

11-20-63

Respondent.

No. 16548-E

A. That Revised Finding of Fact 14 is amended to read as follows:

14. That Paul Kozlowski had been employed as a "moldmaker" with various employers for over twenty years when he commenced his employment with the Company on April 3, 1973 as a moldmaker, and continued in such classification until December 13, 1974 on which date he was laid off; that on February 24, 1975, Kozlowski was recalled to active employment by the Company as a machinist and he continued to be employed in such classification until June 4, 1977 when he participated in the strike; that on May 7, 1978, the Company placed a newspaper ad seeking to fill a moldmaker position; that the Company did not offer said position to Kozlowski who, as noted

1/ (footnote continued)

judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

above, sought reemployment as a moldmaker; that the moldmaker classification is the Company's highest skilled position and requires the ability to make molds into which plastic is injected to form plastic parts; that between 1973 and 1977, the Company's molds had become more complex and required greater skill by the moldmaker; that, as of May 7, 1978, Kozlowski was not qualified for the Company's classification of moldmaker; that Kozlowski was qualified to perform in the classification of machinist, a position requiring less skills than that of a moldmaker; and that at no time after January 23, 1978 has the Company filled any "machinist" position.

B. That Revised Conclusions of Law 5 is amended to read as follows:

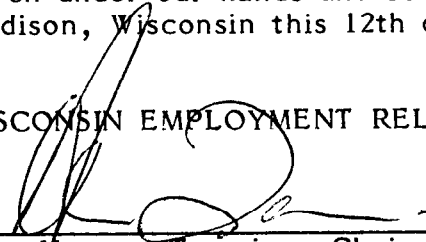
5. That Evco Plastics, by failing to notify Paul Kozlowski to return to active employment anytime after January 23, 1978, has not violated, and is not violating, the terms of the strike settlement agreement because he was not qualified for a moldmaker position, no machinist position became available since the above date, and the evidence failed to prove that he was qualified for any other vacancy which occurred after January 23, 1978, and, therefore, Evco Plastics has not committed an unfair labor practice within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act.

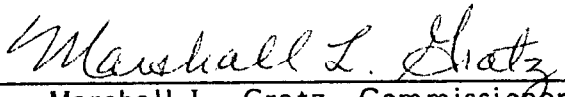
C. That the Revised Order is affirmed in all respects.

Given under our hands and seal at the City of
Madison, Wisconsin this 12th day of June, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING
ORDER AMENDING REVISED FINDINGS OF FACT,
AMENDING REVISED CONCLUSIONS OF LAW,
AND AFFIRMING REVISED ORDER

THE COURT'S DECISION:

The Circuit Court remanded this matter "for further proceedings consistent with the Court's memorandum decision". The Court determined that the Commission erred "in that its conclusion concerning Paul Kozlowski's qualifications as a moldmaker in May, 1978 is without a sufficient evidentiary basis". It further found that the Commission failed to determine whether Kozlowski was qualified for any other position filled by the Company between January and September, 1978.

THE COMMISSION'S PRIOR DECISION:

The Commission originally found that the only reference in the record as to Kozlowski's qualifications as a moldmaker was his original employment in this classification from 1973 to 1974. It further found that he was employed as a machinist from February, 1975 to June 4, 1977, when he went on strike. It concluded that on the basis of this evidence, the Company had no obligation to offer Kozlowski a moldmaker position in May, 1978.

COMPLAINANT'S POSITION:

The Complainant contends that Kozlowski is qualified as a moldmaker. It points out that he began his trade as a moldmaker in 1948, and since then has worked as a moldmaker for numerous employers, including the Company. It notes that Kozlowski was hired by the Company as a moldmaker and satisfactorily completed his probationary period in this position. It alleges that he never received any complaint or discipline as to his moldmaking work. It asserts that the Company never advised Kozlowski that he was unqualified as a moldmaker. It claims that inasmuch as Kozlowski occupied the position and completed probation in it, he is qualified for the position.

The Complainant argues that under the circumstances, the Company has the burden of proving that Kozlowski suddenly became unqualified for the moldmaker position. It maintains that the Company's proof with respect to Kozlowski's qualifications consists of the self-serving and inconsistent testimony of James Kollath, the Company's Engineering and Tooling Supervisor. It argues that his testimony consists of conclusions without any proof. It points out that his testimony about Kozlowski's role in a mold change-over problem was unclear and that no particulars were offered. It notes that, while he testified that Kozlowski's lack of speed in performing tasks was supported by records, no records were produced.

The Complainant also challenges Kollath's credentials to evaluate Kozlowski's competence as a moldmaker and points out that Kollath supervised Kozlowski for only a few of the days he was classified as a moldmaker. It refers to the charge by Kollath that Kozlowski had been demoted as not supported by the record. It insists that the record establishes that Kozlowski was laid off in 1974 because of a lack of work, and he was recalled as a machinist in 1975, while retaining the right to reinstatement to the moldmaker position when such position became available. It admits that Kozlowski filed a grievance but that it did not relate to his classification of machinist on recall; rather it was only about the Company's paying him at the machinist rate while assigning him moldmaker work. The Complainant contends that if the Company had demoted Kozlowski, it evaded the just cause provisions of the contract under the guise of a layoff for lack of work, thereby preventing the Complainant and Kozlowski from grieving such action. The Complainant requests the Commission to reject the Company's attempt to discharge Kozlowski and deprive him of his contractual rights.

COMPANY'S POSITION:

The Company initially asks the Commission to hold the matter in abeyance until the Court of Appeals acts on the Company's appeal of the Circuit Court's decision so as to avoid a possible conflicting decision. Additionally, the Company argues that the Complainant has the burden of proving that Kozlowski was qualified to perform the job of moldmaker in 1978. It contends that the Complainant failed to satisfy this burden as the Complainant's proof is merely that Kozlowski worked elsewhere as a moldmaker and in 1973 was hired by the Company as a moldmaker. The Company insists that this is insufficient to establish he was qualified as a moldmaker. It challenges Kozlowski's testimony that he had not been criticized about the quality of his mold work and points to his inconsistent testimony regarding his recall as a moldmaker in 1975.

The Company claims that, since Kozlowski was hired, the Company's molds have become increasingly more complex, requiring a higher level of competence on the part of moldmakers. It points out that the amount of labor time spent in making a mold is an important element in determining the Company's profitability. It insists that Kozlowski was not qualified because he could not perform the highly skilled moldmaker work with the necessary speed. It relies on the opinion of supervisor Kollath, based on his daily observations of Kozlowski, that Kozlowski was not qualified as a moldmaker. It notes that Kozlowski had been assigned machinist duties for two and half (2 1/2) years prior to the strike and had not been assigned any moldmaking duties during that time. In support of Kollath's opinion, it points to the one occasion when Kozlowski made a mistake on a mold and his slowness in making molds. It concludes that this evidence establishes that Kozlowski was not qualified as a moldmaker and the Company had no obligation to recall him after the strike.

It further contends that the Company, for substantial and legitimate business reasons, eliminated the machinist classification and instead hired apprentice moldmakers, so its failure to recall Kozlowski as machinist was proper.

DISCUSSION:

Section 111.07(3) of the Wisconsin Employment Peace Act provides, in part, that, in complaint proceedings, "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence." Inasmuch as the Complainant has alleged the Company violated the strike settlement agreement with respect to the recall of Kozlowski, such burden of proof lies with the Complainant. 2/ The Complainant contends that it has established a prima facie case that Kozlowski was a qualified moldmaker. The evidence presented at the hearing on the issue was that since 1948 Kozlowski had worked for numerous employers as a moldmaker and was originally hired and employed as a moldmaker with the Company from April 3, 1973 until December 13, 1974. This is essentially the same evidence we concluded did not satisfy the Complainant's burden of proof in light of Kozlowski's having held the machinist position from December 3, 1974 to June 4, 1977. On the basis of the additional record herein, we conclude that Kozlowski was not qualified as a moldmaker on the following basis:

1. The Company's molds are more complex than the average for the industry. Kollath, the Company's witness, testified that the Company was at the upper end of the scale with respect to the complexity of molds. 3/ No contrary evidence was presented by the Complainant. Indeed, Kozlowski testified that the biggest mold he ever made was at the Company and he took pictures of it because he was proud of the mold. 4/ The inference reasonably drawn from this testimony is that the molds at the Company were larger and more complex than those Kozlowski had

2/ Memorial Hospital Association, 10010-B, 10011-B (11/71).

3/ TR-14-15.

4/ TR-62, Ex-9.

worked on previously in the industry where he also had been a moldmaker. The high complexity of molds at the Company required highly skilled moldmakers. The profitability of the Company is dependent on its ability to make highly complex molds in a timely fashion by its skilled moldmakers.

2. The Company's molds became even more complex over the time period 1974 to 1977. Kollath testified that customers have demanded higher quality parts with no deviation from original part designs. 5/ Again, this testimony was not contradicted by Kozlowski. Kozlowski was employed during this period and did not dispute the increasing complexity of the molds. The increased complexity required even greater skill on the part of the moldmaker.
3. Kozlowski did not work in the position of moldmaker since December 13, 1974 and the vacancy did not occur until May 7, 1978, so approximately three and a half (3 1/2) years had passed since he last worked in the position. While he may have been qualified in 1974, given the passage of time and the greater skill required for the position in 1978, it simply does not follow that Kozlowski still met the qualifications for the position solely on the basis of once having qualified for it.
4. In the opinion of Kollath, Kozlowski was not qualified as a moldmaker. 6/ The Complainant takes strong exception to Kollath's opinion arguing that it is self-serving; however, the subjective opinion of a supervisor is entitled to weight where it is supported by objective evidence. This is particularly so where the job is highly skilled and is critical to the continued success of the business. Kollath testified that he was Kozlowski's supervisor from 1974 through 1977, and prior to that Kollath was a mold designer and observed Kozlowski on a daily basis. 7/ Kollath's observations of Kozlowski, both as a moldmaker and as a machinist, properly form a basis for determining Kozlowski's qualifications as a moldmaker. Although for most of this time, Kozlowski was working as a machinist and not as a moldmaker, there is a certain overlap of the jobs in that the machinist does the rough work for the moldmaker, who is ultimately responsible for the construction of the mold. 8/ Kollath testified that when Kozlowski was classified as a machinist, he made a mistake on a changeover on a mold, resulting in downtime. 9/ Kozlowski did not deny the occurrence of this problem. Kollath also testified that Kozlowski could not perform moldmaker duties with the speed necessary for a profitable product. 10/ He further testified that he had verbally reprimanded Kozlowski about his performance. 11/ While Kozlowski testified that no one had criticized him with respect to the slowness or the quality of his work 12/, Kozlowski's memory with respect to being recalled as a moldmaker and having never been fired from any

5/ TR-13.

6/ TR-16.

7/ Id.

8/ TR-7, 8, 34.

9/ TR-21.

10/ TR-16, 22.

11/ TR-42.

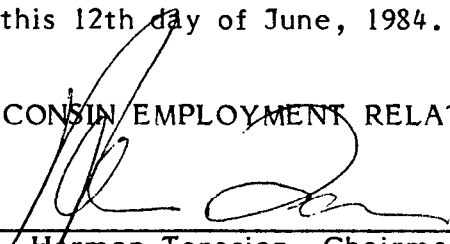
of his work was shown to have been somewhat in error, which, with the long passage of time, is certainly understandable, but leads us to discount his testimony in this regard. We conclude that Kollath's opinion is supported by objective facts and therefore is entitled to be given weight.

In sum, on the basis of the complexity of the Company's moldmaking, the increase in mold complexity from 1974 to 1978, the time that elapsed since Kozlowski was in the moldmaker position, and the opinion of Kozlowski's supervisor with respect to his qualifications, we conclude that Kozlowski did not meet the qualifications for a moldmaker in May 1978, despite his having performed the job in 1973 and 1974. No claim was made by the Complainant and no proof was offered that Kozlowski was qualified for any other position except that of machinist, and as we have found that no vacancies occurred in that classification, no recall was required by the Company. 13/ Therefore, we have modified our previous Revised Findings of Fact and Revised Conclusions of Law and affirmed our previous Revised Order.

Dated at Madison, Wisconsin this 12th day of June, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner

13/ Examiner Crowley made it clear at the outset (Tr. 5) of the hearing following remand that,

. . .the remand was to determine two factual or at least establish some evidence in-the-record with respect to two issues. One was what are the qualifications of the individual, Paul Kozlowski, and, secondly, whether or not Kozlowski was qualified to fill any position between January and September of 1978.