

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SUSAN RAKOWSKI, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent.

Case ID: 303.0006

Case Type: PA

DECISION NO. 36969

Appearances:

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

Sheri G. 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 March 1, 2017, Susan Rakowski filed an appeal with the Wisconsin Employment Relations Commission asserting she should have been hired by the State of Wisconsin Department of Workforce Development as an Adjudication Support Associate. The appeal was assigned to Examiner Peter G. Davis. A hearing was held on May 25, 2017, in Menomonee Falls, Wisconsin. Post-hearing written argument was filed until July 12, 2017.

On July 26, 2017, Examiner Davis issued a Proposed Decision and Order determining that Department of Workforce Development had abused its discretion and ordering that Rakowski be offered the next vacant Adjudication Support Associate position that Department of Workforce Development intended to fill. On August 25, 2017, Department of Workforce Development filed objections to the Proposed Decision and Order and the matter became ripe for our consideration on September 6, 2017.

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

FINDINGS OF FACT

1. Susan Rakowski applied for an Adjudication Support Associate (ASA) position with the State of Wisconsin Department of Workforce Development (DWD).

2. As part of the hiring process, Rakowski completed an examination which certified her as being qualified to hold the ASA position. Although she received one of the highest scores on the examination, the DWD hiring process does not provide that information to the DWD panel that interviews qualified applicants.

3. A three-person panel was utilized by DWD to interview all certified applicants (including Rakowski) and making a hiring recommendation. The hiring recommendation was to be based exclusively upon how an applicant responded to the panel's questions. The panel included two individuals who had earlier successfully recommended that Rakowski's employment in another DWD position be terminated during a probationary period. The panel did not recommend that Rakowski be offered employment as an ASA, and she was not hired for the ASA position.

4. If the panel had recommended that Rakowski be hired, the hiring process would then have moved to the stage of reviewing references. Rakowski listed six references including one of the two panel members who had earlier successfully recommended that she be terminated from another DWD position during a probationary period. If the hiring panel had recommended that Rakowski be hired, that panel member would have provided a negative recommendation and Rakowski would not have been hired.

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 appeal pursuant to § 230.44 (1)(d), Stats.

2. The State of Wisconsin Department of Workforce Development did not act illegally or abuse its discretion by failing to hire Susan Rakowski.

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

ORDER

The State of Wisconsin Department of Workforce Development's decision not to hire Susan Rakowski is affirmed.

Signed at the City of Madison, Wisconsin, this 29th day of September, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYNG DECISION AND ORDER

Section 230.44(1)(d), Stats., provides:

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.

An illegal act is one that is contrary to Wisconsin civil service statutes or administrative rules. An abuse of discretion is when an agency exercises discretion “to an end or purpose not justified by and clearly against reason and evidence.” Appellant has the burden of proof. *Moeller-Bunker v. DWD*, Dec. No. 36786 (WERC, 5/17).

Here, among other matters, Susan Rakowski attacks the hiring process because the three-person panel utilized by the Department of Workforce Development for interviewing all certified applicants (including Rakowski) and making a hiring recommendation included two individuals who had earlier successfully recommended that Rakowski be terminated from another DWD position during a probationary period. The relevant panel’s members testified that, because the hiring recommendation is to be based exclusively on how an applicant responds to the panel’s questions, they did not consider their prior interactions with Rakowski when recommending that she not be hired. While the Commission has no conclusive basis for finding their testimony less than credible, it does ask quite a lot of panel members to put potentially relevant information out of their minds when making a hiring recommendation. Indeed, the Commission is uncertain as to the wisdom of the DWD policy in this regard. However, while the composition of the panel, at a minimum, raises questions about the appearance of bias in the hiring process, the Commission concludes the panel composition is not sufficient to meet Rakowski’s burden of proof in this matter.

Rakowski also alleges she has proven bias in the hiring process because it is undisputed that she would not have been hired even if the hiring panel had recommended her for employment. In this regard, the record establishes that if the hiring panel had recommended that Rakowski be hired, the next step would have been reviewing references. Rakowski provided six names as possible references, including one of the two panel members who had previously successfully recommended that her DWD employment be terminated during a probationary period. That panel member testified that if Rakowski had been recommended for hire, she would have provided DWD with a negative reference (based on her prior supervision of Rakowski), and Rakowski would not have been hired. One perspective on the above scenario is that because she would never have been hired, the hiring process was a sham as to Rakowski and thus an abuse of discretion. An alternative perspective is that, because Rakowski chose to list her former supervisor as a reference (albeit one of six), there would have been nothing improper for that individual to have provided a reference based on her prior interactions with Rakowski. The Commission finds the second scenario to be more persuasive.

Lastly, Rakowski takes issue with how the interview panel scored her responses to the interview questions. While it is clear that such scoring is inherently subjective and thus subject to attack for a variety of reasons, the Commission does not second guess the scoring choices made by a hiring panel unless they are “clearly against reason and evidence.” *Moeller-Bunker v. Department of Workforce Development, supra*. Rakowski has not met her burden in this regard.

Given the foregoing, the Commission affirms the DWD's decision not to hire Rakowski.

Signed at the City of Madison, Wisconsin, this 29th day of September, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman