

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LAURA VARRIALE, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, Respondent.

Case ID: 291.0003

Case Type: PA

DECISION NO. 36728-A

Appearances:

Richard F. Rice, Fox & Fox, S.C., 124 West Broadway, Monona, Wisconsin, appeared on behalf of Laura M. Varriale.

William H. Ramsey, Department of Administration, 101 E. Wilson Street, 10th Floor, Post Office Box 7864, Madison, Wisconsin, appeared on behalf of the State of Wisconsin Department of Public Instruction.

DECISION AND ORDER

This appeal filed pursuant to § 230.44(1)(d), Stats., arises out of Appellant Laura Varriale's non-selection as chief legal counsel for the Wisconsin Department of Public Instruction. The matter was assigned to the Wisconsin Employment Relations Commission Chairman James R. Scott with final authority, pursuant to §§ 227.46(1) and (3)(a), Stats., by order dated October 13, 2016.

Following discovery a hearing was conducted on December 14, 2016, and following the hearing the parties submitted written argument in support of their respective positions. On behalf of the Commission, I make the following:

FINDINGS OF FACT

1. Appellant Laura M. Varriale is employed as an attorney by the State of Wisconsin Department of Public Instruction and held that position in August of 2016.

2. The Department of Public Instruction is a state agency headed by an elected State Superintendent of Public Schools. Michael Thompson serves as Deputy Superintendent of Public Instruction.

3. In June of 2016, the position of chief legal counsel for the Department of Public Instruction became vacant as a result of the retirement of the incumbent Janet Jenkins.

4. Five individuals were certified as eligible for consideration to fill the vacant chief legal counsel position.

5. Two of the five, Ryan Nilsestuen and Varriale, were current employees of the Department of Public Instruction. The other three were employed outside state service.

6. The Department of Public Instruction followed all of the prescribed steps in filling the vacancy and conducted interviews on August 10 and 12, 2016.

7. Following completion of the process, Nilsestuen was selected by Thompson to fill 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 to review non-selection decisions in state civil service pursuant to § 230.44(1)(d), Stats.

2. The State of Wisconsin Department of Public Instruction did not act illegally or abuse its discretion when it decided not to select Laura Varriale for the position of chief legal counsel.

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

ORDER

This appeal is dismissed.

Dated at Madison, Wisconsin, this 7th day of February 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Parties challenging a state employer's decision not to employ them face a difficult burden. The unsuccessful applicant must establish that the decision maker engaged in illegal action or otherwise abused its discretion.

The State of Wisconsin has fashioned a set of administrative hiring criteria of overwhelming complexity in an effort to turn a subjective decision making process into an objective one. Here, we have a three-person legal department from which the employer is seeking to replace the supervisor with one of the underlings or possibly an outside candidate. The decision maker, Deputy Superintendent Thompson, was obviously familiar with the respective abilities of the two in-house candidates having worked with each of them for several years. If this were the private sector, Thompson could simply select one of the two or conduct a search for an outside candidate. This, however, is state civil service and the lengthy process dictated by administrative regulations was utilized by DPI.

A total of five applicants participated, including the two DPI employees and three outsiders. Nilsestuen the other DPI employee was selected. Varriale relies on the provisions of those administrative regulations in an effort to demonstrate that the decision was an abuse of discretion. The Wisconsin Human Resources Handbook, Chapter 176, entitled "Competitive Selection Procedure and Assessment Options," contains 21 pages of direction which supposedly brings "objectivity" to a subjective decision making process.

One of those directives involves the requirement that persons on the interview panel be "comprised of subject matter experts who can objectively judge the candidates." Varriale argues that the failure to include one or more attorneys on the panel demonstrates support for an overall determination of an abuse of discretion. The obvious response is that every day non-lawyers hire lawyers for all manner of legal services. I reject the notion that only a lawyer can hire another lawyer. More importantly, each of the three interviewers had interacted over the past years with both in-house candidates. All three were aware of the types of legal work needed by DPI. Furthermore, the definition of "subject matter expert" is "an individual who knows the critical aspects of the job." That rather vague guideline does not support the notion that failure to include a lawyer on the panel violates the regulation. Varriale argues that a lawyer would have viewed her "experience" more favorably than a lay panel member. That conclusion is pure speculation.

Varriale also faults the numerical scoring process as subjective. Again, as I noted previously, there is an element of subjectivity in the hiring of professionals no matter how determined the state is to make the process purely objective. The decision as to who will serve as chief legal counsel for an important state agency cannot be reduced to the objectively one might apply to hiring a clerk. Minor disparities in the cumbersome scoring process used here do not equate to an abuse of discretion.

Finally, Varriale challenges the reference checking process. I find that argument unconvincing. Thompson, the decision maker, was fully aware of the capabilities of Nilsestuen

and Varriale. When one has years of experience in dealing with two people, checking references seems particularly pointless. Obviously reference checking the outside applicants, including checking their former employers has value. As to the in-house candidates, their retiring supervisor, Janet Jenkins, chose not to recommend either of her two subordinates, viewing both as qualified.

In the end, it is clear that DPI had a difficult choice to make between two in-house candidates who were relatively close in terms of their qualifications. Either of the two in all likelihood could have handled the job. Under the applicable rules, the hiring process need not be perfect; it need only be reasonably fair. I am satisfied the Department's hiring was a reasonable use of its discretion.

Dated at Madison, Wisconsin, this 7th day of February 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman