

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

YVETTE MOELLER-BUNKER, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE
DEVELOPMENT, Respondent.

Case ID: 303.0003

Case Type: PA

DECISION NO. 36786

Appearances:

Yvette Moeller-Bunker, 724 Crestwood Drive, Burlington, Wisconsin, appearing on her own behalf.

Sheri Pollock, Deputy Chief Legal Counsel, Department of Workforce Development, 201 East Washington Avenue, P.O. Box 7946, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Workforce Development.

DECISION AND ORDER

On October 5, 2016, Yvette Moeller-Bunker filed an appeal with the Wisconsin Employment Relations Commission, pursuant to § 230.44(1)(d), Stats., asserting that she should have been selected by the State of Wisconsin Department of Workforce Development for a permanent business service consultant (BSC) position. The Commission assigned the appeal to Examiner Raleigh Jones who conducted a hearing on January 18, 2017, in Madison, Wisconsin. No briefs were filed in this matter.

On February 23, 2017, Examiner Jones issued a Proposed Decision and Order affirming the Wisconsin Department of Workforce Development's decision not to select Moeller-Bunker. Moeller-Bunker filed objections. The Wisconsin Department of Workforce Development did not respond and the matter became ripe for Commission consideration on April 4, 2017.

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

FINDINGS OF FACT

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

vocational rehabilitation. The Division of Vocational Rehabilitation (DVR) helps jobseekers with disabilities find and retain jobs.

2. DWD and DVR developed the BSC position to connect individuals with disabilities to employment. BSCs engage with businesses to inform them of the benefits of DVR's talent pool and services.

3. DWD initially decided to staff BSC positions with project employees (as opposed to permanent employees). Project employees have an established probable date of termination. DWD eventually hired about 20 project BSC employees.

4. Yvette Moeller-Bunker worked for DVR as a project BSC from 2013 until September, 2016 (about 3½ years).

5. In 2016, DVR eliminated all the project BSC positions referenced in Finding of Fact 3.

6. In July, 2016, DWD posted a job announcement that it was seeking to fill nine permanent BSC positions statewide. Two of these positions were to be located in what DWD called the Southeast/Milwaukee region, with the remaining seven positions located elsewhere around the state.

7. Fifteen former project BSCs applied for the permanent BSC positions, as did about fifty-five outside applicants. Thus, about seventy people applied for the nine permanent BSC positions.

8. Moeller-Bunker was one of the project BSCs who applied for a permanent BSC position. In her application, she specified that the only geographic area she was interested in was the region known as the Southeast/Milwaukee region.

9. The applications were then screened by application-rating panels. Moeller-Bunker made it through this screening process. Any applicant who made it through this screening process was given an initial interview. Moeller-Bunker was one of about thirty-five applicants who had an initial interview. Following this first round of interviews, DWD decided to conduct a second round of interviews in a number of regions, including the Southeast/Milwaukee region.

10. DWD's human resources department personnel then created questions to be asked in the second interview and rating criteria which the interviewers would use to rate the candidates. After the interviewers applied the rating criteria to the candidates, they were to rate them as either "highly recommended," "recommended," or "not recommended."

11. DWD then created an interview panel for the Southeast/Milwaukee region. The panel which was created consisted of four supervisors from DVR who were familiar with the work done by BSCs.

12. On August 19, 2016, the interview panel just referenced convened and conducted eight interviews over the course of a day.

13. All four interviewers rated candidate Moeller-Bunker as "recommended" on Part 1 and "not recommended" on Part 2. In rating her "not recommended" on Part 2, all four interviewers determined that Moeller-Bunker met less than two of the evaluation criteria.

14. All four interviewers rated candidate Raquel Rodgers Ramsey as "highly recommended" on Part 1 and "recommended" on Part 2.

15. All four interviewers rated Kurt Barikmo as "recommended" on Part 1 and "recommended" on Part 2.

16. Following the interviews, the interviewers concluded that the top two candidates were Raquel Rodgers Ramsey and Kurt Barikmo. Following reference checks, they were offered the (two) permanent BSC positions in the Southeast/Milwaukee region. Barikmo was the only former project BSC who was offered a permanent BSC position in the Southeast/Milwaukee region.

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 the state civil service pursuant to § 230.44(1)(d), Stats.

2. Yvette Moeller-Bunker has the burden to establish that the State of Wisconsin Department of Workforce Development acted illegally or abused its discretion when it decided not to select her for a permanent BSC position.

3. Yvette Moeller-Bunker has failed to sustain her burden of proof.

4. The State of Wisconsin Department of Workforce Development did not act illegally or abuse its discretion when it decided not to select Yvette Moeller-Bunker for a permanent BSC position.

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

ORDER

The decision not to select Yvette Moeller-Bunker is affirmed.

Signed at the City of Madison, Wisconsin, this 15th day of May, 2017.

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 the decision not to select Yvette Moeller-Bunker for a permanent business service consultant (BSC) position, is being reviewed pursuant to the Commission's authority under § 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.

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 an illegal action or otherwise abused its discretion.

Within the meaning of § 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, 01/12) (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.* "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.*

Moeller-Bunker contends at the outset that she was qualified for a permanent BSC position. To support that contention, she avers that she had a stellar work record as a project employee, had excellent attendance, had an exceptional work ethic, and always did what was asked of her. For the purpose of discussion, it is assumed that all of these claims are true. However, in this case, the question before us is not whether Moeller-Bunker was qualified for a permanent BSC position; it is whether DWD committed an illegal act or abused its discretion in not selecting her for a permanent BSC position.

Moeller-Bunker also contends that the permanent BSC positions should have gone to the former project BSCs instead of outside (external) applicants. It would be one thing if there was statutory authority that supported her claim. However, there is not. To the contrary, § 230.15, Stats., says that appointments "shall be made only according to merit and fitness, which shall be ascertained so far as practicable by competitive procedures." Also, § 230.16(2), Stats., says that "[t]he selection process for a position in the civil service shall be free and open to all applicants who have fulfilled the preliminary requirements stated in the position announcement." We interpret this statutory language to mean that the state does not have to fill permanent positions with former project employees or internal candidates; it can hire outside (external) candidates if it chooses to do so.

As to the interview and selection process DWD's human resources department personnel created an interview that consisted of two parts. In Part 1, the candidate was to give an oral presentation that they would give to the owner of a business regarding the value of working with DVR and hiring individuals with disabilities. The candidates were notified that they were to

prepare this oral presentation in advance of the interview. In Part 2, the candidate was to describe their professional experience and/or training that involved presenting to individuals and groups. Specifically, the candidate was to indicate the type of group they had presented to, the size and composition of the group, the content of the presentations, and considerations in developing and delivering the presentation. We have no trouble finding that these interview questions were related to the duties and responsibilities of the BSC position.

DWD's human resources department personnel also created rating criteria which the interviewers were to use to rate the candidates on their responses. For Part 1 of the interview, there were ten evaluation criteria that the interviewers were to use when critiquing the oral presentation. If the candidate met seven of these criteria, they were to be rated as "highly recommended"; if they met five criteria, they were to be rated as "recommended"; and if they met four or less criteria, they were to be rated as "not recommended." For Part 2 of the interview, there were seven evaluation criteria that the interviewers were to use when critiquing the candidate's responses. If the candidate met two of those criteria, they were to be rated as "recommended"; if they met less than two of the criteria, they were to be rated as "not recommended"; and if the candidate met more of the criteria than at the "recommended" level, they were to be rated as "highly recommended." Insofar as the record shows, the evaluation criteria were neutral and objective.

DWD's human resources department personnel then created an interview panel for the Southeast/Milwaukee region. That panel is the only panel at issue in this case. The four supervisors on that interview panel (Lea Collins Worachek, Susan Chandek, Mark Poffinbarger, and Deanna Krell) were familiar with the work done by the BSCs. That interview panel subsequently conducted eight interviews over the course of a day. Four of the candidates interviewed that day were former project BSCs who some of the interviewers knew and had previously supervised. As a result, those interviewers were familiar with the work history of those candidates (i.e. the former project BSCs). In an attempt to make the hiring process more objective than it would have been otherwise, one of the interviewers specifically directed the other interviewers before the interviews started to rate all the candidates exclusively on their responses to the questions at the interview and not on their prior work history as project employees.

At the start of each interview, the candidate was given a written copy of a document which contained a cover page, the two questions that were going to be addressed in the interview, and the evaluation criteria which the interviewers would use to rate the candidate on Parts 1 and 2 of the interview. One of the interviewers read the cover page out loud to each candidate. Each candidate was then given thirty minutes to address the two questions. During the interviews, the interviewers took notes on their copies of the document that was given to the candidates and used the aforementioned rating criteria to rate the candidates' responses to Parts 1 and 2 of the interview.

In Moeller-Bunker's interview, all four interviewers rated her as "not recommended" on Part 2. That was the question where she was to describe her professional experience and/or training that involved presenting to individuals and groups. Moeller-Bunker admits that her responses in Part 2 were, as she put it, "short and sweet." That strategy of brevity proved problematic here, though, because Moeller-Bunker simply did not tell the interviewers much about her prior work experience in presenting to groups. Specifically, she did not tell them much

about the types of groups she had presented to, the size and composition of the groups, the content of her presentations, and considerations she had used in developing and delivering her presentations. That is important, of course, because those were the areas Moeller-Bunker was supposed to address in Part 2 of her interview. When she did not do so, the interviewers all rated her as meeting less than two of the evaluation criteria. Under the rating system, if a candidate met less than two of evaluation criteria, that resulted in a rating of "not recommended."

Moeller-Bunker's "not recommended" rating on Part 2 dropped her below other candidates who scored higher than she did. That, in turn, gave DWD an objective basis for hiring the people that it did.

The essence of Moeller-Bunker's claim is that she would have been hired if DWD had not excluded its pre-interview knowledge of her successful work experience from its decision-making process. This may be true. However, in an effort to be fair to all internal and external candidates, DWD chose to make hiring decisions based solely on interview responses and subsequent reference checks of the top applicants. That is a choice the law allows DWD to make.

We therefore find that DWD's decision not to select Moeller-Bunker for a permanent BSC position in the Southeast/Milwaukee region was not "clearly against reason and evidence" and thus was not an abuse of discretion. Nor has Moeller-Bunker provided evidence to establish that any part of DWD's hiring process was illegal. Accordingly, we have affirmed the DWD decision not to select Moeller-Bunker.

Signed at the City of Madison, Wisconsin, this 15th day of May, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner