

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DAPHNE ZEILER, Appellant,

vs.

Secretary, **DEPARTMENT OF CORRECTIONS**, Respondent.

Case 20
No. 63239
PA(sel)-9

Decision No. 31107-A

Appearances:

John Smerlinski, Attorney at Law, 802 West Broadway, Suite 301, Madison, Wisconsin 53713, appearing on behalf of Daphne Zeiler.

Kathryn Anderson, Assistant Legal Counsel, P.O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the Department of Corrections.

DECISION AND ORDER

This matter was filed by Daphne Zeiler as an appeal of a non-selection decision with the Wisconsin Personnel Commission (PC) in 2001. The PC heard this case on a consolidated basis with Ms. Zeiler's complaint of arrest/conviction record discrimination, filed under the Wisconsin Fair Employment Act, arising from the same transaction. The consolidated hearing commenced in 2002 and continued in 2003. Attorney Kurt M. Stege, who at that time was employed by the PC, was redesignated as hearing examiner by the PC after the first two days of hearing were conducted before Commissioner Kelli Thompson. Mr. Stege listened to the tape recording of the proceeding and then conducted the final two days of hearing. After the completion of the hearing, the parties filed written arguments. Before a decision was issued, the Personnel Commission was abolished, effective July 26, 2003, pursuant to the provisions of 2003 Wisconsin Act 33, and the authority to process this appeal was transferred to the Wisconsin Employment Relations Commission (the Commission). The same legislation transferred the responsibility for processing the complaint of discrimination to the Equal Rights Division of the Department of Workforce Development. The exhibits and other hearing

materials were sent to the Equal Rights Division which issued a Decision and Order (ERD Case #200302940) on August 8, 2003, finding that the Respondent did not discriminate against Ms. Zeiler based on her conviction record. Ms. Zeiler filed a petition for review and the Labor and Industry Review Commission (LIRC), on September 16, 2004, affirmed the decision of ERD. On September 20, 2004, the Commission received the hearing exhibits from LIRC, having previously received a transcript of the consolidated hearing before the PC.

The issue in the matter before the Commission reads as follows:

Whether Respondent committed an illegal act or an abuse of discretion in not appointing the Appellant to the position of Teaching Assistant at Jackson Correctional Institution.

The hearing examiner issued a proposed decision on October 19, 2004. No objections were filed by the requisite due date of November 18th.

For the reasons set out below, the Commission concludes that the Appellant has failed to establish her claim. Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Daphne Zeiler, the Appellant in this matter, had a misdemeanor conviction in June of 1998 for possession of cocaine. She was sentenced to two years of probation and completed her probation in June of 2000.

2. In December of 2000, Ms. Zeiler was one of two candidates interviewed for the position of Teacher Assistant in the food service program at Jackson Correctional Institution (JCI). 1/

1/ The parties stipulated to Findings 2, 8, 9, 12 and 15.

3. JCI is a medium security prison.

4. The Teacher Assistant position in question required direct contact with JCI inmates. Much of the interaction between inmates and the person filling the position would occur outside of the view of any supervisor or institution security personnel. That contact provided numerous opportunities to transfer contraband, including illegal drugs, to the inmates, whether the transfer was initiated by the employee or was the result of coercion by the inmate.

5. Many of the inmates at JCI had drug problems.
6. Earlier in 2000, a teacher was caught smuggling drugs to inmates at JCI.
7. At all relevant times, the Department of Corrections (DOC) has had an Arrest and Conviction Policy. The written policy (Executive Directive #42) that was in effect during the selection at issue is dated June 29, 1998. The policy reads, in part:

II. Policy

To help ensure that the Department meets its mission and at the same time complies with the Wisconsin Fair Employment Act . . . [a] pending criminal charge or a conviction may only be considered if the circumstances of the offense substantially relate to the circumstances of the job. . . .

It is the intention of this administrative directive to establish a framework, which provides guidance to DOC employing units without unduly restricting their exercise of discretion.

. . .

IV. DOC Pre-Employment Criteria Only

Affected Applicants: This procedure applies to all permanent, project and limited term appointments, including all new hires, and permissive reinstatements.

An attachment to the policy listed “job related offense factors” to be considered when determining whether the circumstances of the pending charge or conviction are substantially related to the circumstances of a job within DOC.

1. The Job
 - a. The nature and scope of the job’s public, patient/offender contacts;
 - b. The nature and scope of the job’s discretionary authority and degree of independence in judgment relating to decisions or actions which affect the care and custody of offenders, {the commitment or expenditure of funds};
 - c. The opportunity the job presents for the commission of offenses;
 - d. The extent to which acceptable job performance requires public, or offender trust and confidence;
 - e. The amount and type of supervision received in the job; and
 - f. The amount and type of supervision provided to subordinate staff, if any.

2. The Offense

- a. Whether the elements of the offense (as stated in the statute or ordinance the employee is charged under or convicted of) are substantially related to job duties;
- b. Whether the circumstances of the conviction arose out of an employment situation;
- c. For current employees, whether the conduct giving rise to the pending charge or conviction occurred during the working hours . . .
- d. Whether intent is an element of the offense; and
- e. Whether the offense was a felony, misdemeanor or other.

3. The Individual

Consider such elements as:

- a. The number and type of pending charges and convictions;
- b. The length of time between the pending charge or the conviction(s);
- c. The length of time between the completion of incarceration for the conviction(s);
- d. The individual's employment history, including references;
- e. The individual's participation in or completion of pertinent programs of a rehabilitative nature . . .
- f. The individual's probation or parole status;
- g. The individual's ability to perform (or to continue to perform) the job consistent with the safe, efficient and effective operation of the program.

DOC maintained a committee, consisting of staff from its central offices in Madison, that was available to apply the Arrest and Conviction Policy if the hiring institution was unsure how the policy would be employed. The committee helped DOC to apply its policy consistently, department-wide.

8. Ms. Zeiler ranked number one following the interviews based on her interview scores (and before consideration of references and any conviction record).

9. JCI staff checked Ms. Zeiler's references and found them satisfactory.

10. JCI then reviewed Ms. Zeiler's conviction record and was concerned that there had not been enough time since she had successfully completed probation to proceed with the hire. The JCI human resource director, Kathryn Long, contacted a long-standing member of the Committee, Jean Nichols, to obtain a recommendation on application of the policy to the hiring decision. Ms. Nichols conferred with Anne Mikkelson who had served on the committee until November of 2000.

11. When Respondent determined whether to hire Ms. Zeiler, it considered circumstances relating to the Teacher Assistant position, circumstances relating to the offense and elements relating to Ms. Zeiler.

12. Respondent determined, under its Arrest and Conviction Policy, that Ms. Zeiler's conviction for possession of cocaine and resulting two-year sentence of probation were substantially related to the position of Teacher Assistant at JCI.

13. In reaching this conclusion, a determinative factor was that only six months had passed since Ms. Zeiler completed her two years of probation. Respondent's practice is to not hire a prospective employee within five years of the date the candidate completed supervision for a misdemeanor drug conviction where the job duties require substantial contact with inmates. The five-year benchmark for misdemeanor convictions and a similar ten-year standard for felony convictions are premised on the likelihood of recidivism.

14. On December 21, 2000, one of DOC's employees made the following notation on Ms. Zeiler's application supplement:

No hire – per Jean Nichols & Anne Mikkelson – generally wait 5 yrs. for this kind of conviction & being off prob. – too soon to hire into position w/neg. inmate contact.

15. DOC did not hire Ms. Zeiler for the Teacher Assistant position at JCI based on its determination under Finding 12.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The Commission has the authority to review a non-selection decision pursuant to Sec. 230.44(1)(d), Stats.

2. Ms. Zeiler has the burden to establish that DOC acted illegally or abused its discretion when it decided not to hire her for the Teacher Assistant position at JCI.

3. She has failed to sustain her burden of proof.

4. DOC did not act illegally or abuse its discretion when it decided not to hire Ms. Zeiler for the Teacher Assistant position.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

This matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 7th day of December, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Parties:

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Department of Corrections (Zeiler)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This matter, which arises from the decision not to select Daphne Zeiler for a Teaching Assistant position at the Jackson Correctional Institution, is being reviewed pursuant to the Commission's authority under Sec. 230.44(1)(d), Stats:

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 order to prevail, Ms. Zeiler must show that DOC's decision not to hire her was either illegal or an abuse of discretion.

As noted above, the hearing was held by the Wisconsin Personnel Commission (PC) on a consolidated basis with Ms. Zeiler's complaint of discrimination filed with the same agency pursuant to the Wisconsin Fair Employment Act (Subch. II of Ch. 111, Stats.) Upon the dissolution of the PC, pursuant to 2003 Wisconsin Act 33, Ms. Zeiler's claim of conviction record discrimination was addressed by the Equal Rights Division and by the Labor Industry Review Commission. Because the only claim of illegality was one of conviction record discrimination under the Fair Employment Act and because that issue has been decided in a separate administrative ruling by a different agency, it will not be addressed by this Commission.

In *NELDAUGHTER v. DHFS*, 96-0054-PC, 2/97, the PC summarized its interpretation of an "abuse of discretion" as follows:

An "abuse of discretion" is "a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." *LUNDEEN v. DOA*, 79-0208-PC, 6/81. As long as the exercise of discretion is not "clearly against reason and evidence," the commission may not reverse an appointing authority's hiring decision merely because it disagrees with that decision in the sense that it would have made a different decision if it had substituted its judgment for that of the appointing authority. *HARBORT v. DILHR*, 81-0074-PC, 4/82.

Ms. Zeiler has advanced the argument that DOC did not respond to information about her conviction record in a manner consistent with its previous practice. She offered evidence at least arguably relating to DOC's track record upon learning that various employees, or prospective employees, had a conviction record. However, DOC has pointed out a variety of factors that distinguish Ms. Zeiler's situation from other individuals noted by the Appellant.

DOC established that many of these other employees were hired into positions that involved working outside rather than inside its correctional institutions, so the employee has little or no contact with inmates. DOC also established that some of these persons were longstanding employees rather than prospective hires. Existing employees are subject to a “just cause” standard in terms of any discipline imposed against them. In at least some instances, these employees were able to negotiate a “last chance” agreement with DOC in exchange for not pursuing a grievance relating to the disciplinary action that had been imposed. The circumstances of some of the other employees at JCI and the Department of Corrections who had conviction records contrasted to those of Ms. Zeiler because there had been a lengthy passage of time between the time of their conviction and the time they were being considered for hire. Other persons alleged to be similarly situated to Ms. Zeiler had successfully completed the terms of a deferred prosecution agreement so they, in fact, had no “criminal record.”

Respondent has made hundreds of decisions under its Arrest and Conviction Policy over the years. DOC did not invariably reject all candidates for employment who had conviction records nor did it always fire existing employees whenever they were convicted of an offense. In order to comply with Sec. 111.335(1)(c)1., Stats., of the Wisconsin Fair Employment Act, Respondent must, on a case-by-case basis, consider both the circumstances of the job and of the conviction. Respondent’s decisions reflected those differing circumstances. DOC decided here that there was a substantial relationship between the duties of the Teacher Assistant position in the food service program at JCI and Ms. Zeiler’s misdemeanor conviction for drug possession. She was seeking employment in a position that interacted directly and frequently with the inmates at a medium security prison. The duties of the Teacher Assistant position were such that the employee could readily transfer contraband, including drugs, to inmates. DOC is very concerned about illegal drugs making their way into the prison setting. Employees within JCI are only rarely searched as they enter the institution. Ms. Zeiler had been convicted for drug possession in June of 1998. She completed her probation for that offense in June of 2000, just a few months before she sought employment at JCI. Respondent’s regular practice was not to hire someone in Ms. Zeiler’s situation until the candidate had a “clean” record for five years after successfully completing supervision. Ms. Zeiler’s post-probation history was not long enough to overcome DOC’s legitimate concern that she might transfer illegal drugs to JCI’s inmates if hired. She has failed to show that DOC’s decision not to hire her six months after she successfully completed probation was an abuse of discretion.

In her post-hearing brief, Appellant includes a chart entitled “Summary of Responses of DOC Witnesses to Key Questions about Arrest and Conviction Policy” and contends the responses of the five witnesses “varied dramatically” so that “the decision was arbitrary and capricious at best.” While it is true that some witnesses were not familiar with all aspects of the process used by DOC to address arrest/conviction questions, the testimony was quite consistent relative to the key elements of Ms. Zeiler’s situation.

Respondent reasonably required applicants for the Teacher Assistant position to disclose their conviction records. DOC considered the nature of Appellant's conviction as well as the duties assigned to the position and decided not to hire Ms. Zeiler after reasonably concluding that her conviction was substantially related to the position in question. The Commission cannot say it was "clearly against reason and evidence" for DOC to decide in December of 2000 not to hire Ms. Zeiler for the Teacher Assistant vacancy due to her misdemeanor drug conviction in 1998 for which she completed probation in June of 2000.

In light of the absence of evidence that Respondent acted illegally or abused its decision when deciding not to hire Ms. Zeiler for the vacant Teacher Assistant position at JCI, that decision must be affirmed.

Dated at Madison, Wisconsin, this 7th day of December, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner