

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KATHLEEN WEISS, Appellant

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0017

Case Type: PA

DECISION NO. 36128

Appearances:

Mitchell Perzichilli, Representative, 11592 – 46th Avenue North, Chippewa Falls, Wisconsin, appearing on behalf of Appellant Kathleen Weiss.

Katharine Ariss, Attorney, Department of Corrections, 3099 East Washington Avenue, Post Office Box 7925, Madison, Wisconsin, appearing on behalf of Respondent State of Wisconsin Department of Corrections.

DECISION AND ORDER

On November 7, 2014, Kathleen Weiss filed a timely appeal of a decision of the State of Wisconsin, Department of Corrections not to select her to fill a Food Service Leader 2 position at the Chippewa Valley Correctional Treatment Facility, thereby invoking the jurisdiction of the Wisconsin Employment Relations Commission under § 230.44(1)(d), Stats. The Commission assigned Laurie A. Millot to act as Hearing Examiner.

Although a hearing in this case was held on March 12, 2015, in Chippewa Falls, Wisconsin, the parties subsequently entered into a stipulation of facts with attached exhibits that constitutes the record reviewed and considered by the Commission. Written arguments were received by September 15, 2015.

On December 1, 2015, Examiner Millot issued a proposed decision, concluding that the State of Wisconsin, Department of Corrections did not act illegally or abuse its discretion when it did not select Kathleen Weiss for the Food Service Leader II position. No objections were filed and the matter became ripe for Commission consideration on January 4, 2016.

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

FINDINGS OF FACT

1. Respondent State of Wisconsin, Department of Corrections (“DOC”) is a state agency responsible for the operation of adult correctional facilities, including Chippewa Valley Correctional Treatment Facility (“CVCTF”) located in Chippewa Falls, Wisconsin, and Stanley Correctional Institution (“SCI”) located in Stanley, Wisconsin.

2. Appellant Kathleen Weiss is a DOC employee. In June of 2012, Weiss was hired by DOC into a part-time Food Service Leader 2 position at CVCTF. In late 2013, Weiss transferred into a full-time Food Service Leader 2 position at SCI.

3. On September 1, 2014, CVCTF posted a full-time Food Service Leader 2 position. Weiss was employed as a Food Service Leader 2 at SCI at the time and submitted a transfer request in response to the posting.

4. Weiss was not selected for the CVCTF Food Service Leader 2 position.

5. DOC’s decision not to select Weiss for the Food Service Leader 2 position was based on uniformly applied selection criteria that were related to the duties and responsibilities of the position, and the decision was not clearly against evidence or reason.

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 to review this matter pursuant to § 230.44(1)(d), Stats.

2. Appellant Kathleen Weiss has failed to sustain her burden of proof to show that Respondent State of Wisconsin, Department of Corrections acted illegally or abused its discretion when it did not select her to fill the Food Service Leader 2 position at the Chippewa Valley Correctional Treatment Facility.

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

ORDER

The matter is dismissed.

Signed at the City of Madison, Wisconsin, this 16th day of March 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This matter, which arises from DOC's decision not to select the Weiss for the Food Service Leader 2 position at CVCTF, is being reviewed pursuant to the Commission's authority under § 230.44(1)(d), Stats., which provides in relevant part 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.

The burden is on Weiss to show that DOC's decision not to hire her was either an illegal act or an abuse of discretion.

Weiss alleges that DOC's decision was an abuse of discretion. In *Zeiler v. DOC*, Dec. No. 31107-A (WERC, 12/04), the Commission interpreted an "abuse of discretion" as:

... "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. [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. *Rakowski v. DWD*, Dec. No. 34075-B (WERC, 11/13).

When Weiss applied for a transfer into the CVCTF Food Service Leader 2 position, she was an internal candidate working in a Food Service Leader 2 position at SCI. Karla Holland, the candidate selected by DOC for the position, was an external candidate who never had been employed by the State.¹ Weiss argues that DOC's written policy required it to give preference to Weiss as an internal candidate. She points to DOC Policy 200.30.502, which outlines processes for filling certain DOC vacancies, and she relies specifically on Section V of that policy, which provides as follows:

¹ Holland actually was the second candidate to be offered the Food Service Leader 2 position. The first candidate to whom an offer was made, Joel Rihn, turned the position down.

