

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SUSAN RAKOWSKI, Appellant,

v.

Secretary, DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent.

Case 22
No. 71665
PA(sel)-91

Decision No. 33899-B

Appearances:

Susan Rakowski, W204 N7623 Lannon Road, Menomonee Falls, Wisconsin, appearing on her own behalf.

Sheri Pollock, P.O. Box 7946, Madison Wisconsin, Deputy Chief Legal Counsel, appearing on behalf of Respondent.

DECISION AND ORDER

On June 28, 2012, Susan Rakowski filed a timely appeal of the decision by the Department of Workforce Development (DWD) not to select her to fill the position of Unemployment Benefit Specialist 1 – Adjudicator in the Milwaukee Call Center, thereby invoking the jurisdiction of the Wisconsin Employment Relations Commission under Sec. 230.44(1)(d), Stats. The Appellant alleged that Respondent’s decision was improper because she had more experience and was more qualified than successful applicants for the position, and due to purported inadequacies in the interview process. Hearing in the matter was held in Milwaukee, Wisconsin on July 17, 2013, before Examiner Stuart D. Levitan, a member of the Commission’s staff. During a prehearing conference with Kurt M. Stege, a former Examiner on the Commission’s staff, the parties agreed to the following statement of the issue:

Whether the Respondent’s decision not to appoint the Appellant to any of the 15 Adjudicator positions that were the subject of a notification received on June 1, 2012, was illegal or an abuse of discretion.

Respondent submitted written argument on August 6, 2013. Appellant waived her right to do likewise.

On September 11, 2013, Examiner Levitan issued a Proposed Decision and Order concluding that Respondent did not act illegally or abuse its discretion when it did not hire

Appellant. No objections were filed and the matter was ripe for Commission consideration on October 12, 2013.

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

FINDINGS OF FACT

1. The Department of Workforce Development (DWD) is the agency of the State of Wisconsin responsible for a variety of programs to support the Wisconsin workforce, including administering Unemployment Insurance.

2. Appellant Susan Rakowski has been an Unemployment Insurance Claims Specialist (ESA-3) in the DWD's Milwaukee Call Center since 1995, involved in the initial processing of a claim for unemployment insurance and making determinations on relatively simple questions of eligibility. In May, 2013, Rakowski received a merit-based Discretionary Merit Compensation Award of \$1,900.

3. At some point in early 2012, DWD posted a job announcement for the position of Unemployment Benefit Specialist 1 – Adjudicator, responsible for investigating and making determinations on more complex issues of eligibility. Respondent DWD anticipated filling 15 vacancies in the Milwaukee, Madison, Appleton and Eau Claire offices.

4. Interested applicants were to pre-register for a multiple choice exam to be administered in March, 2012; those who scored above a certain grade were deemed qualified for the position and invited for interviews. Approximately 100 applicants were certified for interviews for the 15 vacancies respondent would be filling.

5. Appellant Rakowski was certified for an interview, which was conducted in April, 2012. The interview panel, which remained constant for all interviews, consisted of three female Unemployment Insurance supervisors, at least one of whom was African-American, all of whom had vacancies in their units.

6. As of April, 2012, DWD Policy 445, "Exam and Interview Balanced Panels," required that interview panels used when filling positions in underutilized job groups for racial/ethnic minorities, women and/or persons with disabilities include representatives from at least two different affirmative action groups. The position of UBS-1 (Adjudicator) was not underutilized for the protected status groups.

7. The interview panel asked all applicants the same questions, with a constant scoring matrix. Five questions listed possible responses, with established benchmarks (More Acceptable, Acceptable, Less Acceptable) depending on how many of the responses the applicant enumerated. The questions were devised, prior to the certification of the interviewees, by MCC Adjudication Manager Robert Jessel and various supervisors, all with many years' experience performing and supervising unemployment adjudication. The applicants were also evaluated on their overall oral communications, as demonstrated

throughout the interview. Applicants, who had approximately 15 minutes prior to the interview to reflect on the five scored questions and prepare answers, were also asked two “cold questions” which did not have benchmarks and were not to be rated. The scored

questions were all job-related and represented a neutral method of evaluating candidates and were consistent with DWD hiring policy and practice.

8. Rakowski’s oral communications were rated as “acceptable” by two of the three interviewers (the third did not complete that page for any applicant). All three interviewers ranked her as “More Acceptable” on two questions, “Acceptable” or “More Acceptable” on two questions, and “Less Acceptable” on one question.

9. The question on which all three interviewers rated Rakowski as “Less Acceptable” concerned how to deal with a claimant who was irate over a delay in determining eligibility. The interviewers’ material listed 14 appropriate responses, with applicants needing to provide six or more to be judged “More Acceptable,” and at least four to be judged “Acceptable.” All three interviewers determined that Rakowski provided only three of the listed responses, and they therefore scored her as “Less Acceptable” on that question, which Jessel considered the most important of the five scored questions.

10. On the basis of Rakowski’s “Less Acceptable” score on the question discussed in Finding of Fact 9, Jessel declined to conduct a reference check for Rakowski or offer her a position.

11. One successful applicant was rated as less than “Acceptable” by two interviewers on one question, which Jessel considered the second least important. No successful applicant was rated as less than “Acceptable” on the question discussed in Finding of Fact 9.

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 Susan Rakowski has the burden to establish that Respondent Department of Workforce Development acted illegally or abused its discretion when it decided not to hire her for the position of Unemployment Adjudicator (ESA-3) in the Milwaukee Call Center.

3. Appellant Susan Rakowski has failed to sustain her burden of proof.

4. Respondent DWD did not act illegally or abuse its discretion when it decided not to hire Appellant Susan Rakowski for the position of Unemployment Adjudicator (ESA-3) in the Milwaukee Call Center.

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

ORDER

This matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 20th day of November 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

/s/ James R. Scott

James R. Scott, Chairman

/s/ Rodney G. Pasch

Rodney G. Pasch, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This matter, which arises from the decision not to select Susan Rakowski for the position of Unemployment Benefit Specialist 1 (Adjudicator) in the Milwaukee Call Center, is being reviewed pursuant to the Commission's authority under Sec. 230.44(1)(d), Stats., which provides in relevant part:

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, Rakowski must show that DWD's decision not to hire her was either illegal or an abuse of discretion. In DEPARTMENT OF CORRECTIONS (ZEILER), Dec. No. 31107-A (WERC, 12/04), the Commission adopted and applied the interpretation of the term "abuse of discretion," as set forth in NELDAUGHTER V. DHFS, 96-0054-PC, 2/97:

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. (Internal citations omitted).

When determining whether an abuse of discretion occurred in the context of a hiring decision, the Commission considers whether the selection criteria used by the appointing authority were related to the duties and responsibilities of the position, and whether the criteria were uniformly applied. ROYSTON V. DVA, CASE NO. 86-0222-PC (PERS. COMM., 5/10/88).

Appellant Rakowski did not file written arguments, relying instead on introductory and closing comments at hearing. It appears the bases for her contention that the Respondent erred in not selecting her were (a) her answer to Question 2 accurately reflected her training as a claims specialist, (b) there were no males on the interview panel, and (c) she was more qualified than other successful applicants. None of these arguments is persuasive.

The DWD interview matrix listed 14 appropriate responses when, due to delays in determining eligibility, a claimant quickly became irate during a telephone interview, including "allow the person to vent" and "apologize." Applicants who provided six or more of the responses were scored as "more acceptable," applicants who provided four or five of the responses were scored as "acceptable" and applicants who provided fewer than four listed responses were scored as "less acceptable."

Rakowski, who provided only three of the indicated responses, testified that she had been trained by DWD not to allow upset applicants to vent, because she had to process each claims interview within six minutes. She also felt that apologizing was wrong, because then the applicant would demand that, if she was so sorry, she should fix the problem. Accordingly,

she contends DWD committed an abuse of discretion by scoring her as “less acceptable” on this question and not selecting her for the position.

There are several problems with Rakowski’s analysis. First, even if Rakowski were correct, and the two answers she disputes were not appropriate responses, that would not add to her total of correct answers. She was not scored as “less acceptable” because she did not provide *these* two answers, she was scored as “less acceptable” because she only provided three correct answers. There were nine other acceptable answers which Rakowski could have provided to meet the benchmark of acceptability.

More importantly, there is no basis in the record for finding that Rakowski is in fact correct. Jessel testified that, unlike claims specialists, adjudicators have no set time limit per call. He also testified that an apology would be appropriate when there has been a delay in determining eligibility, especially in a situation where the claimant “quickly became irate.” Adjudication Supervisor Patricia Woodard, with more than 20 years’ experience in adjudicating unemployment claims, also testified credibly how important it was for adjudicators to know how to handle irate claimants.

The interview questions, answers and benchmarks were prepared by veteran supervisors with extensive experience performing and supervising the work of adjudicators. There is no evidence in the record that they abused their discretion in preparing and conducting the interviews.

Rakowski also seems to be claiming the process was illegal because there was no male on the interview panel, and because DWD did not perform a sufficient number of reference checks on the successful applicants.

Whether or not violating the internal DWD policy document 445, “Exam and Interview Balanced Panels” would constitute an illegal act in this context, there was no requirement for there to be a male on the panel, as the adjudicator position was not in an underutilized job group for protected status groups. Further, the fact that there was only one reference consulted for one or more successful applicants does not make those hires “illegal” in this context.

Finally, Rakowski challenges her non-selection because she contends that Jessel really didn’t understand all the work she already does, and that she’s more qualified than other, successful applicants. But as noted above, the questions before us is not whether an appellant was qualified for a position; it is whether or not respondent committed an illegal act of violated the Zieler standard cited above.

Respondent conducted a hiring process consistent with agency policies. The interview questions were job-related and represented a neutral method of evaluating candidates. Supervisors involved in the interview and hiring process testified credibly to the importance of the question for which they scored Rankowski as less acceptable, and why they had done so.

Respondent’s hiring decisions were not “clearly against reason and evidence,” and thus were not an abuse of discretion. Nor has Appellant provided sufficient evidence to establish

that any element of the hiring process was illegal. Accordingly, we conclude that the appeal filed is without merit, and must be dismissed.

Dated at the City of Madison, Wisconsin, this 20th day of November 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

/s/ James R. Scott

James R. Scott, Chairman

/s/ Rodney G. Pasch

Rodney G. Pasch, Commissioner