

PENNY PEARL SKAIFE,

Appellant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 91-0133-PC

DECISION
AND
ORDER

This matter is before the Commission as an appeal from a non-selection decision. As reflected in a letter dated August 21, 1991, the issue for hearing read as follows:

Whether respondent's decision not to hire appellant for the Registered Nurse position in question at Mendota Mental Health Institute was illegal or an abuse of discretion.

Subissue: Whether respondents should be equitably estopped from refusing to hire appellant for this position.

At the hearing, it was made clear that the issue of relief was being withheld until such point that the Commission rendered an interim decision favorable to the appellant.

FINDINGS OF FACT

1. In January of 1983, the appellant began working for the University of Wisconsin Hospital and Clinics as a Nursing Assistant.

2. In 1986, while continuing to work as a Nursing Assistant, the appellant began taking classes on a part-time basis towards an Associate Degree of Nursing (A.D. Nursing).

3. In August of 1990, the appellant reduced her work hours from full to half-time, working 40 hours every 2 week pay period.

4. The appellant completed the A.D. Nursing requirements in May of 1991. At approximately the same time, the appellant advised her supervisor that because of her graduation, she was going to resign from her half-time

Nursing Assistant position in the hospital's emergency room. No specific effective date for the resignation was agreed upon.

5. During May, June and July of 1991, the appellant applied for numerous Registered Nurse (RN) positions with various employers throughout the state.

6. On July 1 or 2, 1991, the appellant completed an application form for RN positions at the Mendota Mental Health Institute (MMHI). The appellant also filed a copy of her resume and a list of references who could be contacted, and completed an experience questionnaire. These materials were received by Linda Enders, a Nursing Supervisor 2 whose job duties include recruiting, interviewing and hiring of all nursing staff. The appellant signed a "Release Statement for Credentialing Investigation" which authorized the release of information pertaining to the appellant's "personal or professional ability or competence." Ms. Enders informed the appellant that her references would be contacted and that all hiring was contingent upon obtaining references and on successfully completing a physical examination. Ms. Enders also informed the appellant that there was a vacancy in MMHI's Management Unit and scheduled an employment interview for the appellant with the nurse manager for that unit.

7. On July 3, 1991, Ms. Enders sent reference request forms to the references listed by the appellant. The forms were to be completed and returned to MMHI.

8. MMHI is a psychiatric facility for patients of all ages. It includes a 10 unit forensic program, including maximum security units where numerous psychiatric evaluations and competency evaluations are conducted. The most difficult and unmanageable patients in maximum security are in the Management Unit. Many of these patients are extremely manipulative. The nurse manager or head nurse of the Management Unit is David Pollock.

9. During the morning of Friday, July 12, 1991, Mr. Pollock interviewed the appellant for the vacant position on the Management Unit and at the end of their meeting, tentatively offered her the position. The appellant indicated that she wanted to think about the offer over the weekend and said she would call on Monday, January 15th. Mr. Pollock also stated that the appellant would have to contact Ms. Enders in order to formally get the job because Ms. Enders

had to get the appellant's references and those references had to be satisfactory.

10. At about 7:30 a.m. on Monday, July 15, 1991, the appellant informed Ms. Enders that she was ready to accept the position. Ms. Enders welcomed the appellant and asked her about the status of the required physical examination. The appellant stated that she had already scheduled an exam for July 20th with the office of the physicians who conducted the exams for MMHI. The appellant agreed to report to MMHI's personnel office to start work at 8:00 a.m on July 29th.

11. Ms. Enders noted in her calendar for July 15th that the appellant had accepted the position on the Management Unit and that Ms. Enders needed to check the appellant's references which had not yet been received by MMHI.

12. Shortly after her conversation with Ms. Enders, the appellant telephoned the University of Wisconsin Hospital and Clinics and advised them that her last day of work there would be July 27, 1991.

13. Sometime between July 15th and July 22nd, Ms. Enders received various written references for the appellant. One of the references was from Carol Needham, R.N., an instructor for the Southwest Wisconsin Technical College Associate Degree Nursing Program. Ms. Needham rated the appellant as "average" (versus "marginal," "superior" or "unable to evaluate") as to all eight categories on the MMHI Confidential Evaluation Form. Those categories were 1) basic nursing knowledge, 2) professional judgement, 3) responsibility, 4) skill and competence, 5) ability to work with others, 6) medical records completeness, 7) patient management and 8) compliance with nursing action. Ms. Needham offered the following written explanation of her evaluation:

I supervised Penny on a 7 week clinical rotation and observed safe professional nursing care. She is a patient advocate and feels strongly that this is one of her best roles. See enclosed ADN Faculty rating form.

14. The attached rating form was completed by Ms. Needham and 3 other instructors from the Southwest Technical College and was dated May 22, 1991. The instructors rated the appellant as "needs improvement" (as compared to "above average" or "average") as to each of 7 listed character traits. Those traits were 1) demonstrates therapeutic communication skills, 2) assumes responsibility, 3) accomplishes assignments according to established policies and

procedures, 4) displays integrity in work (trustworthiness), 5) recognizes own strengths and weaknesses, 6) prompt and 7) completes assignments in time allowed. The appellant was rated as "average" for all 10 categories under the heading of "nursing care" except that she was noted as needing improvement in the category of "establishes and maintains appropriate patient-nurse relations." The instructors wrote the following comments:

Penny has demonstrated safe clinical skills. She is perceptive to the needs of her clients. Based on the faculty's observations growth would be encouraged in the following areas:

- Receptive to authority figure
- Acceptance of feedback to the opinions of others
- Promptness

The rating form was signed by the appellant indicating she had read and discussed it with the instructor.

15. This reference raised serious concerns for Ms. Enders and for MMHI's Director of Nursing, Edie Kelm. Ms. Kelm directed Ms. Enders to contact the appellant as soon as possible to schedule a meeting.

16. Ms. Enders tried to telephone the appellant several times at both her home and her place of work but was unable to reach her. On July 22, 1991, Ms. Enders sent the following letter to the appellant:

I have been unable to reach you by phone. It is imperative that you call regarding you[r] pending employment. We need to arrange a meeting with the Director of Nursing, Eda Kelm.

Please call as soon as you can at (608)246-9228. I will be on vacation, but please ask for Eda and make an appointment.

17. The appellant received the letter on Friday, July 26th and tried to call Ms. Kelm later that day. Ms. Kelm was out so the appellant left a message with a phone number where she could be reached that weekend.

18. The next day, Ms. Kelm left a message with the appellant's father that the appellant was to speak to her before reporting to work on Monday, July 29th.

19. After several telephone calls during the morning of July 29th, the appellant finally reached Ms. Kelm by telephone. Ms. Kelm informed the appellant that her references were inadequate and that she would not be hired for the position in question.

20. In the interim, the appellant's old Nursing Assistant position in the emergency room had been filled. However, the appellant understood that she could have returned to a position as a Nursing Assistant in a different location in the hospital. The appellant declined to do so.

21. On August 26, 1991, the appellant was hired to a full-time RN position at Columbus Community Hospital.

22. The respondent's standard procedure is to notify new employes by letter of their appointment to a position at MMHI. The letter is only sent after the prospective employe's references have been found to be satisfactory. The letter also informs the prospective employe that they must successfully complete a physical examination prior to their starting date. Because the appellant's references were not acceptable to MMHI, the appellant was never sent an appointment confirmation letter.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(d), Stats.
2. The appellant has the burden of proving that the decision not to hire her was illegal or an abuse of discretion.
3. The appellant has failed to sustain her burden of proof.
4. The respondent's decision not to hire the appellant as a RN in MMHI's Management Unit was neither illegal nor an abuse of discretion.

OPINION

The jurisdictional basis for this proceeding is found in §230.44(1)(d), Stats., which provides:

Illegal action or abuse of discretion. 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.

The appellant has not made any allegations that the respondent acted illegally in not hiring her for the Management Unit position. Therefore, the question which remains is whether the respondent properly exercised its discretion.

The Commission has previously defined the term "abuse of discretion" as "a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." Lundeen v. DOA, 79-208-PC, 6/3/81. In Harbort v. DILHR, 81-74-PC, 4/2/82, the Commission interpreted the standard as follows:

Thus, the question before the Commission is not whether it agrees or disagrees with the appointing authority's decision, in the sense of whether the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather, it is a question of whether, on the basis of the facts and evidence presented, the decision of the appointing authority may be said to have been "clearly against reason and evidence."

Based on the record before it, the Commission cannot conclude that the decision made by Ms. Kelm not to hire the appellant for the position of RN in the Management Unit was "clearly against reason and evidence." The reference from the Southwest Technical College was characterized by Mr. Pollack as a "damning reference." The respondent pointed out that the reference was signed by four instructors at the technical college, the reference was quite current and it raised concerns which were specifically related to the duties in the Management Unit which provides care to highly manipulative patients. The appellant's reference materials indicated that she needed improvement in the areas of therapeutic communication skills and in establishing and maintaining appropriate patient-nurse relations and that she felt strongly that "one of her best roles" was as a patient advocate.

Ms. Kelm testified that in the Management Unit, the appellant would have had contact with sociopathic patients who are highly manipulative. She also testified that it is very difficult to maintain a therapeutic and appropriate relationship with these patients because of their anti-social personalities and because they remain in the unit for an extended stay. During the last 6 years, there have been 14 cases of RN's in the forensic units who had non-therapeutic relationships with patients. Two RN's had recently been discharged for such conduct. The respondent reasonably concluded that the appellant's abilities were not a good match for the patient population in the Management Unit.

The appellant contended that she should have been hired and given an opportunity to prove herself during her probationary period. The respondent

could have chosen this option instead of the action taken. However, that does not mean that the respondent acted illegally or abused its discretion in not doing so. The respondent had good reason not to hire the appellant. Respondent's concerns about the appellant's performance would have applied whether the appellant was serving a probationary period or held permanent status in class. In addition, if the appellant's argument was taken to its logical extreme, the appointing authority would effectively be required to hire every position applicant, regardless of experience and skill level and regardless of references. While it is certainly possible that the appellant would have been able to successfully perform as a RN in the Management Unit, it cannot be said that Ms. Kelm's decision not to hire the appellant for that position was an abuse of discretion.

The second aspect of this case, and a more difficult question, is whether the respondent should be equitably estopped from not hiring the appellant. The doctrine of equitable estoppel was discussed by the Commission in Meschefske v. DHSS & DMRS, 88-0057-PC, 7/14/89:

Equitable estoppel 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, 78-154-PC, 5/14/79, aff'd, Dane Co. Cir. Ct. 79-CV-3420, 3/24/80. The three factors or elements essential for equitable estoppel to lie are stated in Gabriel v. Gabriel, 57 Wis. 2d 424, 429, 204 N.W. 2d 494 (1973), as follows:

"The tests for applicability of equitable estoppel as a defense derive from the definition by this court of such estoppel to be: '...action or nonaction on the part of the one against whom the estoppel is asserted which induces reliance thereon by another, either in the form of action, or nonaction, to his detriment....' Three facts or factors must be present: (1) Action or nonaction which induces (2) reliance by another (3) to his detriment." (footnote omitted)

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

In Department of Revenue v. Moebius Printing Co., 89 Wis. 2d 610, 638-39, 279 N.W. 2d 213 (1979), the court offered a more thorough explanation of the considerations involved in deciding whether to apply equitable estoppel against a government agency:

Courts have recognized "the force of the proposition that estoppel should be applied against the Government with utmost caution and restraint, for it is not a happy occasion when the Government's hands, performing duties in behalf of the public, are tied by the acts and conduct of particular officials in their relations with particular individuals." Schuster v. CIR, 312 F. 2d 311, 317 (9th Cir., 1962). Nevertheless we have recognized that estoppel may be available as a defense against the government if the government's conduct would work a serious injustice and if the public's interest would not be unduly harmed by the imposition of estoppel. In each case the court must balance the injustice that might be caused if the estoppel doctrine is not applied against the public interests at stake if the doctrine is applied. (citations and footnotes omitted)

The burden is on the party asserting estoppel to "prove all of the elements by clear, convincing and satisfactory evidence." Advance Pipe & Supply v. Department of Revenue, 128 Wis. 2d 431, 439, 383 N.W. 2d 502 (Ct. of App., 1986).