V. POLICY

Once a position is authorized for hiring, the process of filling a vacancy begins. It is the policy of the Department that priority will be given to employees within their current employing unit as well as across the Department prior to an open selection. This ensures employees have an ability to move to a job preferred within a desired geographic area or work site by utilizing the provisions of a transfer, demotion or reinstatement. Filling a vacancy through a transfer or demotion and often a reinstatement normally amounts to a movement of employees but a vacancy remains which can be further opened for competitive selection under the provisions of the Department's External Staffing Policy.

The purpose of this policy is to create a consistent process in filling positions with transfer, demotion or reinstatement of current Department employees. The policy further establishes an order of consideration which must be followed during the internal selection process and completed prior to initiating an external selection process.

As indicated, this language appears in a section of Policy 200.30.52 that is entitled "Policy." We can understand Weiss' inclination to believe that the "Policy" section of the document contains the policy that applies to covered transactions. The relatively non-specific nature of the statements in Section V, however, particularly when read in conjunction with the other sections of Policy 200.30.52, suggest that the statement on which Weiss relies is to be read as more of a general, aspirational commitment on DOC's part to hiring internally and giving relocation opportunities to DOC employees. The actual mechanical requirements to be followed when making hires are set forth at Section VI, which is identified as the "Procedures" section. The Procedures section is much more specific in a way that overrides any direction provided in the general section of the document highlighted by Weiss.

The Procedures at Section VI contain a number of "steps" that set forth in great detail recruitment and selection process requirements. DOC used Step 5-B of the Procedures to fill the position at issue here, and Weiss agreed in her post-hearing submission that it was appropriate to have done so. Importantly, Step 5-B contains nothing that requires or allows preference to be given to internal candidates.

Weiss also contends that her interview performance and background establish that DOC abused its discretion, but we also do not find support in the record for that argument. The record indicates that DOC interviewed twelve candidates for the Food Service Leader 2 position using uniform, job-related interview questions, the same interview panel, the same

review sheets, and the same reference check forms with all of the candidates. Weiss argues that she ranked higher in the interview process than Holland. While the record shows that out of 21 total interview ratings Weiss received one additional “More Than Acceptable” rating than Holland, it also shows that Weiss and Holland both received overall interview ratings of “Acceptable.”

While Weiss’ references had positive things to say about her, two of her immediate supervisors indicated Weiss had been disciplined twice at SCI, once in February of 2014 for leaving work before the end of her shift and once in March of 2014 for giving food to inmates against policy. Also, Weiss’ other reference, a Captain at SCI, noted some difficulty Weiss had with a coworker, though he also noted that the difficulty was mutual. Holland’s references, on the other hand, did not note any prior discipline and indicated that she got along well with others.

CVCTF Warden Pugh made the ultimate hiring decision. The record indicates that Pugh believed that the ability to get along with staff was important because staff members who get along present less of an opportunity for inmates to isolate members of a staff. Also, although Weiss argues that her disciplines were “incredibly minor,” the evidence indicates that Pugh was concerned about them because he believed they were relevant to the duties of the job and the environment at CVCTF. It is not against reason or evidence that Pugh made a connection between these factors and the nature of the Food Service Leader 2 position. Additionally, it is not against reason or evidence that Pugh concluded that these factors outweighed the other factors that qualified Weiss for the job, including the positive aspects of her references and the fact that she already had worked in the job, and selected a candidate that did not present such issues.

When filling a vacancy, DOC completes a “written hiring reasons” form. When it first offered the position at issue here to Joel Rihn, DOC indicated on the form that Weiss had not been hired because her “references reflected two previous disciplines; one of which was directly related to her Food Service position.” When DOC subsequently offered the position to Holland, however, it completed the same form again and indicated that Weiss had not been hired because she “did not have as favorable of references; her references were poor.” Weiss argues that DOC cannot now take the position that Weiss’ prior disciplines played a role in DOC’s decision not to hire her for the position. We disagree. The reasons provided on the two forms are basically the same, with one referring specifically to discipline and another referring more generally to her references (who, the record shows, made reference to the disciplines). The fact that different wording was used is not noteworthy.

Signed at the City of Madison, Wisconsin, this 16th day of March 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner