

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 12

RICHARD J. BISBEE,

Petitioner,

-vs-

Case No. 617-636

STATE PERSONNEL COMMISSION,

Respondent.

DECISION AND FINAL ORDER

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In July, 1982 the Petitioner, Richard Bisbee, filed an Amended Complaint with the Department of Health and Social Services (DHSS), alleging that the Respondent, State Personnel Commission (the Commission), discriminated against him in violation of the Wisconsin Fair Employment Act, sec. 111.31, Stats., et seq. Following an investigation a Commission-Equal Rights officer found no probable cause to believe that Petitioner was not hired as a DHSS-hearing examiner based on his mental condition and/or sexual orientation. Chapter-PC, sec. 4.03, Wis. Adm. Code. Following a hearing, the full Commission affirmed and Petitioner filed this review action under Ch. 227, Stats., challenging the dismissal of his Complaint, see also sec. 111.375(2), Stats.

Petitioner argues that circulation within the DHSS of a certain "bizarre" civil complaint he filed in Dane

County Circuit Court, together with the "lame reasons" given by the Commission for hiring another candidate, establish probable cause to believe that discrimination has been committed.

Ch.-PC, sec. 4.03, Wis. Adm. Code. He also argues that the exclusion of material evidence at his hearing was improper, clearly erroneous, and damaging to his case. Alternatively, Petitioner seeks leave to present additional evidence to the Commission in the form of a "crucial" newspaper article "unknown to him" at the time of his hearing. See sec. 227.19(1), Stats. and Appendix No. 1 attached to Petitioner's brief.

The Commission argues that Petitioner simply failed to satisfy his burden of establishing probable cause to believe he was discriminated against. It argues that its findings of fact on the probable cause issue are supported by substantial evidence in the record, and that its assessment of the weight of the evidence adduced below is conclusive. Sec. 227.20(6), Stats. It also contends that the evidence which Petitioner asserts should have been admitted was properly excluded under sec. 227.08(1), Stats. The Commission opposes Petitioner's request for leave to present the newspaper article on remand, on grounds that he has not "shown ... good reasons for failure to present it in the proceedings before the agency." Sec. 227.19(1), Stats.

FACTS

(1) At all times relevant to this action, the

Petitioner was handicapped due to mental illness, sec. 111.32(8), Stats., and had a "preference for ... homosexuality or bisexuality ..." Sec. 111.32(13m), Stats.

(2) The Commission found that, though placed in his personnel file at DHSS and circulated among staff members of the Office of Administrative Hearings (OAH), the Petitioner's "bizarre" Dane County Circuit Court Complaint was not reviewed or discussed by or among the OAH selection panel with which Petitioner interviewed.

(3) Senior panel member Randal testified that her hiring decision was based on: a) Petitioner's responses to interview questions touching his qualifications, b) a comparison of Petitioner's responses with those of the successful candidate, c) a review of notes taken by all three panel members regarding each interviewee.

(4) The Commission found that, though aware of Petitioner's mental illness, Ms. Randal based her hiring decision on a comparison of the candidates' responses to interview questions, and on the written comments of the selection panel regarding each interviewee. It found no evidence that the criteria informing the panel's deliberations were unreasonable or not uniformly applied. It also found that no member of the interview panel knew of Petitioner's sexual preference at the time he was interviewed and not selected, and that only Ms. Randal knew of his mental illness.

(5) The newspaper article which Petitioner seeks leave to present to the Commission was referenced twice in the Commission's October 26, 1982 Initial Determination, filed approximately six months before Petitioner's hearing began.

(6) The testimony of a former OAH employee that Ms. Randal's predecessor told the witness that Petitioner was a pervert and that he would never work at DHSS again was objected to, excluded, and stricken as hearsay.

ISSUES

I. Whether the Commission's no probable cause determination under Ch.-PC sec. 4.03, Wis. Adm. Code was plainly erroneous?

II. Whether there was a rational basis for the Commission's exclusion of the evidence sought to be admitted by the Petitioner?

III. Whether the Petitioner has shown good reasons for his failure to present the newspaper article in the proceedings before the Commission?

RELEVANT STATUTES AND REGULATIONS

The Court adopts the relevant statutes and regulations set out in sec. I of the Commission's brief at pp. 3-6.

DECISION

I. The Commission's no probable cause determination is affirmed.

Great weight should be given to the administrative agency's interpretation and application of its own rules, unless plainly erroneous or inconsistent with the regulations so interpreted. Vonasek v. Hirsch and Stevens, Inc., 65 Wis. 2d 1, 7 (1974). So long as reasonable minds could arrive at the same conclusion, the Commission's dismissal of Petitioner's discrimination Complaint is supported by substantial evidence in the record. Wisconsin's Environmental Decade v. DNR, 85 Wis. 2d 518, 538 (1978). The Court will not substitute its judgment for the Commission's as to the weight and reasonableness of the evidence as a whole, nor as to the credibility of witnesses. Sec. 227.20(6), Stats.; Hilboldt v. Wisconsin Real Estate Broker's Board, 28 Wis. 2d 474 (1965).

As the sole judge of the weight of the evidence and the credibility of witnesses, the Commission was entitled to find against the Petitioner on the probable cause issue. Ms. Randal testified that several non-discriminatory, objective criteria formed the basis of her hiring decision. She also testified that she did not see an actual copy of the "bizarre" Dane County civil Complaint, or discuss it in particular or the Petitioner in general with any OAH staff, before the hiring decisions were made. Based on her testimony, and on Petitioner's failure to introduce any credible evidence of improper input into the selection process, reasonable minds could conclude that there existed no probable cause to believe that discrimination had been committed in

violation of Ch.-PC sec. 4.03(3). Thus, the Commission's application of its own rule is by no means plainly erroneous, 65 Wis. 2d at 7, and is supported by substantial evidence in the record, 85 Wis. 2d at 538.

II. There was a clear and rational basis for the hearing examiner's exclusion of the evidence in question.

The examiner's ruling was proper. Whether the declarant's statement was being offered for its truth or simply for the fact it was said, sec. 227.08(1) requires exclusion of immaterial, irrelevant testimony. There is no evidence in the record or argument in the briefs that either the declarant or the witness had ever had occasion to speak with Ms. Randal or any other panel member about the Petitioner. There was thus no connection between what was said or heard about the Petitioner in this context, and any of the subject matter in controversy. As such, the proffered testimony did not tend to make the existence of any fact in issue more or less probable, sec. 904.01, Stats., and was properly excluded.

III. Leave to present additional evidence to the Commission is denied.

The Court is not satisfied that there were good reasons for Petitioner's failure to present the newspaper article in the proceedings before the Commission. Sec. 227.19(1), Stats. In its initial determination dated October 26, 1982, the Commission referred to the article twice, once at Investigative Finding 12

and once at 22. Though not specific as to when and where it appeared in the press, the references were sufficient to put a reasonable person on notice of the article's existence, and subject matter. Thus, Petitioner had almost six months before his hearing began in which he failed to investigate and locate the article for evidentiary purposes.

In addition, the Petitioner extensively questioned Ms. Randal regarding the article at his hearing, Tr. 165-167, and easily could have sought to enter a copy of it into evidence at that time. Further, whether or not Ms. Randal saw or read the article before making her hiring decision in this matter, the Commission deemed her a credible witness, finding that she had no knowledge of the nature of Petitioner's sexual orientation at any time relevant to this action. See Commission's Findings of Fact Nos. 11 and 12. The Court will not substitute its judgment for the Commission's as to the credibility of witnesses, 28 Wis. 2d at 482, and there being no good reason shown to this Court for Petitioner's failure to present this evidence at his hearing, the request is denied.

CONCLUSION AND ORDER

For all the foregoing reasons, the Commission's finding of no probable cause is affirmed, the Petition is dismissed, and the request for leave to present additional evidence on remand is denied.

Dated at Milwaukee, Wisconsin,
this 3rd day of October, 1984.

BY THE COURT:

Michael Skwierawski

Hon. Michael Skwierawski
Circuit Judge, Branch 12