
MAURICE VAN SUSTEREN,

Plaintiff,

vs.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

and

WISCONSIN STATE BUREAU OF PERSONNEL,

and

WISCONSIN STATE PERSONNEL BOARD,

Defendants.

MEMORANDUM DECISION

Case No. 160-437

Plaintiff seeks to enjoin various state agencies from holding examinations and/or selecting a person to fill the position of "Attorney 13 -- Supervisor" at the Department of Natural Resources (DNR).

Plaintiff has taken this controversy through what was described by Judge William C. Sachtjen in 1976 as "protracted administrative procedure and litigation." Maurice Van Susteren v. Wisconsin State Personnel Board, Case No. 149-435, (Dane County Circuit Court, 1976). Now, a year and two months later, the adjective "protracted" seems pale.

In August, 1972, Lester P. Voight, Secretary of the DNR, removed the plaintiff from his then position in the examining section of the department's Bureau of Legal Services, and made

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him acting head of the research section of the same bureau. Plaintiff, believing this transfer to be in violation of the state Civil Service laws, filed simultaneous appeals with the State Personnel Board (Case No. 73-126) and the Director of the Bureau of Personnel (Case No. 73-127). The appeal to the Board was based on plaintiff's contention that he had been serving as chief hearing examiner, and that the transfer was an improper demotion. In the appeal to the Director, plaintiff alleged that the transfer was an abuse of discretion and otherwise illegally effectuated. By order entered October 4, 1972, the Board referred Case No. 73-126 to the DNR for processing as a grievance through the statewide grievance system. The plaintiff appealed from an adverse decision on the grievance back to the Personnel Board (Case No. 73-128).

Both cases were appealed to the Circuit Court and both were remanded for hearings before the Personnel Board. The parties agreed to defer proceedings in Case No. 73-126 and Case No. 73-128 (the "demotion" appeal). Case No. 73-127, alleging illegality and abuse of discretion, was pursued on the merits.

On January 10, 1974, the Personnel Board entered an opinion and order in 73-127 requiring the Director to hold a hearing on the plaintiff's appeal. Evidence was presented at the hearing relative to Van Susteren's status as "Chief hearing examiner." The Director determined that the transfer was illegal and that he should be restored to his position as hearing examiner. The DNR appealed

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the Director's decision to the Personnel Board, and the appeal was heard on the basis of the record made before the Director. Van Susteren argued, and the Board found, that he formerly held the position of Chief hearing examiner and therefore should be returned to that position. The DNR then petitioned the Circuit Court for review of the Board's decision (Voigt v. Wis. State Personnel Board, Case No. 145-300). On May 8, 1975, the Court, Judge George Currie presiding, affirmed the decision of the Board, except as to the Board's modification of Van Susteren's reinstatement as "Chief" hearing examiner rather than "hearing examiner." The net result was that Mr. Voigt's action in changing Van Susteren's duty assignment was found to be unlawful; that at the time of the transfer he was acting not as chief examiner, but simply as a hearing examiner; and that he should be restored to this latter position. Each of these determinations was thoroughly litigated.

On December 29, 1977, plaintiff commenced the instant action by serving and filing with the court a Summons and "Complaint for Temporary Restraining Order and Temporary Injunction." The complaint seeks the following relief:

"That a preliminary injunction issue enjoining defendants, their servants, and employees, from holding examination and/or selecting a person for the position of Attorney 13 -- Supervisor - CP - DNR during the pendency of this action to determine whether or not the plaintiff was demoted without just cause from his position as Chief, Examining Section, Bureau of Legal Services of the Department of Natural Resources." (Emphasis added.)

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The requisites for issuing a temporary injunction in Wisconsin include: (1) a complaint stating a cause of action; (2) a showing that the plaintiff has a reasonable probability of ultimate success in the action; and (3) a showing that the acts sought to be enjoined will render futile in considerable degree the judgment sought, or will cause serious and irreparable harm to the plaintiff. Shearer v. Congdon (1964), 25 Wis. (2d) 663, 668, 131 NW (2d) 377.

The complaint appears ultimately to seek a determination by this court on the question of whether the plaintiff was demoted by reason of his job transfer in 1972, and to enjoin the DNR from filling the newly-created Attorney 13 position until such determination is made. The basis of the action, and the relief sought by the plaintiff, is his assertion that he was "demoted without just cause," and he argues that he has never had his day in court on this question.

A determination of whether a demotion occurred is necessarily a determination of the plaintiff's status before and after his change of duties in 1972. After a detailed review of the record made before the Board--which included documentary and testimonial evidence offered by the plaintiff on the question of his job status and duties before and after the transfer--Judge Currie ruled that his position in the department at the time of the transfer was that of an Attorney 12, with no supervisory duties or other duties "in the nature of a chief hearing officer"; and that ". . .because his position standards . .do not include any supervisory functions, he is not entitled as a matter of law to be restored to any position

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other than hearing examiner, which is his chief function under such position standards" (Currie decision, p. 18).

Plaintiff did not appeal Judge Currie's decision, and the time for such an appeal has long since expired. Some time after the entry of judgment by Judge Currie, plaintiff filed a petition with the Personnel Board asking that hearings be held in the "demotion" case (73-126 and 73-127). It will be recalled that the Circuit Court had remanded this matter to the Board in 1973, with directions to hold hearings on the question of whether plaintiff's transfer was a demotion, and that the parties agreed to defer further proceedings pending resolution of the "illegality" case by Judge Currie. On December 11, 1975, the Board issued an opinion and order dismissing the matter, after considering most of the arguments made by the plaintiff in the instant action. The Board concluded that even though no hearings were held by the agency in the "demotion" case (73-126 and 73-128), the "illegality" case involved the same operative facts, and Judge Currie's decision in the latter case was res judicata on the question of demotion.

Van Susteren petitioned the Circuit Court for review of the Board's order, and on November 4, 1976, Judge Sachtjen entered an order dismissing the review proceeding, stating that since he had, in 1973, entered an order remanding the original "demotion" case to the Board with directions to hold a hearing on the matter, ". . . the petitioner's remedy is under Sec. 272.02, Stats." Sec. 272.02, now Sec. 815.02, provides for the enforcement of judgments through

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contempt proceedings.

Plaintiff did not appeal Judge Sachtjen's order, nor has he (apparently) taken any steps to enforce the 1973 order.

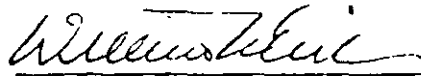
It is clear that plaintiff has had his day in court on the "demotion" question. He has presented evidence and/or argued the point before the Director, the Board (twice), and the court. He took no appeals from the adverse rulings of Judges Currie and Sachtjen, nor did he follow the procedure suggested by Judge Sachtjen in his November 4, 1976 decision.

I conclude therefore that the instant action is barred by the doctrine of res judicata. Since there can be no argument concerning the plaintiff's claim of demotion without just cause in this action, the complaint fails to state any claim upon which relief can be granted.

Accordingly, the defendant's motion to dismiss the complaint is granted, and counsel for the defendants may prepare an appropriate judgment for the Court's signature.

Dated at Madison, Wisconsin, this 25th day of January, 1978.

BY THE COURT:



William F. Eich
Circuit Judge

cc: Bruce K. Kaufmann, Atty. for Plf.
Robert J. Vergeront, Assis. Atty. Gen.