

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SUSAN RAKOWSKI, Appellant,

v.

Secretary, DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent.

Case 24
No. 71985
PA(sel)-93

Decision No. 34075-B

Appearances:

Susan Rakowski, W204 N7623 Lannon Road, Menomonee Falls, Wisconsin, appearing on her own behalf.

Sheri Pollock, P.O. Box 7946, Madison Wisconsin, Deputy Chief Legal Counsel, appearing on behalf of Respondent.

DECISION AND ORDER

On February 13, 2013, Susan Rakowski filed a timely appeal of the decision by the Department of Workforce Development (DWD) not to select her to fill the position of Unemployment Benefit Specialist 1 – Adjudicator in the Milwaukee Call Center, thereby invoking the jurisdiction of the Wisconsin Employment Relations Commission under Sec. 230.44(1)(d), Stats. The Appellant alleged that Respondent’s decision was improper because she had more experience and was more qualified than successful applicants for the position and due to purported inadequacies and improprieties in the interview process. A hearing in the matter was held in Milwaukee, Wisconsin, on July 17, 2013, before Examiner Stuart D. Levitan, a member of the Commission’s staff. During a prehearing conference with Kurt M. Stege, a former Examiner on the Commission’s staff, the parties agreed to the following statement of the issue:

Whether the Respondent’s decision not to appoint the Appellant to any of the 15 Adjudicator positions that were the subject of a notification received on January 15, 2013, was illegal or an abuse of discretion.

Respondent submitted written argument on August 6, 2013. Appellant waived her right to do likewise.

On October 3, 2013, Examiner Levitan issued a Proposed Decision and Order concluding that Respondent did not act illegally or abuse its discretion when it did not hire Appellant. No objections were filed and the matter was ripe for Commission consideration on November 5, 2013.

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

FINDINGS OF FACT

1. The Department of Workforce Development (DWD) is the agency of the State of Wisconsin responsible for a variety of programs to support the Wisconsin workforce, including administering Unemployment Insurance.

2. Appellant Susan Rakowski has been an Unemployment Insurance Claims Specialist (ESA-3) in the DWD's Milwaukee Call Center since 1995, involved in the initial processing of a claim for unemployment insurance and making determinations on relatively simple questions of eligibility. In May, 2013, Rakowski received a merit-based Discretionary Merit Compensation Award of \$1,900.

3. In the late summer of 2012, DWD posted a job announcement for the position of Unemployment Benefit Specialist 1 – Adjudicator, responsible for investigating and making determinations on more complex issues of eligibility. The position of UBS-1 (Adjudicator) is considered a “fast-paced, high-demand” position, for which precise and concise written communication is necessary. Respondent DWD anticipated filling seven vacancies in the Milwaukee call center.

4. Interested applicants were to pre-register for a multiple choice exam to be administered in September, 2012; those who scored above a certain grade were deemed qualified for the position and invited for interviews.

5. There were approximately 30 applicants certified for an interview, including Appellant Rakowski, who had interviewed previously for the same position in an earlier round of hirings. Because she had filed a complaint over her earlier non-selection, and received certain internal working documents illuminating the hiring process, Rakowski was aware of the questions and expected answers. She accordingly tailored her answers to conform to what she

understood were the interviewers' expectations, and met the benchmarks for proceeding to the next step of the hiring process, reference checks.

6. In conducting the reference checks, members of the hiring panel used the standard DWD Employment Reference Check, which, among other questions, asked about the strengths and weaknesses of the applicant under review. Rakowski provided as a reference her immediate supervisor at the Milwaukee Call Center, Lynn Thompson, who gave a generally positive recommendation. As to Rakowski's weaknesses, Thompson replied (as recorded by interview panelist Christine Swoboda) that she was "too wordy, wrote books to me on information, too long and I had to ask her to make it shorter, tell her I wanted it clear and concise." Asked the specific, additional question if Rakowski would make a good adjudicator, Swoboda recorded Thompson replying, "she works independently, and keeps material organized, has a good work ethic. Since I've never been an adjudicator, that's the best answer I can give." Swoboda also contacted Sandra Conners, one of Rakowski's prior supervisors since promoted to claims manager, whom Rakowski had listed as a reference on an earlier application. As recorded by Swoboda, Conners stated Rakowski's weaknesses as "needs to be more specific and concise in wording. W(oul)d write 2 to 3 paragraphs for a TISQ m(es)s(a)g(e), verbose. Had to be told to be specific & concise." As to Rakowski's potential for advancement, Conners replied, "it depends; w(oul)d be more suitable for a claims lead worker position than for adjudicator position." Asked the specific, additional question whether Rakowski would work well in adjudication, Conners replied, "meticulous, learns well, but writes a lot. I was an adjudicator for a while + I don't know if she could meet productivity or put out a lot of cases. She could take long statement and could add extra to a case and take too long. She keeps memos from 1980's/1990's and files and refers to them. She does know claims, but adjudication is different than claims and I'm not sure she could handle production and doing (?) adjudication work."

