

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JILL SWEENEY, Appellant,

vs.

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

Case 97
No. 68686
PA(sel)-61

Decision No. 32959

Appearances:

Jill Sweeney, appearing on her own behalf.

Deborah Rychlowski, Assistant Legal Counsel, Wisconsin Department of Corrections, 3099 East Washington Avenue, Madison, Wisconsin 53707, appearing on behalf of the Department of Corrections.

ORDER TO REOPEN HEARING

This matter is before the Commission as an appeal of the decision not to select the Appellant, Jill Sweeney, to fill a position of Institution Complaint Examiner at the Stanley Correctional Institution operated by the Department of Corrections. Appellant contends that the Department acted illegally and abused its discretion when it hired applicant KR, instead. The Commission designated Steve Morrison, a member of its staff, as Hearing Examiner. The Examiner held a hearing on July 15, 2009, the parties completed the post-hearing briefing schedule on December 17 and the examiner issued a proposed decision on February 4, 2010. No objections were filed by the March 4 due date.

The Commission's authority to review the hiring decision arises from Sec. 230.44(1)(d), Stats., which grants the Commission jurisdiction over 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." The hire in question occurred after approximately 25 candidates were certified as eligible for selection. While the selection decision is the subject of this appeal, evidence relating to earlier stages in the hiring process and to events occurring before the Department received the list of certified candidates may still be relevant to the question of whether the selection was illegal or an abuse of discretion. In *RANSOM V. UW*, CASE NO. 87-0125-PC (PERS. COMM. 7/13/1988), the appellant was a UW-Milwaukee employee who contended that the employer's conduct of seeking a statewide list of candidates, rather than limiting the list to UW-Milwaukee employees, was indicative of an effort to undermine the appellant's chances for appointment. Evidence relating to the certification process was considered relevant to a review of the selection decision.

Dec. No. 32959

The present action reviews the Institution Complaint Examiner hiring decision made by Brad Hompe, the Deputy Warden at Stanley Correctional Institution. The proposed decision contained the following paragraph on the final page:

In her brief, Ms. Sweeney alleges that “[e]arly in the hearing, it was established that pre-certification information would not be considered as this was a post-certification appeal.” She implies that she was in some way prevented from calling a number of witnesses as a result. There is no mention of this topic reflected in the recording of the administrative hearing and the Hearing Examiner has no recollection of that topic arising at the hearing. The Examiner did not prevent Ms. Sweeney from calling any witnesses at hearing, either of the pre-certification or post-certification variety. She was free to call whomever she pleased, and the Examiner would have considered all relevant evidence produced. The Examiner recalls a conversation relating to pre-certification versus post-certification matters which took place prior to the hearing. Because the Appellant’s witness list was long, the Examiner discussed the issue of presenting redundant testimony and indicated to the Appellant that redundant testimony would not be allowed. During this discussion, the Appellant informed the Examiner that a number of her intended witnesses would present pre-certification evidence. The Examiner merely informed the Appellant that, generally speaking, pre-certification evidence in a post-certification appeal would be considered irrelevant. This exchange is not a reasonable basis for concluding that “pre-certification information would not be considered.”

While it is not incorrect to say that “generally speaking, pre-certification evidence will not be relevant to the review of a selection decision”, the present case is one in which the Appellant suggests that the decision maker had taken steps to hire someone other than the Appellant even before the institution received the list of certified candidates.¹ Appellant was one of only two candidates who sought to transfer or reinstate into the vacancy while all the other candidates had taken the competitive examination. According to her post-hearing brief:

Several witnesses who were scheduled to testify were cancelled by the appellant as their testimony largely would have addressed pre-certification issues. If given the opportunity, Jodi Dougherty would have testified that in January, 2009 while scoring the Institution Complaint Examiner exam, she was told by former incumbent Matt Gerber that Deputy Warden Hompe was not interested in any of the permissive candidates and that he was only considering candidates from the certified list. Mr. Gerber would have been called upon to testify to this information along with information about the training that was provided to KR, a candidate he knew was taking the Institution Complaint Examiner promotional exam. This was the same promotional exam that was reviewed and revised by Deputy Warden Hompe in October, 2008 and scored by Mr. Gerber in January, 2009 upon the recommendation of Deputy Warden Hompe and HR Director Dorn.

¹ As already noted, there were no objections to the proposed decision in this matter, so the Appellant’s arguments relating to pre-certification evidence are found in her post-hearing brief.

. . . . Based on [a pending non-selection case filed by Appellant's spouse, Jerome Sweeney, where the examiner had explicitly rejected all pre-certification evidence of pre-selection that had been offered by the appellant and where, after the issuance of the proposed decision, the appellant had been provided an opportunity to make an offer of proof to describe the evidence he would have presented absent the examiner's ruling], the [Appellant] in this case would ask that the above mentioned pre-certification actions be considered.

The Appellant asks that the hearing be reopened so she may offer evidence relating to pre-certification conduct. She suggests her understanding that pre-certification evidence would be inadmissible was based on comments by the examiner. The present case is also colored by an examiner's rulings in Mr. Sweeney's appeal of a separate hiring decision, DOC (JEROME SWEENEY), CASE NO. 81 NO. 67936 PA(SEL)-53. Those rulings conflicted with the holding in RANSOM V. UW, cited above. It is also noteworthy that Jill Sweeney appears without the benefit of counsel in the present appeal.

When viewed in the aggregate, all of these circumstances convince the Commission that the hearing in this matter should be reconvened in order to provide Appellant with an opportunity to present evidence of pre-certification events that bear on the question of whether the hiring decision for the Institution Complaint Examiner position was illegal or an abuse of discretion. The Appellant reasonably, but incorrectly, believed that she would not be able to present such evidence at hearing. Presumably in part due to her pro se status, the Appellant did not question this belief until events after the close of the hearing caused her to reconsider her belief. The Appellant should now be allowed to present the evidence that she had initially, and correctly, thought would be relevant.²

This result is consistent with the approach taken in BLIED V. DOT, CASE NO. 81-290-PC (PERS. COMM. 3/4/1982), where the examiner issued a proposed decision that had the effect of excluding as hearsay a physician's written report offered by the appellant as an exhibit. The report was on a form specifically developed for use as evidence in a workers compensation proceeding and was titled "Practitioner's Report . . . in Lieu of Testimony". The appellant, who appeared without counsel, had a mistaken but "not entirely unreasonable" expectation that the form would be received in evidence³ and the document related to the central issue in the appeal. Rather than addressing the merits of the case, the Commission directed that the appellant be allowed to reopen the hearing in order to present testimony by the physician who

² We caution the Appellant that even though her request to reopen the hearing is being granted, she does not have an unfettered opportunity to supplement the existing record in any way she feels appropriate. The reopened hearing is limited to pre-certification evidence of reasonable probative value and is subject to objections and rulings that are consistent with the constraints identified in Sec. PC 5.03(5), Wis. Adm. Code.

³ The examiner in BLIED initially sustained the objection to the physician's report, then reversed that ruling after the hearing, and finally, in his proposed decision and order, reversed the ruling again and excluded the document.

prepared the report and to give the respondent an opportunity to present countervailing evidence. As explained in BLIED, the absence of counsel was an appropriate consideration:

[S]ome degree of solicitude is indicated so that [pro se] parties have a reasonable opportunity for a fair hearing and to present their cases as fully as possible. . . .

In the opinion of the Commission, hearings before it should be conducted as informally and flexibly as possible, consistent with the requirements of the Administrative Procedure Act. Reasonable efforts must be made to make this process accessible to parties who are without counsel. See *KROPIWKA v. DILHR*, 98 WIS. 2D 709, 721, 275 N.W.2D 881 (1979)

Because of the surrounding circumstances and even though Examiner Morrison's comment about the relevancy of pre-certification evidence may well have been accurate based on his own expectation as to the Appellant's theory of the case, we believe that the Appellant should be given an opportunity to fully pursue that theory now.

For the reasons set forth above, the Commission issues the following

ORDER

The examiner is directed to contact the parties for the purpose of scheduling a time to reopen the hearing for receiving evidence relating to relevant pre-certification conduct.

Given under our hands and seal at the City of Madison, Wisconsin, this 12th day of May, 2010.

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