
 *
 STUART S. MUKAMAL, *
 *
 Appellant, *
 *
 v. *
 *
 Chairperson, WISCONSIN EMPLOY- *
 MENT RELATIONS COMMISSION, *
 *
 Respondent. *
 *
 Case No. 79-126-PC *
 *

DECISION
 AND
 ORDER

NATURE OF THE CASE

This matter involves the appeal of a layoff, pursuant to §230.44(c). The parties stipulated that the selection of the appellant for layoff, as opposed to other employes who might have been laid off, is not at issue in this case; appellant makes no claim that his selection was arbitrary or capricious.

The issues noticed for hearing were:

- "1. Did the condition precedent to a layoff of a civil service employe with permanent status in class exist such as to support the action of the Employment Relations Commission?
2. Did the WERC violate the contract of employment entered into between it and Mr. Mukamal by laying him off from his position?
3. Did Mr. Mukamal detrimentally rely upon representations made by the WERC, its officers or its agents such that the WERC is estopped from laying him off from his position?"

Testimony was also heard as to the appellant's entitlements to damages and the authority of the WERC to transfer the appellant's work location. The WERC objected to Commission jurisdiction over the second issue. WERC also contested Commission authority to limit the

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WERC prospectively in the assignment of its employes from one work location to another and to award damages, including attorney fees or costs, as requested by appellant.

It was agreed that the resolution of disputed issues would be held in abeyance, pending the conclusion of the hearing and submission of briefs.

FINDINGS OF FACT

1. Stuart S. Mukamal, an attorney, was employed in the Milwaukee office of the Wisconsin Employment Relations Commission (WERC) beginning June 12, 1978, as Mediator 1, based on an offer of employment dated April 19, 1978, which he accepted by letter of May 3, 1978.

2. In the course of the pre-employment interview Mukamal indicated his preference for employment in Milwaukee although he was willing to consider Madison. Mukamal reiterated this position on May 2, 1978, when he talked with Byron Yaffe, WERC Staff Director, in the Madison office.

3. On May 2, 1978, Yaffe advised Mukamal that the position would be permanent upon his completion of the required six-month probationary period and that a training period would be necessary which would require his spending two or three days a week in Madison for a period of several months.

4. Prior to his acceptance of the position, Mukamal made a search of the Wisconsin Statutes regarding permanent positions and concluded that a permanent employe would retain his job unless discharged for just cause.

5. Marshall Gratz, a WERC Commissioner, was on leave of absence (LOA) from his position as a WERC classified staff mediator pursuant to §230.33(1), Stats. and had restoration rights to that position. His work location had been the Milwaukee office.

6. About a week after Mukamal accepted the position, Yaffe advised Mukamal that they would be able to honor his request initially and that he would be assigned to the Milwaukee office as one of two mediators in that office. Yaffe did not tell Mukamal that Milwaukee would be his work station indefinitely. Yaffe did indicate that if Gratz was not reappointed as Commissioner and returned to the WERC staff and to the Milwaukee office, it was possible that Mukamal subsequently would be reassigned to Madison.

7. At the time of hire, Yaffe did not advise Mukamal or the other junior mediators of the possibility of layoff.

8. William C. Houlihan was hired as a Mediator 1 in the Madison office beginning July 2, 1978; formerly he had worked for WERC as an LTE. Timothy Hawks was hired on May 15, 1978, also for the Madison office. They, along with Mukamal, were the three most junior Mediators 1.

9. When Governor Dreyfus was elected in November, 1978, WERC directed Yaffe to make inquiries as to their options if Gratz was not reappointed, including whether there was any way they could retain all professional staff. Following consultation with the Department of Employment Relations (DER) and WERC's budget analyst, it was determined that one of the three least senior Mediators 1 would have to be laid off.

10. WERC also explored with DER several possibilities to avoid layoff, including voluntary reduced work hours or partial reductions in pay, which they were advised were not possible.

11. Houlihan first became aware of the possibility of Gratz's reinstatement immediately prior to the 1978 gubernatorial election because of speculation in the Madison office. Mukamal was not a part of these discussions. After the election, because he was concerned that he would be laid off, Houlihan discussed with Yaffe the possibility of his taking a leave of absence for four months from November 1978 through February 1979 to attend the School for Workers. Yaffe discouraged him from taking the leave, indicating that there might be no layoff and, if there were, Houlihan would not be laid off. Houlihan never requested LOA.

12. On February 13, 1979, WERC submitted a proposed layoff plan to DER which attempted to merge the Mediator 1, 2, and 3 classifications so that WERC could implement the plan by laying off James D. Lynch, a Mediator 1 in the Madison office, whom they considered the least effective mediator. His anniversary date was December 12, 1977. Merger of the three classifications of mediators would enable WERC to claim an exemption of four of the 19 authorized mediator positions. in determining the specific employe to be laid off, pursuant to PERS 22.035, WAC.

13. This plan (Respondent's Ex. 7) was approved reluctantly on March 16, 1979, by Verne Knoll, Deputy Administrator of the Division of Personnel; both Knoll and Dale Bruhn of the Division advised WERC that

this plan, if challenged would probably be ruled invalid because the concept of class as used in the PERS would not permit the merger of the three mediator classifications.

14. If this proposed layoff plan had been implemented, Mukamal would have been reassigned to Madison.

15. The February 1979 proposed layoff plan did not conform to the requirements of PERS 22.035 as illuminated by PERS 2.01 and the 1978-79 Classification and Compensation Plan.

16. On April 9, 1979, Yaffe advised Mukamal that he had been selected for potential layoff in the event that Gratz was not reappointed and chose to exercise his restoration rights and return to the Milwaukee office. Yaffe also discussed with Mukamal the possibility of re-employment with WERC as an LTE during the pending maternity leave of Ellen Henningsen as well as his probable reinstatement as a permanent employe shortly after January 1, 1980, when it was anticipated that Donald Lee would retire. Yaffe said he would see what he could do about Mukamal's remaining in Milwaukee but offered no encouragement. Both Henningsen's and Lee's positions were in Madison.

17. On April 19, 1979, Governor Dreyfus appointed Gary L. Covelli as Commissioner to succeed Gratz, effective May 21, 1979.

18. On April 18 or 19, 1979, Gratz advised WERC that he would be exercising his restoration rights.

19. On April 24, 1979, WERC submitted another Proposed Layoff Plan to Knoll, indicating that Gratz wished to exercise his restoration rights

pursuant to §230.33(1), Stats., and establishing Mediator 1 as the affected classification. There were six employees in this classification and the WERC elected to exercise its rights pursuant to PERS 22.035 to exempt the least senior Mediator 1, Houlihan, based on "his versatility, well-developed mediation skills and ability to function effectively under limited supervision." (Respondent's Ex. 9). Mukamal was identified as the employee subject to layoff. This plan was approved by Knoll on April 27, 1979 (Respondent's Ex. 10).

20. On May 1, 1979, Mukamal was informed by telephone that he would be laid off as of May 21, 1979. He received written notification by letter dated May 3, 1979. (Respondent's Ex. 16). Mukamal filed an appeal with the Personnel Commission on May 7, 1979, by letter dated May 1, 1979. (Commission's Ex. 1).

21. Reinstatement of Gratz would bring to 20 the total number of WERC mediators with permanent status, whereas there were 19 authorized mediator positions. Continued employment of Mukamal as an "overhire" or his employment as an LTE until a vacancy occurred would require authorization in accordance with §16.505 Stats.

22. In March 1979, at the request of WERC, the Legislature's Joint Committee on Finance, pursuant to its emergency powers under §13.101 Stats., appropriated the necessary funds (\$30,000) as an unallotted reserve to cover a shortfall in the WERC budget, primarily for salary and fringes. No request was made for funds for an LTE or overhire, nor would WERC's budget analyst have recommended approval

of such a request even though layoff was the only alternative. It was not known at that time that Gratz would not be reappointed; however, at the budget analyst's suggestion, the appropriation did include the possible extra dollars to pay Gratz's salary if he returned to his staff position.

23. It is the general WERC policy not to transfer people between the Milwaukee and Madison offices.

24. Mukamal offered to take a three-month layoff if he was allowed to stay in Milwaukee; this offer was rejected by WERC.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over this appeal of layoff pursuant to §230.44(c), Stats.

2. The burden of proof is on the respondent to establish by the greater weight of credible evidence that the layoff was for just cause. Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46 (1976).

3. The WERC has established that the layoff was for just cause.

4. The burden of proof is on the appellant to establish by the greater weight of credible evidence that the WERC violated its contract of employment. Reinke v. Personnel Board, 53 Wis. 2d 123.

5. The appellant has not met his burden of proof on the issue of contract violation.

6. The burden of proof is on the appellant to establish by clear and convincing evidence that the WERC is equitably estopped from laying him off from his position. Surety Savings & Loan Association v. State

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54, Wis. 2d 438, 445; DOT v. Wisconsin Personnel Commission, case no. 79-CV-3420, p. 6, Dane County, (Reserve Circuit Judge George R. Currie) March 24, 1980.

7. The appellant has not met his burden of proof on the issue of equitable estoppel.

8. The questions as to appellant's entitlement to damages and the authority of the WERC to change appellant's work location are moot.

OPINION

The Commission takes official notice of relevant sections of the Wisconsin Statutes, the Wisconsin Administrative Code (WAC) and the section of the Administrative Practices Manual marked Respondent's Exhibit 6.

The appellant is not challenging the procedural aspects of the layoff plan and its implementation, which he claims is irrelevant. Rather he argues that WERC lacked the authority to draft and implement a layoff plan in the first place, contending that §230.34(2), Stats. prohibits layoff of a permanent employe except under the circumstances specified in the statute, namely:

" ... because of a reduction in force due to a stoppage or lack of work or funds or owing to material changes in duties or organization but only after all original appointment probationary and limited term employes in the classes used for layoff, are terminated."

Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46 (1976) provides an excellent summary of the law as relates to layoff of permanent classified employes.

" ... an appointing authority acts with 'just cause' in a

layoff situation when it demonstrates that it has followed the personnel statutes and administrative standards set forth in §PERS 22.03 of the Administrative Code and when the layoff is not the result of arbitrary or capricious action."

It is unquestioned that the WERC followed the procedures set forth in §230.34(2), Stats. and PERS Ch. 22, WAC, in establishing and implementing the layoff plan. To determine whether other relevant statutory and WAC provisions were followed, the Commission must consider the following sections of civil service law in correlation with each other:

"§230.33, Stats. LEAVE OF ABSENCE AND PAY WHILE SERVING IN UNCLASSIFIED POSITION. Employees who have completed an original appointment probationary period in the classified service and are appointed to a position in the unclassified service shall be subject to the following provisions relative to leave of absence, restoration rights, reinstatement privileges and pay:

(1) A person appointed by the governor, elected officer, judicial body or by a legislative body or committee, or by any other appointing authority when both the classified and unclassified positions are within his or her department, shall be granted a leave of absence without pay for the duration of the appointment and for 3 months thereafter, during which time the person has restoration rights to the former position or equivalent position in the department in which last employed without loss of seniority. The person shall also have reinstatement privileges for 3 years following his appointment to the unclassified service or for one year after termination of the unclassified appointment whichever is longer. Restoration rights and reinstatement privileges shall be forfeited if the reason for termination of the unclassified appointment would also be reason for discharge from the former position in the classified service.

* * *

(4) This section shall supersede any provision of law in conflict therewith but shall not diminish the rights and privileges of employes appointed to the unclassified service from the classified service prior to April 30, 1972.

§230.34, Stats. DEMOTION, SUSPENSION, DISCHARGE AND LAYOFF.

* * *

(2) Employees with permanent status in class in permanent, sessional and seasonal positions in the classified service and employees serving a probationary period in such positions after promotion or transfer may be laid off because of a reduction in force due to a stoppage or lack of work or funds or owing to material changes in duties or organization but only after all original appointment probationary and limited term employees in the classes used for layoff, are terminated.

(a) The order of layoff of such employees may be determined by seniority or performance or a combination thereof or by other factors.

(b) The administrator shall promulgate rules governing layoffs and appeals therefrom and alternative procedures in lieu of layoff to include voluntary and involuntary demotion and the exercise of a displacing right to a comparable or lower class, as well as the subsequent employe right of reinstatement.

(3) The appointing authority shall confer with the administrator relative to a proposed layoff a reasonable time before the effective date thereof in order to assure compliance with the rules.

§230.31, Stats. RESTORATION OF EMPLOYMENT AND REINSTATEMENT PRIVILEGES. (1) Any person who has held a position and obtained permanent status in a class under the civil service law and rules and who has separated from the service without any delinquency or misconduct on his or her part but owing to reasons of economy or otherwise shall be granted the following considerations for a 3-year period from the date of such separation:

(a) If on layoff status, the person shall be placed, in inverse order of layoff, on an appropriate mandatory restoration register for the unit used for and on a service-wide restoration register. Use of such registers shall be subject to the rules of the administrator.

(b) Such person shall be eligible for reinstatement in a position having a comparable or lower pay rate or range for which such person is qualified.

The rules in effect at the time of Mukamal's layoff were promulgated by the administrator's predecessor, the Director of the Bureau of Personnel.

PERS 18.05(2) provides:

"RIGHTS UPON RETURN FROM LEAVE OF ABSENCE. A properly executed leave of absence without pay shall accord the employe the right to be returned to his or her position or one of like nature on the expiration thereof or sooner if agreeable to the appointing authority, except that if the position has been abolished through legislation or material reorganization of the agency, the employe shall be given consideration for any other position of similar pay grade and class which in the opinion of the director does not require qualifications substantially higher than or different from those of the position previously held, and if there be no such position, the layoff provisions of the law and these rules shall apply. If it is found necessary to fill the position during the interim, the new employe shall vacate the position upon the return of the absent employe subject to layoff, transfer, or demotion rights earned under the law and these rules. Such leaves without pay shall not operate to interrupt the seniority of pay advancement consideration, or cancel unused accumulated sick leave of the absent employe. Holidays or other non-work days immediately preceding the employe's return to duty, shall be counted as part of such absence." (Emphasis added)

It is apparent that the WERC acted in accordance with the law in restoring Gratz to his former position and in maintaining the authorized number of mediator positions through the layoff of one of the junior employes, who was afforded all the rights set forth in §230.32, Wis. Stats.

If Mukamal had been retained, §§16.50(3) and 16.505(1), Wis. Stats., would have required authorization to fill the additional position.

"§16.50, Wisconsin Statutes

(3) LIMITATION ON INCREASE OF FORCE AND SALARIES. No department, except the legislature or the courts, may increase the pay of any employe, expend money or incur any obligation except in accordance with the estimate that is submitted to the secretary as provided in sub. (1) and approved by the secretary or the governor. No additional positions above the number authorized through the biennial budget, budget review process or other legislative act may be granted without the approval of the joint committee on finance acting under s.13.101, except for positions created from funds received under s.16.54 or 20.001(2)(b) or (c)..

§16.505, Wisconsin Statutes

POSITION AUTHORIZATION. (1) No position, as defined in §230.03(11), regardless of funding source or type, may be created unless authorized by one of the following:

- (a) The legislature by law or in budget determinations.
- (b) The joint committee on finance acting under §13.101 or as otherwise provided by law.
- (c) The governor acting under §16.54 or creating positions funded under §20.001(2)(b) or (c).

WERC's budget analyst testified that at the time of Gratz's reinstatement, there was a "short fall" of funds for the agency's entire operation and that he would not have recommended (to the secretary of the Department of Administration - DOA) an "overhire" (hiring over the authorized number of positions) or employment as an LTE. An overhire is, essentially, a sharing of a given position number by two employes and is used in certain limited circumstances, such as to maintain adequate staffing levels for high turnover classifications, in anticipation of attrition, or for training where a new employe is brought in to be trained by the departing employe into whose position the new employe was hired.

Clearly none of these conditions existed in the instant case, and as the budget analyst stated, an overhire would not have been permissible in this case. Nor was the money available to retain Mukamal as an LTE, assuming that this situation came within the Memorandum of Agreement between the Department of Employment Relations and DOA regarding appropriate usage of an LTE.

If an agency has no funds or vacant positions in a situation where an employe has exercised mandatory restoration rights under §230.33(1), Stats., the result is, patently, a "reduction in force due to ... lack of ... funds" within §230.34(2), justifying the layoff of a permanent WERC mediator. The Commission concludes that respondent followed the personnel statutes and administrative standards set forth in the Wisconsin Administrative Code and that the layoff was not the result of either illegal or arbitrary and capricious action. (See Weaver,

supra).

The second issue raised by the appellant is whether or not WERC violated the contract of employment between the parties by laying off the appellant. The Commission will not rule on the respondent's objections to its jurisdiction over this issue. Suffice it to say that the terms of state employment are spelled out by the relevant statutes and labor agreements. See: State v. Industrial Commission, 250, Wis. 140, 143. Manifestly, the acquisition of permanent status in class following satisfactory completion of the probationary period, pursuant to §230.28, Stats., must always be subject to the possibility of layoff because of a reduction in force or material changes in job duties or organizational structure. This is equally true in both the public and private sector; management's offer of a "permanent" position is perforce contingent upon the exigencies of the budget and/or workforce environment.

The layoff sections of the statutes themselves refer to "any person who has held a position and obtained permanent status in class" (§230.31, Stats.) and "employees with permanent status in class in permanent ... positions" (§230.34, Stats.). The Commission therefore concludes that there has been no violation of the appellant's contract of employment.

Appellant's contention that the WERC is estopped from laying him off from his position is without merit.

In Landaal v. State of Wisconsin (Personnel Board), Case No. 138-392, (1973), Reserve Circuit Judge Currie set forth the three factors essential for equitable estoppel to lie, as stated in Gabriel v. Gabriel (1972),

57 Wis. 2d 424, 429:

"The tests for applicability of equitable estoppel as a defense derive from the definition by this court of such estoppel to be: '... action or nonaction on the part of the one against whom the estoppel is asserted which induces reliance thereon by another, either in the form of action or nonaction, to his detriment ...' Three facts or factors must be present: (1) Action or inaction which induces (2) reliance by another (3) to his detriment."

Here there is no dispute but that Mukamal did rely to his detriment upon WERC's offer of a position that would become permanent upon his completion of the required six-month probationary period. Mukamal rejected other offers of employment, including at least one at a higher salary, and was subsequently placed on layoff when Gratz exercised his restoration rights. However there remains the question of whether Mukamal acted with due diligence in relying on the action of WERC.

Department of Transportation v. Wis. Personnel Commission, supra, p. 11, citing Monahan v. Department of Taxation, 22 Wis. 2d 164, 168 (1963), Thorp Finance Corp. v. LeMire, 264 Wis. 220, 228 (1953), and 28 Am. Jur. 2d, Estoppel, pp. 721-722, sec. 80. See also Surety Savings v. Loan Association v. State of Wisconsin, 54 Wis. 2d 438, 445 (1972).

Mukamal, an attorney with some previous labor law experience and who had been associated with the Milwaukee firm of Foley and Lardner for two years, testified that, prior to accepting the WERC position, he had "quite thoroughly searched throughout the statutes" to determine what the term permanent meant. He concluded that it meant he would have continued employment and would remain in the position as long as

his performance was satisfactory, in the absence of those conditions specifically enumerated in the statutes for interruption of employment; that he would retain the job with the exception of discharge for just cause or other misconduct on his part.

Mukamal's conclusions are correct as far as they went. However the Commission finds that there is not clear and convincing evidence that Mukamal's reliance on the WERC conduct was reasonable, so as to support his assertion of equitable estoppel. Mukamal was apprised of the possibility that Gratz would not be reappointed approximately one month before he began his employment with WERC, albeit a week after he accepted the job offer. This information was provided him in connection with notification of his initial assignment to the Milwaukee office. Although it was offered for the purpose of alerting him to the fact that Gratz's return might result in Mukamal's reassignment to Madison and no mention was made of layoff, Mukamal should have been alerted to the fact that layoff was another potential consequence of Gratz's reinstatement. There is no evidence that Mukamal raised this question nor was he offered any assurances that he would not be subject to layoff by WERC in the intervening month before he reported for work.

Mukamal testified that he was aware of the pertinent statutes, that he had in fact, researched them. He could not, in due diligence, ignore the statutory references to layoffs of permanent employes and the restoration rights of employe appointed from a classified to an

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unclassified position. Reading the relevant statutes in context, Mukamal more reasonably would have concluded that the very situation which did occur might well come to pass and that the resulting reduction in force due to lack of funds was always a possibility.

This decision does not address the issue of WERC authority to change the appellant's work location since that did not, in fact, occur.

Since the Commission concludes that the layoff was for just cause, the issue regarding appellant's entitlement to damages is also moot.

ORDER

IT IS HEREBY ORDERED that the action of the respondent in laying off the appellant is affirmed, and this appeal is dismissed.

Dated: October 2, 1981.

STATE PERSONNEL COMMISSION

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