

ROSEMARY SPRENGER,
Appellant,

v.

**Secretary, DEPARTMENT OF
WORKFORCE DEVELOPMENT,**
Respondent.

FINAL
DECISION
AND
ORDER

Case No. 01-0068-PC

This matter is before the Commission as an appeal from a hiring decision. The parties agreed to the following statement of issue for hearing:

Whether respondent's failure to hire appellant for the Word Processing Operator 2 position in the Workers Compensation Division on or about August 27, 2001, was an illegal act or an abuse of discretion.

The parties filed post-hearing arguments and respondent obtained a transcript of the hearing.

FINDINGS OF FACT

1. Complainant had worked as a limited term employee in respondent's Worker's Compensation Division from approximately October of 1990 until May of 1991 doing transcription work. Appellant's lead worker during that period was Carol Wagner and she was supervised by Linda Holzbauer. Ms. Wagner sat in the same cubicle as the appellant and was aware of appellant's work performance. Ms. Wagner considered appellant's typing skills and knowledge of grammar to be excellent but recalled that appellant was very stubborn because she had insisted on revising the materials she was transcribing in order to correct grammar and, by doing so, was not providing an accurate transcription. Appellant told Ms. Wagner that she would quit her LTE position rather than transcribe what appellant viewed as ungrammatical statements. Administrative law judges complained to Ms. Wagner that appellant was changing their words.

2. The vacancy that is the subject of this appeal was a full-time position as Word Processing Operator 2 in the Worker's Compensation Division. The position description (Resp. Exh. 1) for the position includes the following summary:

Under general supervision this position provides technical and word processing support to the Worker's Compensation Division using an electronic transcription and computerized text system. Maintains work performance within established procedures and practices and performs other miscellaneous duties as necessary. This position reports to the Leadworker and/or Supervisor. All work is subject to review by the Leadworker and/or Supervisor.

The position demonstrates, and maintains good public relations by providing quality services to our customers.

The position also served as the Division's back-up receptionist.

3. The interview panel for the vacancy consisted of Mary Pronschinske, Program Assistant 3, Leadworker; Etas Carria, Worker's Compensation Specialist 3; and Sharon Fellows, Executive Staff Assistant Supervisor

4. Ms. Fellows was the supervisor for the vacant position.

5. Appellant was interviewed for the vacancy on July 18, 2001, (Resp. Exh. 3) and she was the only person interviewed from the initial (July 6, 2001) certification list. (Resp. Exh. 14) Everyone else on the initial list either failed to respond to the effort to contact him/her, or declined to be interviewed.

6. Appellant's interview is reflected in contemporaneous notes taken by the three panelists. (Resp. Exh. 3) For the most part, these notes reflect complainant's comments during the interview rather than an analysis of the appropriateness of those comments. However, one interviewer wrote 2 As and 4 Bs next to complainant's responses and another wrote "acceptable" next to all of the responses.

7 Appellant made two comments during the interview that were viewed negatively by the panelists. Appellant made a statement to the effect that she would give the panel a chance to turn her down again because she had tried before. Appellant also said that she needed a job because she "went bankrupt." (Transcript, p. 118) The

panelists viewed these comments by appellant to be unnecessary and felt they projected a negative attitude by appellant.

8. Attached to complainant's resume was a list of references, including Linda Holzbauer, who was then working at the Department of Transportation.

9. Panelist Sharon Fellows called Ms. Holzbauer Ms Holzbauer, who has not worked for Workers Compensation for more than 8 years, said she did not remember appellant's work performance and referred Ms. Fellows to Carol Wagner. Ms. Holzbauer also said she had previously told appellant that she did not want to serve as a reference for her.

10. Ms. Fellows proceeded to contact Ms. Wagner, appellant's former lead-worker. The notes (Resp. Exh. 3) from Ms. Fellows' reference check with Ms. Wagner read:

Have some reservations about it.
Some issues with her
Always[s] LTE
Workwise - wants to do it her way.
Very stubborn
Didn't want to do it the ALJ's way.

These notes accurately reflect Ms. Wagner's comments. Ms. Wagner also said she would not hire the appellant.

11. Ms. Fellows also contacted Mark Bunge, a second reference listed by appellant. According to the notes from that contact, Mr. Bunge indicated that appellant was punctual and a good worker.

12. The interview panel concluded that the appellant was not a sufficiently strong candidate to justify hiring her without considering any other candidates. They requested an additional certification of candidates in order to increase the size of the pool.

13. Respondent received the second certification list on or about August 3, 2001. (Resp. Exh. 13)

14. The same interview panel conducted an additional nine interviews beginning on August 13th

15. Lynn Schwoerer, who was interviewed on August 16th, was recommended by the panel for hire. The panelists' notes (Resp. Exh. 5) from Ms. Schwoerer's interview show one panelist assigned 5 As and 1 B to her responses and another wrote "acceptable" next to 2 responses and "qualified" next to 4 responses. The panel's hiring recommendation was approved (Resp. Exh. 12) by the Division Administrator on August 22nd, but Ms. Schwoerer declined the offer on August 23rd

16. The panel also offered the position to Noreen Meinholz, who was interviewed on August 14th. The notes (Resp. Exh. 6) from Ms. Meinholz's interview show that one panelist gave her 5 As and 1 C for the responses, and another noted "acceptable" next to 4 responses and "qualified" next to 1 response.

17. Julie Scott, interviewed on August 16th, was ultimately hired to fill the vacancy on August 27th. (Resp. Exh. 15) The panelists' notes (Resp. Exh. 4) from Ms. Scott's interview show that one panelist assigned 4 As and 2 Bs to the responses, and another wrote "acceptable" next to 2 responses, "qualified" next to 3 responses, and "most qualified" next to one response.

18. At the time of the interview, Ms. Scott was employed by National Healthcare Resources, where she transcribed independent medical examination reports for several physicians. One of the panelists, Etas Carria, had significant experience with the transcription work product of National Healthcare Resources and she was very impressed with that work. Ms. Carria did not know Ms. Scott before the interview but she strongly supported her candidacy after the interview. In addition to her familiarity with the transcriptions produced by National Healthcare Resources, Ms. Carria felt that Ms. Scott's personality "resonated" during the interview, that Ms. Scott seemed "happy" and she noted that Ms. Scott had direct experience in dealing with physicians and how to deal with rush requests.

19. By letter (Resp. Exh. 2) dated August 27, 2001, appellant was notified that she had not been selected for the vacancy.

20. Appellant was not in the top group of candidates considered by the panel.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.44(1)(d), Stats.
2. The appellant has the burden of establishing that respondent either acted illegally or abused its discretion when it did not hire her for the vacant Word Processing Operator 2 position in the Worker's Compensation Division.
3. Appellant has failed to sustain her burden.
4. The respondent did not act illegally or abuse its discretion when it did not hire the appellant for the vacancy.

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.

In *Ebert v. DILHR*, 81-64-PC, 11/9/83, the Commission stated:

The term "abuse of discretion" has been defined 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. The question before the Commission is not 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." *Harbort v. DILHR*, 81-74-PC, 4/2/82.

In her argument at the conclusion of the hearing, appellant acknowledged that respondent

probably didn't do anything illegal when they didn't hire me, but I thought it was an abuse of discretion and maybe unethical as far as when they called Carol Wagner for a reference without my permission. And as far as not hiring me, I felt I was just as qualified as the person hired.

And the fact that I had been a former LTE should have carried more weight. (Transcript, page 201)

Appellant's contention that she was "just as qualified" as the successful candidate, Ms. Scott, is not supported in the record. The panel reasonably concluded that Ms. Scott was a preferable candidate. The panel considered each candidate's responses to the written questions, as presented during the interview. For the top-ranked candidates, respondent also contacted references. While appellant's experience as an LTE in a substantially similar position was clearly relevant to the decision in question, this experience was more than neutralized by Ms. Wagner's relatively negative view of appellant's performance as an LTE. The panel was also put off by appellant's negative comments (Finding 7) during the interview. It was certainly reasonable for the panel to conclude that appellant was not a desirable candidate. Rather than opting to hire the appellant, the only person interviewed at that point, respondent chose to look at other candidates by obtaining another certification list. Ms. Scott was on the new list. She had extensive and highly relevant work experience. She spoke well at the interview and one of the panelists had a very high opinion of the transcription worked supplied by Ms. Scott and her employer. The reference checks for Ms. Scott generated positive responses. Respondent properly exercised its discretion when it selected Ms. Scott rather than appellant for the vacant position.

In addition to her general statements about her qualifications, appellant offered the following argument in her post-hearing brief:

Employees need to have a say in who is contacted by a prospective employer. I had only given Ms. Fellows permission to contact Ms. Holzbauer at the interview. Supervisors sometimes earn more than non-supervisors and should be willing to provide information about past employees.

There is simply nothing that prevented, or made it inappropriate for, respondent to speak with Ms. Wagner, one of its own employees, about whether appellant would be a strong candidate for the Word Processor 2 position. Ms. Wagner knew appellant's work and certainly knew the job in question. Ms. Wagner was a highly appropriate

person to contact for additional information regarding the appellant's application. While the appellant may wish that Ms. Fellows had not accepted Ms. Holzbauer's suggestion that she speak with Ms. Wagner, an applicant does not exercise total control over the appointment process. The hiring authority has to have some discretion in terms of gaining information about a prospective employee. Respondent properly exercised that discretion in this instance. Ms. Wagner said she would not hire the appellant and had uncomplimentary comments about the appellant's work performance when she worked for the Worker's Compensation Division. Ms. Wagner's comments were based on her knowledge of appellant's work. This information, coupled with appellant's own negative comments during her interview, provide a firm basis for the panel's conclusion to hire Ms. Scott and not the appellant.

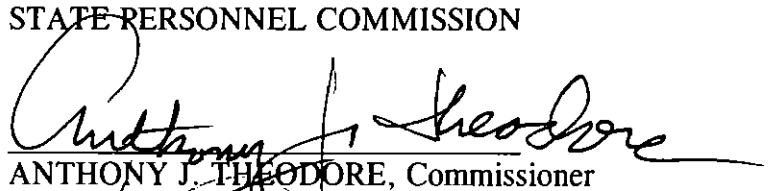
The record does not show that it was clearly against reason and evidence for respondent not to offer the position in question to the appellant.

The Commission notes that in reaching its decision in this matter, it did not consider the document filed as an attachment to appellant's post-hearing brief because it was not part of the hearing record. Likewise, the Commission did not consider statements of fact, found in appellant's post-hearing brief, that were not supported by evidence in the record.

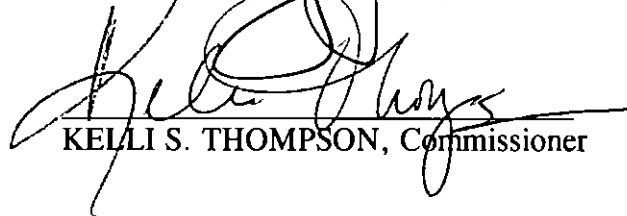
ORDER

Respondent's decision is affirmed and this appeal is dismissed.

Dated: May 15, 2002 STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner

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KELLI S. THOMPSON, Commissioner

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NOTICE

OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the

decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)
2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95