

STATE OF WISCONSIN

PERSONNEL COMMISSION

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PAUL A. TE BEEST,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH  
AND SOCIAL SERVICES,

Respondent.

Case No. 88-0086-PC

\* \* \* \* \*

FINAL  
DECISION  
AND  
ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(b), Stats., of the decision as to appellant's salary following promotion. In an interim decision and order entered December 14, 1988, the Commission denied respondent's motion to dismiss for lack of subject matter jurisdiction. Subsequently the parties reached agreement on a stipulation of facts and agreed to submit this matter for a decision on the merits on the basis of briefs. The following findings are those agreed to by the parties and filed on January 22, 1990. The attachments to the stipulation are not set forth here but are considered to be part of the factual record.

FINDINGS OF FACT

1. Paul A. Te Beest ("the Appellant") was hired as a Correctional Officer (CO) 1 at the Waupun Correctional Institution (WCI), effective April 14, 1986. He was promoted to CO 2 at WCI on April 24, 1988, and remained in that classification at WCI until July 17, 1988.

2. On January 8, 1988, a Statewide Promotional announcement was issued for the CO 3 classification. The announcement provided in part that in-

dividuals promoted would "[s]tart at \$8.991 per hour or receive a 10% increase over your present pay, whichever is greater." (See Attachment #1).

3. The appellant applied and was examined for the CO 3 position. From this examination he was placed on a CO 3 register which would be used for approximately 1 year.

4. Appellant was certified for the Officer 3 position at WCI on May 10, 1988 (See Attachment #4).

5. On April 28, 1988, the Department of Employment Relations (DER) issued a Bulletin on Implementation of Revised Administrative Rules which included the following language in Section III, B, 7, g:

Pay on promotion will be computed differently under § ER 29.03(4).

For promotions effective on or after June 1, 1988, the employe's present rate of pay will be increased by 3 within range pay steps or to the minimum of the range, whichever is greater, subject to the pay range maximum. (See Attachment #2).

6. The DER bulletin was received by the Personnel Manager at WCI on May 5, 1988, however, appellant had no knowledge of the Rule change until the day he accepted a CO 3 position at WCI on or about July 5, 1988.

7. On or about May 20, 1988, the appellant was offered a CO 3 position at Oakhill Correctional Institution. The appellant declined this offer, believing that he would soon be promoted to an identical position at WCI, with an identical pay increase.

8. If the appellant would have been promoted to the position at Oakhill prior to June 1, 1988, he would have received the 10% pay increase. However, for promotions between correctional institutions, at least two weeks notice of resignation is required.

9. On June 1, 1988, the new Administrative Rules went into effect.

10. On June 23, 1988, the appellant was interviewed for promotion to a CO 3 position at WCI. The appellant recalls that he was informed during the interview that he would receive the 10% pay increase if the promotion were granted. The interviewers do not currently recall what, if anything, was said regarding the promotional increase, however, they agree that if the increase were discussed it would have been in terms of the 10% increase rule.

11. On or about July 5, 1988, the appellant was orally offered the promotion to the WCI CO 3 position, and the appellant accepted the promotion. During the conversation appellant was first told that he would receive a 3-step pay increase.

12. Subsequent to the conversation under paragraph 11, by letter dated July 6, 1988, and received on the same date, the appellant's selection to the position of CO 3 was confirmed, effective July 17, 1988. The letter stated in part:

When an employee is promoted, their salary is increased by 3 within range pay steps, or to the minimum of the new range, whichever is greater. Your new salary will be at \$9.586 per hour. (See Attachment #3).

13. Between May 20, 1988 and July 2, 1988, the appellant's rate of pay was \$8.603 per hour. On July 3, 1988, when the negotiated pay increase went into effect, the appellant's rate of pay as CO 2 became \$8.776 per hour.

14. The step increase for CO 3 is \$.270. Appellant's hourly rate of pay effective July 17, 1988, was \$9.586.

#### CONCLUSIONS OF LAW

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

2. Respondent's decision to fix appellant's salary as set forth in Finding #12 -- i.e., an increase of three within range pay steps, or to the

minimum of the new range, whichever is greater -- as opposed to granting appellant a 10% pay increase in connection with his promotion, was neither illegal nor an abuse of discretion, and respondent had no legal obligation to have granted appellant a 10% pay increase in connection with said promotion.

#### DISCUSSION

At the point in time that respondent appointed appellant to the CO 3 position at WCI, revised rule § ER 29.03(4), Wis. Adm. Code, had become effective. This rule mandated that on promotion an employe's pay rate be increased by three within range pay steps or to the minimum of the range, whichever is greater, subject to the pay range maximum. Therefore, respondent's determination of appellant's starting salary, as set forth in Finding #12, was exactly in accordance with the prevailing administrative code rule and, on its face, could not have been illegal. The decision in and of itself also could not have been an abuse of discretion, since the rule does not provide for the exercise of any discretion in the establishment of starting salary on promotion.

The only way that appellant could possibly prevail on this appeal would be with the aid of equitable estoppel. Equitable estoppel may be characterized 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. 78-154-PC (5/14/79); aff'd., Dane Co. Cir. Ct. 79-CV-3420 (3/24/80). The three essential elements needed to establish equitable estoppel are: "(1)action or nonaction which induces (2) reliance by another (3) to his detriment." Gabriel v. Gabriel, 57 Wis. 2d 424, 428, 204 N.W.2d 494 (1973) (emphasis in original).

Additional aspects of equitable estoppel that must be considered here are as follows:

"Before estoppel may be applied to a governmental unit, it must be shown that the government's conduct would work a serious injustice and that the public interest would not be unduly harmed. Department of Revenue v. Moebius Printing Co., 89 Wis. 2d 610, 638, 279 N.W.2d 213, 225 (1979)...the party asserting the defense must prove it by clear and convincing evidence. Gabriel, 57 Wis. 2d at 428, 204 N.W.2d at 497." City of Madison v. Fange, 140 Wis. 2d 1, 7, 408 N.W.2d 763 (1987).

In his brief, appellant argues:

Clearly, the appellant relied on the respondent's representations in refusing the CO 3 position at Oakhill. Had the appellant been promoted to the Oakhill position prior to June 1, 1988, he would have received the 10% increase. Although there are many reasons for accepting a promotion, increased wages is certainly one of the more predominant ones. It is the appellant's testimony that he would have accepted the OCI position had he known it would pay slightly more than a comparable position at WCI. (Interrogatories, question # 1.d.). Although the appellant would have preferred an identical position at WCI, the appellant could have accepted the OCI position, and then transferred back to WCI again in six months, pursuant to his contract. (Interrogatories, question # 1.d.). It is therefore quite likely that the appellant would have accepted the OCI position had he known of the pending rule change.

The difficulty with this contention from the standpoint of equitable estoppel is that "for promotions between correctional institutions, at least two weeks notice of resignation is required." Finding #8. Pursuant to the Wisconsin Administrative Code, § ER-Pers. 1.02(2), an appointment is not effective until the agreed upon starting date and time. Appellant was offered the Oakhill position on May 20, 1988. Therefore, under these circumstances there is no way appellant could have been promoted to the Oakhill position prior to June 1, 1988, so that he could have had the benefit of the earlier version of § ER 29.03(4) prior to the effective date of its change. Accordingly, there was no way appellant's reliance could be said to have been to his detriment, since he could not have gotten the increased salary in any event.

Appellant also takes issue with not having been informed of the effect of change in the rule at the time of his interview at WCI on June 23, 1988. However, he was so advised orally on July 5, 1988, during the course of the conversation in which he was offered the WCI CO 3 position, Finding #11. Appellant is unable to point to any detrimental reliance for equitable estoppel purposes on the June 23, 1988, interview.

ORDER

Respondent's action establishing appellant's starting salary as a CO 3 as \$9.586 per hour in accordance with the revision in § ER 29.03(4), Wis. Adm. Code, which became effective June 1, 1988, is affirmed and this appeal is dismissed.

Dated: May 16, 1990

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

AJT:baj

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

Parties:

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\*Pursuant to the provisions of 1989 Wis. Act 31 which created the Department of Corrections, effective January 1, 1990, the authority previously held by the Secretary of the Department of Health and Social Services with respect to the position(s) that is the subject of this proceeding is now held by the Secretary of the Department of Corrections.