

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NATASHA S. DOTSON, Appellant,

vs.

SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 79
No. 67843
PA(sel)-50

Decision No. 32527-A

Appearances:

Natasha S. Dotson, appearing on her own behalf.

Jonathan M. Nitti, Assistant Legal Counsel, Office of Legal Counsel, Wisconsin Department of Corrections, 3099 East Washington Avenue, P.O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the Wisconsin Department of Corrections.¹

FINAL DECISION AND ORDER

On March 12, 2006, Appellant Natasha L. Dotson, (herein “Appellant”) filed a timely appeal of Respondent, Department of Corrections’ (herein “Corrections” or “Respondent”) decision to not select her for various Probation and Parole Agent (herein “Parole Agent”) vacancies, invoking the jurisdiction of the Wisconsin Employment Relations Commission (herein Commission) under Sec. 230.44(1)(d), Stats. The Commission designated Stanley H. Michelstetter II, a member of its staff, as Hearing Examiner. The Examiner held a hearing on August 21, 2008. The parties stipulated that the issue before the Commission is:

Whether or not the decision of Corrections to not select Appellant was an abuse of discretion or violated the law?

The parties made oral argument at the close of the hearing and waived written briefs.

The hearing examiner issued a proposed decision and order on September 18, 2008. No objections were filed by the requisite due date of October 18, 2008. The Commission has adopted the proposed decision with the addition of footnotes 3 and 4.

¹ Kathryn R. Anderson, Chief Legal Counsel, appeared in the preliminary stages of these proceedings.

Being fully advised in the premises, the Commission now makes the following

FINDINGS OF FACT

1. Natasha S. Dotson was employed by Corrections in its Division of Community Corrections as a Program Support Supervisor at its Walnut-South office in Milwaukee from August 2004 to August 19, 2005, when her employment was terminated, for alleged misconduct while serving probation. She reported to Corrections Field Supervisor Bucholtz who supervised the Walnut-South office. She was not employed by the State of Wisconsin thereafter.

2. The Division of Community Corrections has many offices throughout Wisconsin with approximately eight offices in the City of Milwaukee, including Walnut-South and Kenilworth.

3. Sometime prior to June 6, 2007, Corrections sought applications for Probation and Parole Agent vacancies in the Milwaukee area. Appellant applied on June 6, 2007, completing a Probation and Parole Agent Employment and Experience Questionnaire. She was deemed qualified and was included on the register of eligible candidates (herein "Register").

4. On June 28, 2007, Rosemary Vondron, a Corrections employee, sent a memorandum to the agency's Bureau of Personnel and Human Resources seeking to have Appellant's name removed from the Register, contending: a) She failed to disclose her former employment with Corrections; b) her employment had been terminated for violating Department rules; and c) she misstated her current status as an intern for the Administrator of the Division of Community Corrections. The Department ultimately determined to allow the Appellant to interview for the position.

5. Shortly before January 9, 2008, Corrections sent a notice to Appellant notifying her that interviews would be conducted for the vacancies on January 9 and 10, 2008, and instructing her to contact Nora Diderrich to schedule the interview.

6. At all material times, Nora Diderrich was employed as a Program Support Supervisor by Corrections in a Milwaukee office other than Walnut-South. She had occasionally helped Corrections' Bureau of Personnel and Human Relations on various hiring processes, even though it was not part of her permanent responsibilities. Her duties relative to the Parole Agent selection process included scheduling the interviews, determining which candidates had been most highly ranked by the interview panels, and forwarding the correct number of names representing the highest ranked candidates for the remainder of the hiring process. Diderrich had met Appellant at staff meetings on a few occasions while Appellant had been employed by the Department, and knew Appellant had left the employ of the Department but did not know the reason for her departure.

7. Prior to January 9, 2008, Appellant telephoned Diderrich to schedule an interview. Diderrich told Appellant something to the effect that she was not sure that Appellant was eligible for an interview and that she needed to make a call to find out. Diderrich determined that Appellant was an eligible candidate and scheduled the interview for January 9, 2008.

8. Corrections was conducting a large number of interviews on January 9 and 10, 2008, and had established a number of teams of interviewers, with 3 persons on each team. No candidate was assigned to a particular team until the time they arrived for the interview.

9. Appellant arrived for her interview and was met by Diderrich who gave her the interview materials, including the questions. Appellant had fifteen minutes to prepare. All candidates were treated in the same manner. The interview team assigned to interview Appellant consisted of three supervisory level Corrections employees: Irv Suesskind, Erin King and Joseph Rochetto.

10. Rochetto and King did not know Appellant prior to the interview and were never told that she had worked for Corrections before or that her employment had been terminated.

11. Suesskind has been continuously employed by Corrections since 1991 and at all material times was a Corrections Field Supervisor in the Kenilworth office. He and Bucholtz, Appellant's former supervisor, were friends. He had met Appellant at occasional staff meetings while she was employed by Corrections and she had served with him on an interview panel. At no time material to this dispute did he know why she had left the employ of Corrections.

12. Diderrich conducted Appellant to the interview room on January 9, 2008 after her preparation period. She had no substantive discussion concerning Appellant with any member of the interview panel.

13. The ordinary process for conducting interviews for the disputed positions was for the panel to ask a uniform set of questions of each candidate and to rank the answer to each of these questions as "most acceptable," "acceptable," or "less than acceptable." Panel members each made separate notes of answers to these questions. At the end of the interview, panel members each assigned an overall rating to the candidate using the same three categories. Panel members could add notes explaining their overall rating.

14. When Appellant entered the interview room, Suesskind told Appellant that he remembered her and did so in a neutral manner. Suesskind did not discuss any fact concerning Appellant's prior employment with the other members of the interview panel.

15. The interview panel conducted the interview in accordance with normal procedures and standards. Each member rated Appellant as "acceptable" and no panel member made any additional recommendation beyond that overall assessment.

16. Diderrich received all of the results of the various panels and identified those candidates who were ranked highest by the panels. There were fourteen Parole Agent vacancies to be filled. Twelve were filled with candidates who had been rated as “most acceptable.” Candidates with a ranking of “acceptable” with positive notations were selected for the final two positions. Appellant was not selected for any of the positions.

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

CONCLUSIONS OF LAW

1. The Commission has authority to review non-selection decisions in the State civil service pursuant to Sec. 230.44(1)(d), Stats.

2. Appellant has the burden to establish that Respondent acted illegally or abused its discretion when it decided not to hire her for a Probation and Parole Agent position.

3. Corrections did not abuse its discretion or act illegally when it did not select Appellant for the Probation and Parole Agent positions in dispute.

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

ORDER²

The matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 11th day of November, 2008.

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

² 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.

DEPARTMENT OF CORRECTIONS (DOTSON)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This case is before the Commission under authority provided in Sec. 230.44(1)(d), Stats., on the basis of Appellant's allegation that Corrections' non-selection of her for one of the disputed positions of Probation and Parole Agent was an abuse of discretion or violation of law. Section 230.44(1)(d), Stats., provides in relevant part:

A personnel action after certification which is related to the hiring process in the classified civil service and which is alleged to be illegal or an abuse of discretion may be appealed to the Commission.

In any such proceeding, the Appellant must show by a preponderance of credible evidence that the non-selection was either an abuse of discretion or illegal. The Courts have equated this standard of proof to a reasonable certainty by the greater weight or clear preponderance of the evidence. *REINKE V. PERSONNEL BOARD*, 53 WIS.2D 123 (1971); *HOGOBOOM V. WIS. PERS. COMM.*, DANE COUNTY CIRCUIT COURT, 81-CV 5669, 4/23/84; *JACKSON V. STATE PERSONNEL BOARD*, DANE COUNTY CIRCUIT COURT, No. 164-086, 2/26/79.

At hearing, Appellant conceded that she had no reason to believe that Respondent's selection decision was illegal. The case proceeded solely upon her allegation of an abuse of discretion.

In *DEPARTMENT OF CORRECTIONS (ZEILER)*, DEC. NO. 31107-A (WERC, 12/04), the Commission applied the following interpretation of "abuse of discretion":³

An "abuse of discretion" is "a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." 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. (Citations omitted.)

Appellant's abuse of discretion allegation is solely founded upon her belief that the selection decision was based on the termination of her employment in 2005 rather than on her

³ The decision in *KELLEY V. DILHR*, CASE NO. 93-0208-PC (PERS. COMM. 3/16/1995) expands somewhat on the interpretation applied in *Department of Corrections (Zeiler)*.

responses to the interview questions.⁴ This belief was based upon the assumption that given Suesskind's social friendship with her former supervisor, Bucholtz, Suesskind must have been aware that Bucholtz had terminated Appellant's employment. Appellant suggests that Suesskind's comment (that he remembered her) at the beginning of her interview somehow indicates he also knew of her termination. She acknowledged, however, that nothing in his comments or actions during the interview conveyed to her that he had a negative impression of her. She also suggested that Diderrich knew about the termination because Diderrich, who scheduled the interviews, initially indicated she was unsure if Appellant was an eligible candidate when Appellant had called to set a date and time for the interview. It is undisputed that Diderrich and Suesskind had some very limited contact with Appellant during her employment as a Program Support Supervisor. However, both Diderrich and Suesskind testified that they were not aware the Department had terminated her employment.

We conclude, based on a variety of factors, that neither Diderrich nor Suesskind was aware of her prior termination. First, there is no direct evidence that either of the two knew of it. It is unlikely Diderrich would have known anything about the termination around the time it occurred because her relationship to the circumstances was very distant. Second, we have no reason to believe that Bucholtz would have shared information of the action with Suesskind. Third, there is no direct evidence of any communication between Suesskind and Diderrich concerning this matter, nor is it at all reasonably likely any such communication occurred.

Appellant's theory at hearing was that Suesskind had told Diderrich about Appellant having been previously terminated. There is another conceivable theory; that Diderrich was informed of the contents of the Vondron memorandum that is referenced in Finding of Fact 4. We conclude that this is also highly unlikely. Diderrich was not employed in the agency's Bureau of Personnel and Human Resources. She was only delegated to assist in the interview process. She would not have had access to the memorandum in the ordinary course of her own work. She did not recall seeing the memorandum. While Diderrich knew Appellant was no longer a current DOC employee, she ascribed her decision to check on whether Appellant could interview to her inexperience and normal practice of insuring that she handled the process correctly. It is entirely believable that Diderrich did not have access to the reason that Appellant's right to interview had been challenged because she was only working in an adjunct capacity on personnel matters. Finally, we conclude that Suesskind and Diderrich were both credible witnesses and we credit their testimony denying any knowledge of the circumstances of Appellant's termination. Thus, we cannot relate Diderrich's actions to Suesskind or vice versa.

⁴ Nothing in this decision should be read as indicating that it would automatically constitute an abuse of discretion if a decision not to hire someone is based on the knowledge that the candidate's earlier employment with the agency had been terminated due to alleged misconduct during the probationary period.

We conclude that because Appellant has failed to show by a preponderance of the evidence that Corrections took any action which was illegal or an abuse of discretion, the appeal filed herein should be dismissed.

Dated at Madison, Wisconsin, this 11th day of November, 2008.

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

