

STATE OF WISCONSIN

PERSONNEL COMMISSION

 MARY McCLAIN,
 Appellant,
 v.
 COMMISSIONER OF INSURANCE,
 Respondent.
 Case No. 79-325-PC

DECISION
AND
ORDER

This is an appeal by the appellant, Mary Lou McClain, alleging that respondent, Commissioner of Insurance, has violated pertinent sections of the civil service law by refusing to honor her lay-off reinstatement rights. The case was submitted on briefs, the parties having waived an evidentiary hearing. It is upon this basis that this Commission makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. The appellant, Mary Lou McClain, was employed by the respondent, Commissioner of Insurance, as a Community Services Specialist I with permanent status in class, for almost two years until she was laid off June 30, 1979.
2. On August 28, 1979, appellant was given written notice of recall by respondent to the position of Insurance Examiner I. Appellant responded to the recall notice by letter dated September 6, 1979.
3. The Insurance Examiner I position offered appellant was at the entry level for professional examination and/or auditing work. The position has a travel requirement of 70 percent, which includes audit/examination trips from one to two days to over six months. Some trips would require

the appellant to remain away from home for the duration of the field audit process. The position of Community Services Specialist I required significantly less travel.

4. The appellant is a single parent, head of household with three school-age children.

5. The job duties and responsibilities of the Community Service Specialist I position are quite distinct from Insurance Examiner I. Both require research and analysis relating to insurance and the ability to reduce results to writing. However, only the Insurance Examiner I requires certain training and experience (such as computer science, actuarial science, and statistics), which the appellant lacked.

6. In a letter, dated September 13, 1979, appellant advised respondent that she was not accepting the offered position because of the travel requirements. She had earlier advised respondent that she did not feel qualified for the position.

7. The appellant was not qualified for the Insurance Examiner I position.

8. Respondent's offer of the position of Insurance Examiner I to appellant was not a reasonable offer of reemployment.

CONCLUSIONS OF LAW

1. This Commission has jurisdiction of the matter at hand in accordance with §230.44(1)(b), Wis. Stats.

2. Appellant has reinstatement and restoration rights pursuant to Pers. 16.03 Wis. Admin. Code, but are limited by conditions expressed in Pers. 22.055 and Pers. 22.057 Wis. Admin. Code.

3. The burden of proof is on the appellant to establish that the respondent has violated her rights of reinstatement and restoration.

4. The appellant has established by the greater weight of credible evidence that the respondent violated her reinstatement and restoration rights.

OPINION

The parties agree that when a laid-off employe refuses a "reasonable" offer of reemployment in the employe's former employing unit, other conditions having been met, that employe forfeits any mandatory reinstatement rights. The decision in this case turns upon the reasonableness of the job reinstatement offer by the respondent.

The appellant offers two basic arguments to demonstrate the unreasonableness of the job under review: that she was unqualified for the job and that extensive travel requirements of the position would place an extreme hardship upon her and her three school-age children.

Appellant argues that the position to which she was offered reinstatement two months after being laid off was available at the time she was laid off, but was not offered to her at that time. Respondent, in his brief, contends that "it is entirely possible" that the position did not "officially" become available until somewhat later, or that "there was a delay in processing the offer for appellant."

These contentions are unpersuasive, however, in view of the fact that Robert A. Grehn, director of the Bureau of Staff Services for the Office of the Commissioner of Insurance, told appellant in a letter dated

September 10, 1979 (attachment #5, incorporated herein by reference), that the reason she was not offered this position prior to her layoff was because, "No request for demotion in lieu of layoff was received by the appointing authority from you prior to your layoff." Grehn cited Pers. 17.04(4), Wis. Adm. Code:

"Voluntary Demotion Within a Department in Lieu of Layoff. An employe may request and with approval of the appointing authority may accept a voluntary demotion within the department in lieu of being laidoff. Written acceptance of such demotion shall be furnished to the director."

Grehn fails to mention Pers. 17.04(2) which states:

"Involuntary Demotion in Lieu of Layoff. An appointing authority may demote an employe in lieu of laying him or her off as provided under (former) Section 16.28(2), Wis. Stats.

(a) The demotion may be made to any position of the employing unit; and the employe may appeal the demotion as provided under Chapter Pers 26."

Since this administrative rule unquestionably gives an agency the authority to involuntarily demote an employe in lieu of layoff, respondent can not now claim that it was exclusively appellant's responsibility to request to be demoted rather than being laid off. Respondent argues in its brief that there are various possible reasons for not offering the Insurance Examiner I position to appellant prior to her lay off. All of the reasons are offered as speculation and are unconvincing in the face of appellant's more logical argument in light of the September 10, 1979, letter of Robert A. Grehn. If the position was unavailable at the time the appellant was laid off, Mr. Grehn could easily have so informed her. The letter implies the position was available earlier but was not offered.

If respondent relies on Ch. Pers. 17, Wis. Adm. Code to point out what appellant may have done, respondent must also acknowledge what it could have done under the same chapter. The respondent's brief argues in support of appellant's qualifications for the Insurance Examiner I position in the most general terms. Appellant raised specific issues with respect to qualifications in her brief which respondent did not directly address in its subsequent brief.

In looking at appellant's position description of her job as Community Services Specialist I, the Commission agrees with her contention that she is not qualified to fill the position offered. The job specifications for Insurance Examiner I require that she assist in analyzing insurer financial statements, audit premium tax returns, and have knowledge of computer science, and/or actuarial science and statistics, none of which were contained in her former job description. [Attachments #1 and #2, incorporated by reference herein.]

Appellant argues that a reinstatement offer of a job requiring 70 percent travel to a single parent, with three school-age children, who formerly had a job with little or no travel is also unreasonable. Respondent replies that, "personal circumstances are simply not relevant to one's qualifications for a job. Furthermore, recognizing such personal factors would overburden the system."

This argument fails to take into account that we are not dealing here with a prospective new job applicant. Certainly, a new job applicant would not even consider a job offer requiring 70 percent travel when his or her lifestyle precluded such travel. Recall rights for state employees were

established to provide protection for state employees who are laid off through no fault of their own.

Pers. 22.01, Wis. Adm. Code, states:

"This layoff procedure is adopted pursuant to (former) Section 16.28(2), Wis. Stats., and is intended to be fair to and understandable by all employees; and to retain for the state service its most effective and efficient personnel; and to insure that all layoff actions are appropriately and systematically administered." (Emphasis added.)

In the opinion of this Commission, it is not fair to insist that appellant accept a reinstatement job offer requiring 70 percent travel in view of the fact that her former position required little or no travel and in view of her personal circumstances. Nor do we find that this was a "reasonable" reinstatement offer in view of the fact that she was not offered this position before she was laid off and in view of the fact that she appears unqualified for the offered position. Therefore, we conclude that appellant did not forfeit her mandatory reinstatement rights when she refused the position of Insurance Examiner I, and her reinstatement rights should be restored for a period of three years from the date of this order, less 58 days, the period between her lay off and offer of reinstatement.

ORDER

This matter is remanded to the respondent for action in accordance with this decision.

Dated July 25, 1980

Charlotte M. Higbee
Charlotte M. Higbee, Chairperson

Gordon H. Bréh
Gordon H. Bréh, Commissioner

DISSENT

I do not think the greater weight of credible evidence favors the appellant. Although appellant argues that she was unqualified for the Insurance Examiner I position and that it was not comparable to her former job as a Community Service Specialist I, the agreed upon facts submitted as evidence do not support this position. The majority incorrectly found that appellant was unqualified to fill the position offered because the job specifications "required that she assist in analyzing insurance financial statements audit premium tax returns, and have knowledge of computer science, and or actuarial science and statistics..."

Contrary to the majority's statements, the job specification (Attachment #1) contains no absolute requirements for the Insurance Examiner I position but, rather only examples of general requirements which may be found within the many specific jobs under the classification of Insurance Examiner I. This is exemplified by the use of such headings as, "examples of work performed," and "examples of [sic] knowledges which may be required at this level." It is neither inclusive nor exclusive, but provide understanding of a collection of jobs rated at the same level in particular areas of work.

The appellant has a B.S. degree from Edgewood College in Sociology, Psychology and Economics. She also completed twelve credits at the Insurance Institute of America in Insurance and Economic Security, Principles of Insurance, Legal Concepts and Doctorines, Auto Insurance, Principles of Investigation, Workmen's Compensation, Interpreting Medical Reports, Legal Principles of Products, Liability, and General Liability. Appellant

was employed for nine months as a Property-Casualty Insurance Field Representative, investigating, analyzing, evaluating, adjusting and settling claims. During this time she also evaluated risks, established and recommended insurance coverage. The job required travel in Dane, Sauk, Iowa, Columbia and Dodge counties. In addition appellant worked almost two years as a Community Service Specialist for respondent evaluating the availability of liability insurance for counties, towns, villages, cities and school districts and risk management programs operated by these governmental units.

Without going through the mechanics of the examples in the Insurance Examiner I job specification with appellant's training and job experience it is clear that the appellant was theoretically imminently qualified for the offered Insurance Examiner I position.

Theory aside, the reality is that the respondent, i.e., employer, was in the best position to determine whether or not the appellant, its employee, could successfully carry out the functions of the Insurance Examiner I position. The respondent as the employer had detailed knowledge of both the Insurance Examiner I position offered the appellant and of the abilities of the appellant as they related to the offered position. It is unequivocal that appellant lacked respondent's detailed knowledge of the offered job and that her view of her own abilities in respect to the job lacked respondent's objectivity. On balance then, respondent's position in regards to appellant's ability to perform as an Insurance Examiner I should carry greater evidentiary weight. The majority's finding to the contrary is unsupported by the evidence.

Next is the question of whether or not the offered Insurance Examiner I position was a reasonable substitute for the appellant's former Community Service I position. Again, unquestionably, the respondent possessed the most thorough knowledge and understanding of the content of the respective positions. Other evidence presented on this point was the job specification for the Insurance Examiner I classification and a position description of appellant's former Community Services Specialist I position. The job specification and position description are dissimilar documents, the former containing general information about a broad range of jobs the latter specific information about a particular job. For that reason it is impossible to compare them with any degree of accuracy in terms of results.

The majority, however, is persuaded by the argument that the offered job is not a reasonable substitute for appellant's former job, because the offered job required 70 percent travel. Although this factor may be relevant, standing alone it is insufficient to meet appellant's burden of persuasion. There are many factors pertaining to the position offered and surrounding circumstances which have a bearing on the question of whether or not the offered job was a reasonable substitute. This is exemplified by the unanswered question of whether or not any of respondent's remaining positions, at the level of appellant's former job, were exempt from a higher percentage of travel. The answer to that question would aid in determining the reasonability of the job offered. Appellant had the burden of presenting such evidence but did not. Her only rejoinder was that the travel requirement of the offered job would cause extreme hardship upon her and her

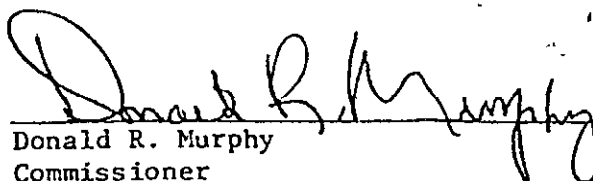
three school-age children. No Section of the Wisconsin Statutes or the Wisconsin Administrative Code pertaining to reasonableness of a reinstatement job offer mention, either directly or indirectly, an employe's personal circumstance as criteria. Accordingly, I do not think appellant established that respondent's offer of reinstatement was unreasonable.

The majority is also persuaded by appellant's argument that proof that she was not qualified for the Insurance Examiner I position was provided when the respondent failed to offer it to her prior to layoff. The appellant failed to present evidence to substantiate this argument. It is just as reasonable to believe that respondent's initial decision was based upon an incomplete understanding of layoff rules. This view is corroborated by the fact, as the majority noted, that respondent was aware appellant could have requested a "voluntary demotion" instead of layoff but not of its authority to "involuntary demote" appellant in lieu of layoff. In any event it was not for the trier of fact to speculate.

For the reasons stated above, I believe the appellant failed to prove her case as required under law. I would affirm the decision of respondent.

Dated September 4, 1980

STATE PERSONNEL COMMISSION


Donald R. Murphy
Commissioner