on the panel because each had a Lead Worker opening in her unit. Further, there is no evidence that any such bias influenced the other interviewer or the outcome of the hiring decision. The evidence establishes that each of the panelists, including the panelist not tainted by any alleged bias,³ independently came to a conclusion regarding the three top candidates based on the candidates’ interview presentations.

³ Rakowski argues that the three interviewers “are all well connected as friends inside and/or outside work...” There was no evidence presented of any social relationship between any of the interviewers. Even if such a relationship exists, there is no basis to conclude that friendship among the panelists is evidence of an abuse of discretion on the part of DWD.

Rakowski also contends that the interviewers' notes are inconsistent and claims that the interviewers did not check the appropriate benchmark items corresponding to her interview answers. She concludes that, as a result, her benchmark totals were inappropriately low and negatively affected her standing on the qualification scale as summarized in the Finding of Fact 7. The interview process necessarily contains subjective determinations that could result in some panel members noting certain aspects of Rakowski's responses that other members did not record. Such inconsistencies are not sufficient evidence that DWD committed an abuse of discretion.⁴

Finally, Rakowski argues that "whether someone interviews well should have nothing to do with the outcome" of the hiring decision. She also suggests that it was improper for two of the panel members to note that Rakowski chopped or banged her hand on the table during the interview when she was making a point. Interviewing well is a relevant consideration of the interview process. Indeed, observing whether a candidate interviews well, including observing the candidate's demeanor, is a central purpose of the interview process. Therefore, we also reject these arguments.

We conclude that DWD did not commit an illegal act or an abuse of discretion when it did not appoint Appellant to a Lead Worker position. The appeal is dismissed.

Dated at Madison, Wisconsin, this 17th day of January, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

⁴The Commission has modified this sentence in the proposed decision to more accurately reflect the weight of the evidence.