

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

D. EDWARD BOLTON,

Petitioner,

vs.

Case No. 143-340

STATE OF WISCONSIN
PERSONNEL BOARD,

JUDGMENT

Respondent.

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

The Court having heard the above entitled review proceeding on the 14th day of April, 1975, at the City-County Building in the City of Madison; and the petitioner having appeared by Attorney Martin E. Love; and the respondent Board having appeared by Assistant Attorney General Robert J. Vergeront; and the Court having had the benefit of the argument and briefs of counsel, and having filed its Memorandum Decision wherein Judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the Decision of respondent State of Wisconsin Personnel Board dated July 3, 1974, in the matter of D. Edward Bolton, Appellant, v. C. K. Wettengel, Director, State Bureau of Personnel, Respondent, Case No. 73-142, which Decision is entitled "Opinion and Order", be, and the same hereby is, affirmed.

Dated this 24th day of April, 1975.

By the Court:



Reserve Circuit Judge

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

D. EDWARD BOLTON,

Petitioner,

vs.

Case No. 143-340

STATE OF WISCONSIN
PERSONNEL BOARD,

MEMORANDUM DECISION

Respondent.

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is a proceeding under ch. 227, Stats., to review a decision of respondent Board dated July 3, 1974, which denied petitioner Bolton's request to re-open the hearing to present further proof, and sustained the action of C. K. Wettengel, Director, State Bureau of Personnel, in dismissing Bolton from his employment as a state employee.

On May 14, 1973, Bolton applied for the position of Vocational Education Consultant I with the Board of Vocational, Technical and Adult Education in the City of Madison. Among the qualifications stated in the posted formal job announcement (Respondent's Exh. 2) was that the applicant have a bachelor's degree. Bolton's job application signed by him stated:

"Education

University of Wisconsin-Milwaukee, 1968-71;
BA, 1970." (Respondent's Exh. 1).

Bolton ranked number one in a group of three qualified applicants for the position and he was hired, his employment commencing on June 25, 1973. Soon afterward an unsuccessful applicant for the position requested an investigation alleging that Bolton had not received his bachelor's degree. Wettengel then requested verification of Bolton's academic standing at the University of Wisconsin-Milwaukee. On August 1, 1973, the Assistant Director of Records at the University informed

Wettengel that Bolton's file showed that he had completed 107 of the 120 credits necessary for a bachelor's degree. There is no dispute that a degree had never been issued to him. On August 16, 1973, Wettengel formally notified Bolton that his employment with the state was terminated for failure to meet the requirements of the job and for improperly asserting on his application that he did. Bolton then appealed his dismissal to respondent Board which conducted a hearing and then rendered the decision which is the subject of this review.

Section 16.22(1)(a), Stats., provides:

"Probationary period. (1)(a) All original and all promotional appointments to permanent; sessional and seasonal positions in the classified service shall be for a probationary period of 6 months, but the director, in an original appointment, at the request of the appointing authority and in accordance with the rules related thereto may extend any such period for a maximum of 3 additional months. Dismissal may be made at any time during such periods. Upon such dismissal, the appointing authority shall forthwith report to the director and to the employe removed, his action and the reason therefor. The director may remove an employe during his probationary period if he finds, after giving notice and an opportunity to be heard, that such employe was appointed as a result of fraud or error." (Emphasis supplied.)

The respondent Board made these findings with respect to the alleged falsification of petitioner's application:

"Appellant's claim that he believed he had completed all the course requirements for a bachelor's degree at the time of his application is not plausible.

"Appellant contends that early in the fall of 1970 he went over his transcript with Assistant to the Dean of the College of Letters and Science, Thomas H. Burton, and that Burton then advised him that if Appellant enrolled for a normal credit load during the fall semester, he would graduate at the end of that semester. Appellant testified that Burton had been his advisor since Appellant's first arrival at the Milwaukee campus and that he relied to a considerable extent on Burton's advice. Appellant insists that he came to believe that, by the beginning of 1971, he had earned the degree and that documentation of this was available to him upon request. Appellant thus asserts that he did not falsify his job application, but rather filled it out in good faith with the facts as he believed them to be.

"Appellant's contention is not credible. The very man on whom he relied--Thomas Burton--wrote Appellant a letter on December 21, 1970, informing the Appellant of his foreign language deficiency. Appellant did not make any effort to clear up this deficiency until the late summer and early fall of 1973. This advice, coming as it did in unambiguous terms from an advisor Appellant claims to have trusted should not have failed to impress Appellant. Yet he did nothing about it until August 27, 1973, when he applied for a waiver. We conclude that the Appellant's new initiative to obtain his degree was prompted by his difficulty with Respondent.

"Moreover, the Appellant admitted at the hearing that he knew from the late summer or early fall of 1972 that he had received an incomplete in Psychology 414--a course taken in the fall of 1970. Indeed, Appellant talked with Dr. Barron, the professor who taught the course, and was told by a letter of February 7, 1973, that the student must take the initiative in obtaining permission to be graded 'pass-fail' in a course, an option Appellant chose in order to erase his incomplete. But the incomplete wasn't removed until August 1973. We do not understand how Appellant could feel he had acquired these credits at the time of his application in May when he wasn't officially given credit for them until August.

"Similarly, Appellant's incomplete in Psychology 205 had been on his record at least since the summer of 1968; yet Appellant made no effort to remove it until August 1973.

"In addition, Erland F. Olfe testified that Appellant was made aware of the duplication of a biology course taken at Whitewater with Botany 130 taken at Milwaukee in the summer of 1966 by an evaluation of his Whitewater credits sent him in the summer of 1967.

"Appellant undoubtedly realized at some point prior to the time of his application that at least some of the courses on which he was relying for degree credits were not yielding them. In addition, there was the language requirement. One would think that Appellant's admitted difficulty with learning languages would make him acutely aware, given the Burton letter, of the hurdle yet to be overcome. The language deficiency which confronted Appellant on December 12, 1970, confronted him still on June 12, 1973. It renders irrelevant Appellant's argument, based on the total number of credits earned, that he had completed the requirements for the bachelor's degree at the time he applied. We find that the Appellant willfully falsified his application, and that termination of his employment by the Respondent was proper."

Petitioner's brief does not question any of the evidence cited in the above quoted extract from the decision. However, this brief asserts that while the evidence would permit the Board to find that Wettengel properly discharged Bolton for error, the Board's finding that he was

properly discharged for falsifying his application is not supported by the record. The Court disagrees with this contention. The Board was not required to accept Bolton's testimony that he thought he had completed all the requirements for a degree. Furthermore, he admitted he did not actually hold a degree (Tr. 17).

Petitioner contends that if the Board had granted his request to re-open the hearing and present further evidence he could demonstrate that he had completed all the academic work required by the University of Wisconsin-Milwaukee for issuance of a degree diploma. The matter of granting petitioner's request to re-open the hearing to present further proof lay within the sound discretion of the respondent Board. This Court may only reverse such denial for an abuse of discretion that would amount to error or denial of due process.

The portion of respondent Board's decision dealing with the petitioner's request to re-open the hearing and present further proof reads as follows:

"The Appellant filed a request that the hearing be re-opened for the purpose of taking additional testimony on the grounds: 1) that two important witnesses had not been called to testify; 2) that two other witnesses had subsequently, in depositions, testified in a manner claimed to be contrary to their original testimony; and 3) that Appellant desired to introduce newly discovered evidence. Appellant urges that the testimony of Dean William F. Halloran and Thomas H. Burton are essential to the case. Counsel for the Appellant had the opportunity to request the attendance of such persons at the hearing of the matter and, in the event they refused, to compel their attendance. Appellant did not do so and is now foreclosed from re-opening the hearing for that purpose. Similarly, Appellant argues that further testimony from Assistant Dean Olfe and V. M. Allison be had in view of what he claims to be their subsequent inconsistent testimony in depositions. Appellant should have proved these matters in his cross examination of these witnesses at the hearing and is barred from re-opening the hearing for that purpose now. Lastly, Appellant makes reference to newly discovered evidence in his affidavit. However, his affidavit does not make clear when such evidence came to his attention, that he was not negligent in seeking to discover it, that it is material and not cumulative, and that it is reasonably probable that a different result would be reached after taking further testimony. See Combs v. Peters, 23 Wis. 2d 629 (1964). We find that

an insufficient showing has been made by the Appellant to warrant the Board ordering further hearing in the matter."

The Court deems that the reasons thus advanced in the decision for denying the request to re-open and present further evidence demonstrate that the Board did not abuse its discretion.

At the oral argument before the Court counsel for petitioner raised a further issue that one of the three members of respondent Board who conducted the hearing ceased to be a member of the Board prior to the rendering of its decision. In the preliminary recitals portion of the decision it is stated:


Since only two members of the Board heard live testimony and they do not constitute a quorum of the Board, this matter has been considered by a quorum of the Board through a reading of the transcripts and the entire record."

The Court determines that there was no denial of due process by reason of the fact that only two of the four Board members who participated in the decision had been present at the hearing.

Let judgment be entered affirming the respondent Board's decision here under review.

Dated this 24th day of April, 1975.

By the Court:



Reserve Circuit Judge