7. On the bases of the replies from Thompson and Conners, the interview panel did not recommend, and Jessel did not extend, an offer of employment as an adjudicator to Rakowski.

8. The interview panel checked multiple references on at least three other successful applicants, including one incumbent DWD employee and two non-DWD employees. The interview panel did not ask any other references whether the applicant at issue would work well in adjudication.

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

CONCLUSIONS OF LAW

1. The Commission has authority to review non-selection decisions in State civil service pursuant to sec. 230.44(1)(d), Stats.

2. Appellant Susan Rakowski has the burden to establish that Respondent Department of Workforce Development acted illegally or abused its discretion when it decided not to hire her for the position of Unemployment Adjudicator (ESA-3) in the Milwaukee Call Center.

3. Appellant Susan Rakowski has failed to sustain her burden of proof.

4. Respondent DWD did not act illegally or abuse its discretion when it decided not to hire Appellant Susan Rakowski for the position of Unemployment Adjudicator (ESA-3) in the Milwaukee Call Center.

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

ORDER

This matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this _____ 20th day of November 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

/s/ James R. Scott

James R. Scott, Chairman

/s/ Rodney G. Pasch

Rodney G. Pasch, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This matter, which arises from the Respondent's decision not to select Susan Rakowski for the position of Unemployment Benefit Specialist 1 (Adjudicator) in the Milwaukee Call Center, is being reviewed pursuant to the Commission's authority under sec. 230.44(1)(d), Stats., which provides in relevant part:

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 order to prevail, Rakowski must show that DWD's decision not to hire her was either illegal or an abuse of discretion. In DEPARTMENT OF CORRECTIONS (ZEILER), Dec. No. 31107-A (WERC, 12/04), the Commission adopted and applied the interpretation of the term "abuse of discretion," as set forth in NELDAUGHTER V. DHFS, 96-0054-PC, 2/97:

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. (Internal citations omitted).

When determining whether an abuse of discretion occurred in the context of a hiring decision, the Commission considers whether the selection criteria used by the appointing authority were related to the duties and responsibilities of the position, and whether the criteria were uniformly applied. ROYSTON V. DVA, CASE NO. 86-0222-PC (PERS. COMM., 5/10/88).

Appellant Rakowski did not file written arguments, relying instead on comments at hearing. It appears the basis for her contention that the Respondent abused its discretion in not selecting her was that Respondent improperly consulted a second reference, and asked an inappropriate question. Her argument is not persuasive.

Rakowski first based her appeal on the fact that Respondent checked both a current and prior reference, asserting at hearing that Respondent "only did one reference check for every single" other applicant. But that is simply not true; there were at least three other successful applicants for whom the interview panel checked more than one reference. Confronted with that evidence at hearing, Appellant responded that what she had asserted was merely an

assumption, which she now acknowledged was without foundation. It was not an abuse of discretion or an illegal act for Respondent to check with someone Rakowski had listed as a reference on a prior application.

Equally without merit is Rakowski's second argument, that the interview panel committed an abuse of discretion by asking her references if she would make a good adjudicator. The DWD Policy 446 – Employment Reference Checking protocol states, "Ask the prepared questions of all the candidates' references, but also use follow-up questions to help clarify potential problems or concerns about information that the reference offers" (emphasis added). That is exactly what Swoboda did – alerted to the fact that Rakowski had a reputation for being verbose, and aware that the adjudicator position required precise and concise communication, Swoboda asked the direct question as to whether she would make a good adjudicator. Far from being "clearly against reason and evidence" for her to do so, it was eminently reasonable. Because the references for other, successful, applicants did not raise specific concerns similar to the ones which Rakowski's references raised about her, it was not an abuse of discretion for Respondent to forego asking them the same follow-up question asked of Rakowski's references.

Because Rakowski has failed to satisfy her burden, we have dismissed the appeal.

Dated at the City of Madison, Wisconsin, this 20th day of November 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

/s/ James R. Scott

James R. Scott, Chairman

/s/ Rodney G. Pasch

Rodney G. Pasch, Commissioner