

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *
 NORBERT SIEBERS,
 Appellant,
 v.
 Secretary, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 Respondent.
 Case No. 87-0028-PC
 * * * * *

DECISION
AND
ORDER

This matter is before the Commission on an appeal pursuant to §230.44(1)(d), Stats., of respondent's decision to set his hourly rate of pay at \$8.352 instead of \$8.552 following his appointment to a Facilities Repair Worker 3 (PR03-08) position. The parties waived a hearing and submitted a stipulation of facts and briefs for a decision on the merits.

FINDING OF FACT

The Commission adopts as its findings the Stipulation of Facts filed by the parties on September 15, 1988. They are as follows (the referenced attachments which are part of the stipulation are not reproduced):

1. The announcement for Facility Repair Worker 3 (hereafter FRW3) appeared in the State Service Current Employment Opportunities Bulletin dated December 27, 1985. (Attachment 1)

2. Norbert Siebers (hereafter Siebers) took the exam and was certified for the FRW3 position at Oshkosh Correctional Institution (hereafter OSCI). (Attachment 2)

3. On December 26, 1986, Siebers was sent a letter from Ana Schiltz (hereafter Schiltz), Personnel Manager at OSCI, regarding the scheduling of an interview. (Attachment 3)

4. Between December 27, 1986, and January 2, 1987, Siebers contacted Schiltz via telephone and set up a time and place for his interview. His interview was scheduled for January 6, 1987, at 3:00 p.m. at OSCI.

5. The interview panel used for all the FRW3 candidates were as follows:

Karl Peterson, Superintendent of Building and Grounds
Maryanne DeZur, Word Processing Supervisor
Curt Bernd, Assistant Superintendent of Building and Grounds

6. During the interviews, all the candidates were asked the same questions and notes were taken by each interviewer on each response. The interview notes on Siebers are attached. (Attachments 4-6)

7. After all the formal questions were completed in the interview, the candidates were asked if they had any questions. At this time Siebers asked what his rate of pay would be. He was informed that it would be \$8.522 by a member of the interview panel. He was also informed that there was a 6 month probation period and that there would be an increase in pay after probation was completed.

8. Siebers was considered the top candidate for the position by the interview panel.

9. Schiltz checked Siebers references on January 7, 1987. (Attachments 7-9)

10. Based on the interview and the references, it was decided to offer Siebers the FRW3 position. Schiltz telephoned Siebers on or about January 8, 1987, and offered him the position. Siebers accepted this offer.

11. During this same telephone conversation (see 10 above), Siebers was told that his base pay would be \$8.522 per hour. Schiltz asked Siebers if he realized that by coming to OSCI he would be receiving considerably

less pay than what he received while working in the trades. Siebers indicated that he understood, however, he was looking for job stability. Schiltz told him that a letter confirming his appointment would be sent to him and welcomed him aboard.

12. Siebers then told his supervisors at the University of Wisconsin-Oshkosh that he had accepted the position at OSCI. Siebers had been working as an LTE carpenter at the U.W. and was paid \$16.72 per hour.

13. On January 12, 1987, a letter of appointment was sent to Siebers (Attachment 10) The effective date of appointment was February 2, 1987.

14. The FRW3 classification is assigned to pay range 3-08.

15. The 1986-87 minimum hourly rate for pay range 3-08 was \$8.522. (Attachment 11) (excerpt from 1986-87 Compensation Plan)

16. The Department of Employment Relations (DER), subject to the approval of the Joint Committee on Employment Relation (JCOER), developed the Master Schedule as part of the DER Secretary's plan to correct pay inequities. The Master Schedule which modified the 1986-87 Compensation Plan was implemented with JCOER approval on February 1, 1987. (Attachment 12-14)

17. The minimum hourly rate for PR 3-08 on February 1, 1987, and later was \$8.352. (Attachment 15, excerpt from 1986-87 Compensation Plan [effective February 1, 1987])

18. On Monday, February 2, 1987, the Complainant reported for work as scheduled.

19. On or about Thursday, February 11, 1987, OSCI received a memo from DHSS Bureau of Personnel & Employment Relation (BPER) providing information about the classifications affected by the Comparable Worth study. (Attachment 14)

20. Schiltz's review of the pay range schedules which came in effect Sunday, February 1, 1987, showed that the new base rate for the Facilities Repair Worker 3 position was \$8.352 per hour.

21. On February 11, 1987, Karl Peterson told Siebers that his pay would be 17 cents per hour less than he had originally been told.

22. On July 1, 1987, Siebers received \$0.251 per hour increase bringing his wages up to \$8.603 per hour.

23. Sieber's current hourly wage is \$8.787 per hour.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(d), Stats.

2. Appellant has the burden of persuasion to establish that respondent's action setting his hourly salary at \$8.352 instead of \$8.522 was illegal or an abuse of discretion and/or gave rise to an equitable estoppel.

3. Appellant has failed to sustain his burden of persuasion, and it is concluded that respondent's decision to set appellant's hourly salary at \$8.352 instead of \$8.522 was not illegal or an abuse of discretion and/or did not give rise to an equitable estoppel.

DISCUSSION

The stipulated issue for decision is as follows:

Whether respondent's decision to set appellant's hourly rate of pay at \$8.352 instead of \$8.522 for his position of Facilities Repair Worker (FRW) 3 (PR 3-08) was illegal or an abuse of discretion.

Appellant's case rests on a theory of equitable estoppel, which may be defined as: "...the effect of voluntary conduct of a party whereby he or she is precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that he will suffer

injury if the former is allowed to repudiate the conduct." Porter v. DOT, Wis. Pers. Commn. No. 79-CV-3420 (3/24/80), aff'd, Dane Co. Cir. Ct. 79-CV-3420 (3/24/80). The basic elements or factors of equitable estoppel were set forth in Gabriel v. Gabriel, 57 Wis. 2d 424, 429, 204 N.W. 2d 494 (1973): "(1) Action or inaction which induces (2) reliance by another (3) to his detriment."

In order for equitable estoppel to be applied against the state, "...the acts of the state agency must be established by clear and distinct evidence and must amount to a fraud or a manifest abuse of discretion...." Surety Savings & Loan Assoc. v. State, 54 Wis. 2d 438, 445, 195 N.W. 2d 464 (1972).

The main problem with appellant's case is that the facts do not show that the agency's actions amounted to "a fraud or a manifest abuse of discretion." The information respondent gave appellant about his salary was accurate at the time it was given in early January, 1987. The changes in the pay plan which DER implemented with JOCER approval in order to correct pay inequities in connection with the Comparable Worth study did not go into effect until February 1, 1987. Appellant began work on February 2, 1987, and he was notified of the change on February 11, 1987, the same day the institution received a memo from Madison which provided information about the classifications affected by comparable worth. There is simply nothing in these facts which suggests any fraudulent action or manifest abuse of discretion.

Another missing link in appellant's case has to do with the element of reliance. There is nothing in the stipulation from which to imply that appellant relied to his detriment on respondent's representation that his salary would be \$8.522 per hour, as opposed to the \$8.352 figure established by the new pay plan. Appellant had been making \$16.72 per hour in

the LTE job he left because he wanted more job stability. It would be speculative on this record to infer that he would not have left the \$16.72 job if he had known his new job paid \$8.352 rather than \$8.522 per hour.

See Taddey v. DHSS, Wis. Pers. Comm. 86-0156-PC (5/5/88).

In DOR v. Moebius Printing Co., 89 Wis. 2d 610, 641, 279 N.W. 2d 213 (1979), the Court held:

...where a party seeks to estop the Department of Revenue and the elements of estoppel are clearly present, the estoppel doctrine is applicable where it would be unconscionable to allow the state to revise an earlier position....

Assuming the elements of estoppel were present, the Commission cannot conclude on this record that it would be unconscionable to allow respondent to revise its earlier representation as to appellant's salary, where his stated reason for going from an LTE job paying \$16.72 per hour to a job paying (ostensibly) \$8.522 per hour was job stability, and subsequent to his acceptance of the second job the starting salary was lowered to \$8.352 per hour due to a change in the pay plan.

Appellant tries to compare his situation to two decided cases where equitable estoppel was applied against the state as employer. In Porter v. DOT, supra, the facts were markedly different. In that case, the employee was induced to take a transfer from the unclassified to the classified service because of the representation that her salary would not be decreased as a result. However, when the appointing authority for the second job made this representation, it was not sure of the employee's classification or her civil service status, and made no attempt to clarify the facts or to verify the appropriateness of the salary offer.

In the case at hand, the information given to Mr. Siebers was correct at the time it was provided. As soon as the appointing authority learned


of changes in the pay plan (over which it had no control), it notified him. In no way can respondent's actions be characterized as fraudulent or amounting to any kind of abuse of discretion.

In Landaal v. State of Wisconsin (Personnel Board, Dane Co. Cir. Ct. No. 138-392 (11/21/73), the employe accepted a voluntary demotion based on the employer's representation that he would retain his current salary. Some sixteen months after that transaction, he was informed that due to a misinterpretation of the civil service code he had been overpaid, that his salary would be decreased, and that he would have to repay the amount overpaid. The Court held that equitable estoppel was present.¹ Again, in the instant case, respondent did not act erroneously when it informed appellant what his initial starting salary would be.

ORDER

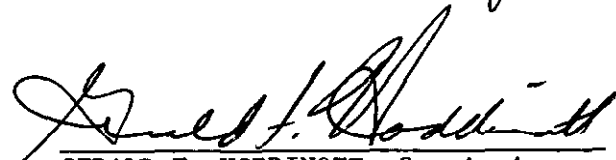
Respondent's action establishing appellant's hourly rate of pay at \$8.352 instead of \$8.552 is affirmed and this appeal is dismissed.

Dated: April 28, 1989 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM/AJT:jmf
JMF01/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

¹ The Court held that the estoppel applied only until the date that the employer informed the employe of the error and reduced his salary -- i.e., the employe was permitted to keep the \$480 overpayment, but was not allowed to keep the higher salary indefinitely.

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