While it may be said that the respondent could have more clearly informed the appellant on July 15th that her filling of the RN position on the Management Unit was contingent both on receipt of satisfactory references and upon completion of the physical examination, neither of which had been obtained as of that date, it cannot be said that the respondent's conduct amounts to a fraud or a manifest abuse of discretion or would work a serious injustice to the appellant. The reasons for this conclusion are as follows:

1. Ms. Enders informed the appellant at the time of her initial application to MMHI that her references would be contacted and that all hiring was contingent upon obtaining references and on successfully completing a physical examination.

2. On July 12th, after the employment interview, Mr. Pollock told the appellant she would have to contact Ms. Enders in order to formally get the job because Ms. Enders had to get the appellant's references and those references had to be satisfactory.

3. On Monday, July 15, 1991, Ms. Enders asked the appellant about the status of the required physical examination, which had not yet been completed

by the appellant, thereby indicating clearly the contingent nature of the appellant's employment with MMHI.

4. During the course of their July 15th conversation, Ms. Enders never mentioned the appellant's references and never advised the appellant that her reference reports had been returned to MMHI or that they were satisfactory.

5. The appellant was aware that she had listed Carol Needham of Southwest Technical College as a reference at the time she had applied to work at MMHI. The appellant was aware of the negative nature of the "ADN Faculty Rating of Student" which is summarized in finding of fact 14 before it was received by the respondent.

6. The appellant resigned from her position at the UW Hospital before she had taken the requisite physical examination for the MMHI position.

7. Ms. Enders made numerous good faith efforts to contact the appellant once MMHI received the negative reference.

8. The appellant declined to return to another Nursing Assistant position in a different location in the hospital after Ms. Kelm informed her that her references were inadequate and that she would not be hired for the Management Unit position.

Given these facts, it cannot be said that Ms. Enders' failure to specifically inform the appellant on July 15th that employment with MMHI was contingent on the receipt of satisfactory reference reports in addition to passing the physical exam worked a "serious injustice" to the appellant so as to outweigh the government's interest in hiring employees who are likely to perform well. In addition to failing to establish the degree of misconduct necessary to establish equitable estoppel against the government, the appellant has also failed to provide clear and convincing evidence that she suffered a detriment as a consequence of the Ms. Kelm's July 29th decision. The appellant offered no testimony nor any argument which specifically addressed the element of detriment. While it is true that the appellant's old position in the emergency room had been filled sometime between July 15 and July 29, and the available Nursing Assistant positions would have been in a different work area and possibly a different shift, the evidence showed that these distinctions were not crucial to the appellant. The appellant had indicated to her supervisor in approximately May of 1991 that she would be leaving her Nursing Assistant position once she found a RN position. Therefore, the key to appel-

lant's decision not to return to UW Hospital and Clinics was that she would have had to return to a Nursing Assistant position rather than to a RN position. In that sense, the consequence of Ms. Kelm's decision was not the loss of the appellant's employment as a Nursing Assistant and the appellant did not sustain her burden of proving the elements of equitable estoppel.

Because equitable estoppel does not lie against the respondent and because the respondent's decision was neither illegal nor an abuse of discretion, the Commission issues the following

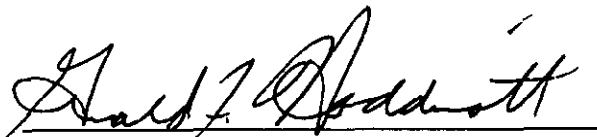
ORDER

The respondent's action is affirmed and this appeal is dismissed.

Dated: December 3, 1991 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms


GERALD F. HODDINOTT, Commissioner

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