

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**KEITH A. HARRSCH**, Appellant,

vs.

**OFFICE OF THE STATE PUBLIC DEFENDER**, Respondent.

Case 3  
No. 67256  
PA(sel)-44

**Decision No. 32376-A**

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**Appearances:**

**Philip Klein**, appearing on behalf of Keith Harrsch.

**Kellie M. Krake**, Legal Counsel, P.O. Box 7923, Madison, Wisconsin 53707-7923, appearing on behalf of the Office of the State Public Defender.

**DECISION AND ORDER**

In a March 11, 2008 Order, the Wisconsin Employment Relations Commission determined that it had jurisdiction over the following issues raised by Keith Harrsch in a personnel appeal filed against the Office of the State Public Defender:

Whether the Respondent's decision on or about April 11, 2007, to rescind its offer of appointment to the Appellant for the 50% position of Financial Specialist 2 was illegal or an abuse of discretion.

Subissue:

Whether the alleged misstatement of the rationale for the rescission was illegal or an abuse of discretion.

Hearing as to said issues was held in Madison, Wisconsin on July 29, 2008 before Examiner Peter G. Davis. The parties thereafter filed written argument - the last of which was received December 1, 2008. The examiner issued a proposed decision on January 30, 2009 and Appellant filed written objections and a request for oral argument. The Commission denied the oral argument request and the final submission relating to the written objections was received on April 10.

The Commission has adopted the proposed decision as written with minor changes, identified by footnotes, to the Memorandum.

No. 32376-A

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

**FINDINGS OF FACT**

1. Keith Harrsch, herein Harrsch, was employed by the Wisconsin Department of Workforce Development (DWD) in the classified service from June 1996 until July 2005 in various positions having accounting duties.

2. In July 2005, Harrsch left his DWD employment pursuant to a confidential settlement agreement with DWD. Pursuant to that agreement, any personnel records from his personnel file for the period of 1997 - July 2005 were removed and any future DWD reference for Harrsch would only state that Harrsch worked for DWD from 1996-2005 and was employed as an accountant at the time he left DWD's employ.

3. After leaving DWD, Harrsch was self-employed as an attorney and accountant.

4. Harrsch subsequently applied for a 50% position of Financial Specialist 2 in the Assigned Counsel Division of the Office of the State Public Defender (OPD). The Specialist 2 position included fiduciary responsibilities such as auditing, reconciling discrepancies between payments and vouchers submitted, and monitoring for billing irregularities. During an initial interview with Counsel Division Director Deb Smith, Harrsch was told that any job offer would be contingent on a criminal and employment background check. On March 27, 2007, Wisconsin Department of Justice performed a criminal background check as to Harrsch and advised OPD that Harrsch did not have a criminal record.

5. On April 9, 2007, Harrsch had a brief interview with State Public Defender Chiarkas after which he received the following letter dated April 9, 2007 from Deb Smith:

This letter confirms in writing your 50% time original appointment as a Financial Specialist 2, in the Assigned Counsel Division of the Office of the Wisconsin State Public Defender. The effective date of your appointment is April 16, 2007.

Your starting salary will be \$13.292 per hour. You must serve a six-month probationary period. Your position is covered by the WSEU bargaining unit agreement and is considered non-exempt under the Federal Fair Labor Standards Act (FLSA).

Several payroll and benefits documents must be completed before the end of your first week of employment. In addition, you will be responsible for providing documentation verifying your identity and authorization to work in this country.

If you have any questions please contact me at (608) 261-8856, e-mail smith@opd.wi.gov or Margie Rem, Human Resources Specialist at (608) 264-8578, e-mail Remm@opd.wi.gov. We are pleased that you have accepted employment with our Office and we look forward to you joining the organization.

Before leaving the Public Defender offices on April 9, Harrsch completed some payroll and benefit documents referenced in the employment offer.

During his interviews with OPD, Harrsch's reason for leaving the employ of DWD was not discussed.

6. On April 10 or 11, 2007, following Harrsch's interview with Chiarkas, the OPD reviewed Harrsch's DWD personnel file and discovered the absence of any personnel documents for the period 1997 - 2005, learned from DWD that Harrsch had left DWD employment pursuant to a settlement agreement which required removal of any personnel documents for the period of 1997 - 2005, and confronted a DWD refusal to provide a copy of the settlement agreement or any information regarding Harrsch's job performance or the circumstances surrounding his departure beyond his dates of employment and job title.

In this context, OPD decided to rescind the April 9, 2007 offer of employment. On April 11, 2007, Deb Smith called Harrsch, told him she had some bad news, and then read the following letter which OPD then mailed to Harrsch that same day:

As a result of the criminal and employment background check conducted as a condition of employment, the offer extended in the April 9, 2007 letter is rescinded.

7. Harrsch was not paid by OPD for the time he spent completing payroll forms on April 9, 2007.

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

### CONCLUSIONS OF LAW

1. Harrsch was never an employee of the Office of the State Public Defender.
2. The Office of the State Public Defender's decision on or about April 11, 2007, to rescind its offer of appointment to Harrsch for the 50% position of Financial Specialist 2 was neither illegal nor an abuse of discretion within the meaning of Sec. 230.44(1)(d), Stats.

3. The Office of the State Public Defender's statement of the rationale for the rescission was neither illegal nor an abuse of discretion within the meaning of Sec. 230.44(1)(d), Stats.

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

**ORDER**<sup>1</sup>

The appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 8<sup>th</sup> day of May, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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<sup>1</sup> Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference.

**Office of the State Public Defender (Harrsch)**

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

We begin with the major issue before us:

Whether the Respondent's decision on or about April 11, 2007, to rescind its offer of appointment to the Appellant for the 50% position of Financial Specialist 2 was illegal or an abuse of discretion.

Harrsch has two primary theories as to this issue:

- (1) Respondent OPD could not rescind the offer on April 11, 2007 because he had already accepted the offer and begun to work on April 9, 2007.
- (2) Even if it is concluded that he had not accepted the offer and thus Respondent OPD could rescind the offer, the bases for the rescission were illegal or an abuse of discretion.

As to Harrsch's first theory, he argues that on April 9, 2007 he met all of the conditions stated in the April 9 letter and indeed began to work that same day on paid status by completing various payroll and benefit forms.

Section ER-MRS 1.02 (2) states:

- (2) "Appointment" means the action of an appointing authority to place a person in a position within the agency in accordance with the law and chs. ER 1 to 47 and ER-MRS 1 to 34, effective when the employee reports for work or is in paid leave status on the agreed starting date and time.

KELLING v. DHSS, Case. No. 87-0047-PC, (Pers. Com. 3/12/91), holds that the State civil service system is entirely a statutory creation which cannot be overridden by individual contracts for employment created by and between individual state employees and applicants for employment.

In light of ER-MRS 1.02 (2), KELLING, and the April 16, 2007 starting/appointment date specified in the April 9 letter to Harrsch,<sup>2</sup> it can reasonably be concluded that nothing that did occur (such as completion of some payroll and benefit forms) or that Harrsch alleges

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<sup>2</sup> We interpret that phrase "on the agreed starting date and time" in ER-MRS 1.02 to be applicable to both the ER-MRS 1.02 phrase "when the employee reports for work" and the phrase "or is in paid leave status" also included therein. Thus, to the extent Harrsch asserts that the phrase "on the agreed starting time and date" does not apply to the phrase "reports for work", we disagree and reject his claim that he reported for work on April 9 within the meaning of ER-MRS 1.02.

occurred on April 9 (including an alleged comment by Chiarkas that “don’t worry, you’ve got the job” and an alleged comment by Smith or Chiarkas that “we’ll pay you for completing the forms”) can confer employment status upon him.

In response to the foregoing, Harrsch contends that by having him fill out forms and telling him he would be paid for the time thus spent, the April 16 appointment/starting date was amended to become April 9. Assuming *arguendo* that Harrsch was told he would be paid for time spent completing the forms and that such a comment could amend the written starting/appointment date specified in the April 9 letter, the testimony of Deb Smith persuades us that she orally advised Harrsch that any offer of employment was conditioned on both a criminal and an employment background check. Her testimony in this regard was not rebutted by Harrsch and is consistent with sound employment practices, OPD’s conduct after Harrsch met with Chiarkas on April 9 and the content of rescission letter itself. While we acknowledge that the absence of any reference to the employment check condition in the April 9 letter raises an inference that the condition did not in fact exist, the evidence discussed above persuades us otherwise. As reflected in Finding of Fact 6, the satisfactory employment check condition was not met. Therefore, Harrsch’s contention fails.

Given all of the foregoing, we reject Harrsch’s first theory.

Harrsch’s second theory asserts it was illegal or an abuse of discretion for OPD to rescind the offer based on its review of Harrsch’s personnel file and awareness of a settlement agreement.

As to illegality, Harrsch contends that one State agency cannot review personnel files in the custody of another State agency - particularly in light of the settlement agreement reached between DWD and Harrsch. Harrsch cites no applicable law to support his general claim of illegality and because the settlement agreement is not in the record, we have no basis for concluding that its content supports Harrsch’s argument as to illegality. Thus, we reject the claim of illegality.

As to abuse of discretion, in *EBERT v. DILHR*, Case. No. 81-64-PC, (Pers. Comm. 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.”

The parties agree that there could be many explanations for the absence of documents in Harrsch’s personnel file and a related settlement agreement - including wrong doing by DWD and subsequent settlement of a lawsuit filed by Harrsch. Harrsch argues that in such circumstances, OPD was obligated to investigate further before rescinding the offer. We disagree. One of the plausible explanations for what OPD discovered/learned before rescinding the offer was that Harrsch had engaged in some misconduct that led to the end of

his DWD employment. Given the absence of information in the personnel file, knowledge that a confidential settlement agreement existed, the minimal reference DWD was willing to provide on April 11, 2007, and the fact that Harrsch had not as of yet volunteered any information regarding the circumstances behind his departure from DWD, it was not an abuse of discretion for OPD to conclude that it was not going to pursue the matter further and would instead rescind the offer. It is of particular importance that Harrsch never sought to modify or rehabilitate OPD's perception of his work history at DWD. Weighing all the relevant circumstances present here, the absence of further investigation by OPD was not an abuse of discretion.<sup>3</sup>

Given the foregoing, we reject Harrsch's second theory as well and conclude that the first issue before us must be answered in the negative.

The "subissue" presented is:

Whether the alleged misstatement of the rationale for the rescission was illegal or an abuse of discretion.

As reflected in Finding of Fact 6, we are persuaded from Deb Smith's testimony that OPD's verbal communication of the reason for rescission was a verbatim reading of the April 11, 2007 letter which read:

As a result of the criminal and employment background check conducted as a condition of employment, the offer extended in the April 9, 2007 letter is rescinded.

The OPD communication was imprecise and overbroad but neither illegal nor an abuse of discretion.<sup>4</sup> Harrsch correctly points out that the criminal background check produced no evidence of any problem and focuses in his appeal on inclusion of the "criminal" reference contained in both the verbal and written communications from OPD. However, as reflected in Finding of Fact 4, any offer to Harrsch was contingent on both criminal and employment background checks. Thus, in this context, although the phrase "criminal and employment background check" could be interpreted as conveying that there was a problem with both the

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<sup>3</sup> The Commission has modified this paragraph in order to better explain our decision.

<sup>4</sup> We reject Harrsch's contention that it was the criminal background check which was OPD's actual motivation for the rescission. Although the email from Mr. Chris Wolle, a DWD Human Resources Specialist, two weeks after his April 11 conversation with OPD suggests he understood that OPD rescinded the offer based on a criminal background check, Wolle testified that his email was a paraphrase of the OPD comment to him. Particularly in the context of the fact that the criminal background check produced no problem, we reject Harrsch's contention. The Commission has modified this footnote in the proposed decision in order to better identify Mr. Wolle and his role in this matter.

“criminal” and “employment” portions of the check, it can also reasonably be understood as an attempt to convey the “check” as a single even - only a portion of which caused the rescission. This ambiguity falls far short of the illegal or abuse of discretion standard.

Given the foregoing, we have concluded that the second issue in this proceeding should also be resolved in the negative.

Therefore, we dismiss Harsch’s appeal in its entirety.

Dated at Madison, Wisconsin, this 8<sup>th</sup> day of May, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner