

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ANDREW T. MURPHY, Appellant,

vs.

UNIVERSITY OF WISCONSIN – MADISON, Respondent.

Case 21 No. 69921 PA(sel)-70

DECISION NO. 34176-A

ANDREW T. MURPHY, Appellant,

vs.

UNIVERSITY OF WISCONSIN – MADISON, Respondent.

Case 60 No. 70249 PA(sel)-75

DECISION NO. 33152-B

ANDREW T. MURPHY, Appellant,

vs.

UNIVERSITY OF WISCONSIN – MADISON, Respondent.

Case 25 No. 71233 PA(sel)-84

DECISION NO. 33589-B

ANDREW T. MURPHY, Appellant,

vs.

UNIVERSITY OF WISCONSIN – MADISON, Respondent.

Case 26 No. 71531 PA(sel)-87

DECISION NO. 33798-B

Appearances:

Nicholas E. Fairweather, Hawks Quindel, S.C., 222 W. Washington Avenue, Suite 450, P.O. Box 2155, Madison, Wisconsin, appearing on behalf of Andrew T. Murphy

Sierra Beckles Young, Office of Legal Affairs, University of Wisconsin – Madison, 361 Bascom Hall, 500 Lincoln Drive, Madison, Wisconsin, appearing on behalf of University of Wisconsin - Madison.

DECISION AND ORDER

Andrew T. Murphy filed four appeals pursuant to § 230.44(1)(d), Stats., asserting that the University of Wisconsin – Madison violated his statutory restoration rights by not appointing him to vacant accountant or financial program supervisor positions. The four appeals were assigned to Examiner William C. Houlihan who conducted a consolidated hearing in Madison, Wisconsin, on September 29 and 30, 2015.¹ The parties thereafter filed written arguments, the last of which was received on December 11, 2015.

On January 15, 2016, Examiner Houlihan issued a proposed decision and order concluding that the University violated Murphy’s statutory restoration rights as to one of the four disputed positions. Both Murphy and the University filed objections to the proposed decision and Murphy also filed a request for attorney fees and costs. The record was complete on February 29, 2016.

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

FINDINGS OF FACT

1. The University of Wisconsin – Madison (hereinafter “UW”) is an entity of the State of Wisconsin.
2. On July 19, 2009, Andrew T. Murphy was demoted in lieu of layoff from his position as Business Services Supervisor in the UW School of Medicine and Public Health, Department of Medicine.
3. UW did not appoint Murphy to the then vacant position of Financial Program Supervisor at the Wisconsin National Primate Research Center in May 2010. Murphy would not have been qualified to perform the work of this position after receiving customary orientation provided newly hired workers in the position.

¹ The parties engaged in a lengthy, good faith effort to resolve this matter without hearing, resulting in a substantial delay between when these matters were filed and when the hearing in these matters was held.

4. UW did not appoint Murphy to the then vacant position of Accountant in the School of Medicine and Public Health, Department of Pediatrics, in September 2010. Murphy would not have been qualified to perform the work of this position after receiving customary orientation provided newly hired workers in the position.

5. UW did not appoint Murphy to the then vacant position of Accountant in the School of Medicine and Public Health, Department of Radiology, in October 2011. Murphy would have been qualified to perform the work of this position after receiving customary orientation provided newly hired workers in the position.

6. UW did not appoint Murphy to the then vacant position of Accountant in the School of Medicine and Public Health, Department of Population Health Services, in January 2012. Murphy would not have been qualified to perform the work of this position after receiving customary orientation provided newly hired workers in the position.

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

CONCLUSIONS OF LAW

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

2. Andrew T. Murphy has the burden of proof to establish that the University of Wisconsin – Madison’s failure to appoint him to the vacant Accountant or Financial Program Supervisor positions after his demotion in lieu of layoff was either illegal or an abuse of discretion.

3. Andrew T. Murphy has sustained his burden of proof with regard to the Accountant position in the School of Medicine and Public Health, Department of Radiology, referenced in Finding of Fact 5.

4. Andrew T. Murphy has not sustained his burden of proof with regard to the three positions referenced in Findings of Fact 3, 4 and 6.

5. The University of Wisconsin – Madison was substantially justified in taking its position as to the matter referenced in Finding of Fact 3.

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

ORDER

1. For the period of October 19, 2011, to the date of this Order, the University of Wisconsin – Madison shall make Andrew T. Murphy whole for any difference in the compensation he would have received had he filled the Accountant position with the Department of Radiology and the compensation he actually received by virtue of his employment with the University of Wisconsin – Madison.

2. For nine months from the date of this Order, Andrew T. Murphy shall have the restoration rights in effect on October 19, 2011.

3. Andrew T. Murphy’s request for attorney fees and costs is denied.

Signed in the City of Madison, Wisconsin, this 19th day of April 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

In July 2009, Murphy accepted a demotion to the position of Financial Specialist 3 in lieu of layoff at the UW. At the time of his demotion in lieu of layoff, Murphy held the position of Business Services Supervisor in the UW's Department of Medicine. He had held that position since January 2007. Prior to his layoff from the Business Services Supervisor position, Murphy had permanent status in class in that position and had passed his term of probation for the position.

The Commission has jurisdiction to hear appeals from State employees alleging that a personnel action related to the hiring process in the classified service was illegal or an abuse of discretion. § 230.44(1)(d), Stats. "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." *Rakowski v. DWD*, Dec. No. 33231-B (WERC, 1/12) (internal citations omitted). An abuse of discretion occurs within the meaning of § 230.44(1)(d), Stats., when an agency exercises discretion "to an end or purpose not justified by, and clearly against reason and evidence." *Id.* (internal citations omitted). "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.* (internal citations omitted). In each of the four appeals before the Commission, Murphy has the burden to establish by a preponderance of the evidence that the UW's failure to appoint him to the vacant position was either illegal or an abuse of discretion.

During the relevant period of 2009 through 2012, the Director of the Office of State Employment Relations ("OSER")² was required to "promulgate rules governing layoffs ... as well as the subsequent employee right of restoration." § 230.34(2)(b), Stats. The rules promulgated by OSER's director, applicable in 2009 through 2012, require that for three years after an employee is demoted in lieu of layoff:

When a vacancy occurs in the agency in the approved layoff group from which the employee ... demoted as a result of layoff ... the employee shall be recalled in inverse order of layoff, providing the employee is qualified to perform the work after being given the customary orientation provided newly hired workers in such position

² OSER, its functions and obligations have since July 2015 been absorbed within the State of Wisconsin, Department of Administration.

Wis. Admin. Code § ER-MRS 22.10(2). This rule effectively provides for the “restoration” of the employee. Restoration was defined by OSER as:

[T]he act of mandatory re-appointment without competition of an employee or former employee under s. 230.31, 230.32, 230.33 or 230.34, Stats., to a position:

- (a) In the same class in which the person was previously employed;
- (b) In another classification to which the person would have been eligible to transfer had there been no break in employment; or
- (c) In a class having a lower pay rate or pay range maximum for which the person is qualified to perform the work after the customary orientation provided to newly hired workers in the position.

Wis. Admin. Code § ER-MRS 1.02(30).

The UW did not appoint Murphy to any of the four positions within its subdivisions after his applications for restoration: (1) Financial Program Supervisor at the Wisconsin National Primate Research Center, in May 2010; (2) Accountant in the School of Medicine and Public Health, Department of Pediatrics, in September 2010; (3) Accountant in the School of Medicine and Public Health, Department of Radiology, in October 2011; and (4) Accountant in the School of Medicine and Public Health, Department of Population Health Services, in January 2012. The Financial Program Supervisor and Accountant positions are within the approved layoff group from which Murphy was demoted in lieu of layoff.

There is no dispute between the parties that: (1) Murphy was demoted in lieu of layoff in July 2009 and as a result entitled to mandatory restoration rights for a period of three years at the UW; (2) Murphy timely applied for restoration to each of the four positions at issue in these cases; and (3) no other employee from the same layoff group was ahead of Murphy in the order to be recalled.

Financial Program Supervisor at the Wisconsin National Primate Research Center
Case 21, No. 66921 PA(sel)-70

The UW sufficiently rebutted Murphy's testimony that with "the customary orientation provided to newly hired workers in the position" he was qualified for the position of Financial Program Supervisor at the Wisconsin National Primate Research Center ("WiNPRC"). WiNPRC Associate Director for Operations James Butts testified that the center sought a candidate demonstrating experience with: WISPER and CAYUSE (automated grant management tools), pre-grant proposal and proposal administration, post-grant award administration, some purchasing, and supervision of other employees. Although Butts acknowledged that he would not likely find a candidate with all of those experience-based qualifications, Murphy did not possess enough experience in those areas to be deemed qualified for the position. The letter sent to Murphy denying his request for restoration to this position summarized this conclusion.

Butts also testified that, based upon Murphy's responses to him during an interview, he did not find Murphy's attitude toward the position's supervisory duties acceptable. Murphy argues that such a consideration is too subjective. Attitude, particularly related to leadership skills for a supervisory position, however, is a fair consideration in evaluation of Murphy's qualifications. Twenty percent of the Financial Program Supervisor's duties are described in a section of its position description entitled "Supervision and direction to the staff of the Grants/Financial Services Office." Among the remaining eighty percent of the position's other duties listed in the description are some that begin with phrases such as "supervise," "direct and oversee," "train, instruct and guide departmental personnel." The position's knowledge and skills require "strong management and supervisory skills, ability to effectively train, lead and administer others." In light of the position's emphasis on leadership skills, Butts' evaluation of Murphy's attitude toward supervision was relevant to Murphy's qualification for the position. Such evaluation, by necessity, may be more subjective, but it is not out of place.

The UW successfully rebutted Murphy's testimony regarding his qualifications for the position. Murphy has not proven by a preponderance of the evidence that he was qualified to perform the duties of a Financial Services Supervisor at the WiNPRC. It cannot therefore be found that the UW's decision to not restore Murphy to this position was either illegal or an abuse of discretion.

Accountant in the School of Medicine and Public Health, Department of Pediatrics
Case 60, No. 70249 PA(sel)-75

The UW also successfully rebutted Murphy's testimony regarding his qualification for an Accountant position in the School of Medicine and Public Health's Department of

Pediatrics. Murphy argues that he held the “basic knowledge” necessary for the position. He further argues that armed with such basic knowledge, any additional training to prepare him for the position is orientation that the UW must provide to him. In support of this proposition, Murphy cites a Personnel Commission case, *Jensen v. UW-Milwaukee*, Case No. 86-0144-PC (Pers. Comm. 11/4/87).³

In his argument, Murphy does not describe what “basic knowledge” he possessed that rendered him qualified for the Department of Pediatrics’ Accountant position. According to the testimony of Associate Director for Business Services Susan Killips, the UW considered three to five years of experience with complex National Institute for Health (“NIH”) research grants to be a necessary qualification for the position. For this position, such experience is more akin to “basic knowledge” as described in the *Jensen* case than Murphy’s general experience with grants and rather limited experience with NIH research grants specifically. Killips’ testimony demonstrated that Murphy did not possess the requisite years of experience with NIH grants necessary for the Department of Pediatrics’ Accountant position.

Murphy has not proven by a preponderance of the evidence that he was qualified to perform the duties of an Accountant in the Department of Pediatrics. It cannot therefore be found that the UW’s decision to not restore Murphy to this position was either illegal or an abuse of discretion.

Accountant in the School of Medicine and Public Health, Department of Radiology
Case 25, No. 71223 PA(sel)-84

Murphy proved by a preponderance of the evidence that the UW abused its discretion and committed an illegal act when it did not restore him to the position of Accountant in the UW’s Department of Radiology within the School of Medicine and Public Health. Murphy credibly testified that he was qualified for this Accountant position. Unlike the three companion matters, in this case the UW did not successfully rebut Murphy’s presentation of his qualifications.

As in the companion cases, Murphy testified regarding his qualifications for this position. He is a certified public accountant and has worked as an accountant previously. In his testimony and by his resume, Murphy demonstrated that he possessed much of the experience, skill and knowledge required by the Radiology Accountant position’s description. In rebuttal of this evidence, the UW’s witness testifying about Murphy’s qualifications for this position stated that she felt Murphy was deficient in NIH and pre-award grant processes and his ability to

³ Murphy cited to page 21 of a 13-page decision; it is apparent from review of the case that his counsel meant to cite page 11.

work efficiently and productively. The position description for the Department of Radiology's Accountant position focuses significantly on post-award grant administration. Among five activities listed under one goal for the position (comprising twenty percent of the position's total duties), only one discusses grant application processes. Even if the UW found that Murphy was deficient with pre-award grant processes, that deficiency encompasses about four percent of the position's duties.⁴ That is objectively not enough to reasonably determine that Murphy is unqualified for the position.⁵ The witness, Program Assistant Supervisor - Advanced Christa Neuser, indicated that Murphy could have been trained in pre-award grant processes and in NIH processes within the customary orientation period.

Neuser further testified that she determined Murphy's efficiency and productivity were deficient because he stated during the telephone interview that he would work longer hours if necessary to ensure deadlines were met and prioritize work for the department's chair. She did not seek any additional information from Murphy or talk with a reference person regarding Murphy's work habits and record of timeliness when completing work projects and meeting deadlines. Neuser had no objective or reasonable subjective reason to believe that Murphy was incapable of meeting deadlines or prioritizing work. Departmental preferences for how to prioritize work may certainly be established or adjusted during new employee orientation.

Without an objective or reasonable subjective reason to find Murphy's qualifications deficient, the UW abused its discretion. Neither the analysis conducted by the School of Medicine and Public Health, which occurred before October 2011, nor the analysis of the Department of Public Health Services, which occurred after October 2011, serve to demonstrate that Murphy was similarly unqualified for the Department of Radiology's vacant Accountant position. The record demonstrates that recruitment for each of the four positions to which Murphy applied for restoration were controlled separately by individuals from each of the four subdivisions of the UW that was hiring. Nothing in the record indicates that Neuser and the Department of Radiology had information from any other subdivision that influenced their evaluation of Murphy's qualifications. Although each of the Accountant positions had emphasis on grant administration, the reasons why Murphy was denied restoration to the other positions were different and related to specific aspects of those positions. The record does not

⁴ The Commission has previously found that "[i]n the absence of evidence to the contrary, it is assumed that each activity within a goal is performed at the same percentage of time." *Peterson v. Dept. of Admin.*, Dec. No. 32814-A (WERC, 9/2009).

⁵ Another goal, comprising forty percent of the position's duties requires the Accountant to "Prepare, reconcile, audit and manage extramural grants, industry sponsored programs, and revenue producing accounts and contracts" The general goal then lists six activities, none of which specifically deals with pre-award grant processes; in contrast one of the six activities specifically requires the Accountant to "Manage awarded grants / contracts"

support imputing those case-specific reasons to Murphy's qualifications for the Department of Radiology's Accountant position.

When the UW abused its discretion by not restoring Murphy to the vacant Accountant position in the Department of Radiology, it also committed an illegal act. The statutes and administrative code require an agency to restore a qualified employee demoted in lieu of layoff when a suitable position becomes available. Murphy's right of restoration was mandatory if he was qualified. Murphy sufficiently demonstrated that he was qualified for the position. The UW did not restore him to the position as required by law.

Accountant in the School of Medicine and Public Health, Department of Population Health Sciences, Case 26, No. 71531 PA(sel)-87

The UW successfully rebutted Murphy's testimony regarding his qualifications for an Accountant position in the School of Medicine and Public Health's Department of Population Sciences. Murphy argues that he was qualified for this position but was denied restoration to it because the interviewer had an unfavorable personal opinion of him.

One of the interviewers, Population Health Services Academic Department Manger Deanna Moore, testified that in his interview Murphy provided broad responses that did not contain sufficient detail to demonstrate that he was qualified for the position. He also did not provide detail when asked questions calling for specific information about grant accounting. Based upon Murphy's responses Moore also determined that he did not have sufficient experience setting up accounts as required for the position or handling errors common within the UW's systems. Moore also conducted a reference check. She did not contact references supplied by Murphy, but other individuals whom she knew had worked with Murphy. Those reference persons did not testify in this matter and the Commission may not base a decision upon uncorroborated hearsay. Accordingly, the purported statements of those reference persons are not part of the Commission decision in this matter.

Murphy has not proven by a preponderance of the evidence that he was qualified to perform the duties of an Accountant in the Department of Population Health Sciences. It cannot therefore be found that the UW's decision to not restore Murphy to this position was either illegal or an abuse of discretion.

Remedy

As a remedy in this matter, Murphy shall receive the difference in compensation between the UW Department of Radiology position to which he should have been restored and the UW position or positions he has held between October 19, 2011 and the date of this

Order.⁶ In addition, Murphy shall regain nine months of restoration rights from the date of this Order.⁷

Fees and Costs

We have denied Murphy's request for a portion of his fees and costs because we conclude that the UW was substantially justified in taking its position as to the matter referenced in Conclusion of Law 3.

Signed in the City of Madison, Wisconsin, this 19th day of April 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

⁶ Section 230.44(4)(d), Stats., precludes us from restoring Murphy to the Department of Radiology position.

⁷ Murphy has already received two years and three months of the three years of restoration rights to which he is entitled.