STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

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DEPARTMENT OF TRANSPORTATION,
STATE OF WISCONSIN,

Petitioner, Case No. 79-CV-3420

v.

JUDGMENT

WISCONSIN PERSONNEL
COMMISSION, STATE OF WISCONSIN,
(Porter)

Respondent.

* *

BEFORE: Hon. George R. Currie, Reserve Circuit Judge

* *

The above entitled review proceeding having been heard by the Court on the 18th day of February, 1980, at the City-County Building in the City of Madison; and the petitioner Department having appeared by Assistant Attorney General Steven D. Bieber; and the respondent Commission having appeared by Attorney David E. Lasher; and the intervenor Barbara Porter having appeared by Attorney Richard V. Graylow of the law firm of Lawton & Cates; 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 and Order of respondent Wisconsin Personnel Commission dated May 14, 1979, in the matter of Barbara Porter, Appellant, v. Department of Transportation, Case No. 78-154-PC, be, and the same hereby are, affirmed.

Dated this 24th day of March, 1980.

By the Court:

Reserve Circuit Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

* *

DEPARTMENT OF TRANSPORTATION,
STATE OF WISCONSIN,

Petitioner, Case No. 79-CV-3420

v.

MEMORANDUM DECISION

WISCONSIN PERSONNEL
COMMISSION, STATE OF WISCONSIN,

Respondent.

* *

BEFORE: Hon. George R. Currie, Reserve Circuit Judge

* *

This is a proceeding by petitioner Department of Transportation (hereafter the Department) under ch. 227, Stats., to review the decision and order of respondent Wisconsin Personnel Commission dated May 14, 1979, which rejected the action and decision of the Department denying to the intervenor Barbara Porter (hereafter Mrs. Porter) compensation no lower than her previous salary as a state employee before entering the employment of the Department and remanding the matter to the Department for further action in accordance with the Commission's decision.

STATEMENT OF FACTS

As a result of a prehearing conference while the matter was pending before the Commission, the parties entered into a stipulation of the facts which stipulation is in the record returned to this Court and bears a stamped impression that it was received by the Commission on December 7, 1978.

In January, 1978, Mrs. Porter took an open competitive civil service examination for the Administrative Secretary I classification administered by the Bureau of Personnel of the State Department of

Administration. On February 10, 1978, she was placed on the certification list. She had never before taken a civil service examination and for the approximate preceding ten years had been employed in secretarial positions with the State Senate and the Assembly in the unclassified service, and was then employed as an Assembly Secretary I at a salary of $6.494 per hour.

On June 6, 1978, the Department made a request to the Division of Personnel of the Department of Employment Relations to certify eligible persons for an Administrative Secretary I position and received a list of seven names, one of which was Mrs. Porter.

On July 10, 1978, Mrs. Porter was interviewed by Arne L. Gausman of the Department who later called in Gerald Knobeck, who held an executive position in the Department and was the appointing authority, because of some questions raised by Mrs. Porter. Paragraphs 5, 6, and 7 of the fact stipulation cover what then transpired, and read:

> "5. Gerald Knobeck spoke with Joyce Gelderman, a personnel specialist in the Bureau of Personnel, Department of Transportation. She informed Mr. Knobeck that if Mrs. Porter were in a classified position the administrative rules would permit a transfer at the same salary level if the transfer was between positions in classes with the same pay rate or pay range maximum. However, Mr. Knobeck was not sure of the appellant's classification at that time or of the appellant's status within the civil service.
>
> "6. Mr. Knobeck contacted Mrs. Porter at work on July 18, 1978 and informed her that the above rule would apply and that her salary if she accepted the position with the Department of Transportation would not be less than her present salary.

"7. On July 19, 1978 Mr. Knobeck wrote a letter confirming the offer and acceptance of the position by Mrs. Porter. Mrs. Porter responded in writing on July 21, 1978. (Copies attached as Exhibits 2 and 3.)"

By letter to Mrs. Porter dated July 19, 1978, Knobeck offered the Administrative Secretary I position to her, she to start work August 7, 1978, which letter made no mention of salary. Mrs. Porter returned to Knobeck her written acceptance of the position dated July 21, 1978.

On Mrs. Porter's first day of work for the Department on August 7, 1978, she was informed that a mistake had been made and that her starting salary would be but $4.760 per hour.

THE BASIS FOR THE COMMISSION'S DECISION

The basis for the Commission's decision, as set forth therein, was that the Department was equitably estopped from paying Mrs. Porter a starting salary of less than $5.404 per hour because of Knobeck's representation to her before she accepted the position with the Department and gave up her job as Assembly Secretary I, that such salary "would not be less than her present salary".

THE ISSUES

Based on the contentions advanced by counsel for the Department, the Court deems the issues to be resolved are:

(1) Whether the Commission's decision is based on an erroneous statement of the facts.

(2) Whether the Commission committed reversible error in stating the burden of proof applicable to proving equitable estoppel.

(3) Whether the Commission committed an error of law in grounding its decision on equitable estoppel.

THE COURT'S DECISION

A. Alleged Misstatement of Facts by Commission.

Counsel for the Department is particularly critical of these statements made by the Commission in its decision:

> "On July 18, 1978 . . . One Gerald Knobeck . . . informed her that if she accepted the position with the Department of Transportation her salary 'would not be less than her present salary.'" (Bottom page 3, top page 4).

> "The appointing authority's oral representation on July 18, 1979 [should have been 1978] . . ." (Second sentence of last full paragraph on page 7).

> ". . . in advising the appellant that, if she accepted the position with the Department of Transportation, her salary would not be less than her present salary." (First sentence in paragraph beginning on page 9).

> "The appointing authority . . . nevertheless offered the appellant the position at no less than her present salary." (First complete sentence on page 11).

The reason why Department's counsel contends the above quoted statements in the Commission's decision misstated the facts is that they are grounded entirely on these words of paragraph 6 of the fact stipulation, "Knobeck contacted Mrs. Porter at work on July 18, 1978 and informed her . . . that her salary if she accepted the position with the Department of Transportation would not be less than her present salary", and omitted these words of the sentence: "that the above rule would apply and". It is asserted that these omitted words qualified the words which followed which were relied upon by the Commission. Counsel points out that the words "the above rule" refer

to the rule stated in paragraph 5 as follows: "if Mrs. Porter were in a classified position the administrative rules would permit a transfer at the same salary level if the transfer was between positions in classes with the same rate of pay or pay range maximum".

In reading paragraph 6 it is ambiguous whether or not the words which referred to the "above rule" applying qualified the statement which followed that Mrs. Porter's salary would not be less than her present salary. There being this ambiguity it was for the Commission, as the finder of fact, to resolve the ambiguity. It is clear in reading the Commission's decision that the Commission did not consider that there was any qualification of Knobeck's statement that Mrs. Porter's salary, if she accepted the position with the Department, would not be less than her "present" salary, i.e., the salary she was then receiving as an Assembly Secretary I.

Whether Knobeck's statement with respect to the rule stated in paragraph 5 of the fact stipulation applying should have alerted Mrs. Porter that it was inapplicable to her will hereinafter be dealt with in resolving the equitable estoppel issue.

The Court agrees with counsel for the Department that one misstatement of fact did occur in the Commission's decision. It occurs in the sentence commencing on the bottom of page 4 and ending on page 5, reading:

> "Appellant contends that because she was told by the person with the authority to do the hiring that she would be employed at either her previous rate, or the minimum rate, whichever was higher, the employer should be bound by the verbal agreement."

The Court can find no basis in the fact stipulation for the words "or the minimum rate, whichever was higher". However, it is clear

that the minimum rate of the position with the Department was not higher than Mrs. Porter's previous rate of pay and this error had no effect on the result reached by the Commission. Therefore the Commission's action in this case did not depend on such misstated fact within the meaning of sec. 227.20(6), Stats.

B. The Burden of Proof Issue.

The correct standard of burden of proof for equitable estoppel is a showing of clear and convincing evidence. "[T]he proof of estoppel must be clear and convincing, and not rest upon conjecture." Bank of Sun Prairie v. Opstein, 86 Wis. 2d 669, 680, 273 N.W. 2d 279, 284 (1979). See, also, Surety Savings & Loan Association v. State, 54 Wis. 2d 438, 445, 195 N.W. 2d 464, 468 (1972); City of Jefferson v. Eiffler, 16 Wis. 2d 123, 133, 113 N.W. 2d 834, 839 (1962). The Commission in Conclusion of Law No. 2 stated: "The burden of proof is on the appellant to show to a reasonable certainty to the greater weight of the evidence, . . . that respondent's action was not illegal or an abuse of discretion."

The Court is satisfied that the burden of proof stated in Conclusion of Law No. 2 was erroneous because it was a lesser degree of proof than that of clear and convincing evidence. However, a burden of proof is only applicable to fact finding. Here the facts were stipulated. It was necessary for the Commission to draw some inferences from the stipulated facts but the Court is of the opinion the test to be applied to that function is whether the inferences that were drawn were reasonable.

The Court determines that the Commission's erroneous statement of the burden of proof did not affect the result, and that neither subs. (4) or (5) of sec. 227.20, Stats., requires that the Court set aside the Commission's decision and order and remand for further proceedings.

C. The Estoppel Issue.

The Department contends that as a matter of law this was not a proper case to invoke estoppel against the state.

It is true that generally the doctrine is sparingly applied against the government or a public agency. Department of Revenue v. Moebius Printing Co., 89 Wis. 2d 610, 638, 279 N.W.2d 213 (1979); Libby, McNeill & Libby v. Department of Taxation, 260 Wis. 551, 559, 51 N.W.2d 796, 800 (1952). Nevertheless, estoppel was applied against the state in both the Moebius Printing Co. and the Libby, McNeill & Libby cases. The Supreme Court in Park Bldg. Corp. v. Industrial Comm., 9 Wis. 2d 78, 87, 100 N.W.2d 571, quoted with approval a statement from 2 Administrative Law Treatise by Kenneth Culp Davis, p. 541, sec. 17.09, that the trend was growing in both the federal and state courts to apply estoppel against governmental units.

The case of Gabriel v. Gabriel, 57 Wis. 2d 424, 204 N.W.2d 494 (1973), states the three factors essential for equitable estoppel to lie are. (1) Action or inaction which induces (2) reliance by another (3) to his detriment."

The Department contended before the Commission that estoppel should not be applied in this case because the salary of $4.760 per hour paid Mrs. Porter was in accordance with the provisions of sec. 16.415(1) of the civil service statutes and the administrative rules of the Department of Administration, and to have paid her in excess of that salary would have violated the statute and the administrative rules. The Commission's answer to that argument was made at page 7 of its decision as follows:

> ". . . The appointing authority's oral representation on July 18, 1979 [1978] followed by his 'silence or negative omission' regarding starting salary in his letter of July 19, 1978, confirming the offer and acceptance of the position by the appellant, and finally his failure to advise the appellant to the contrary during the intervening 3 weeks, taken as a whole establish a course of

conduct under which it would be unconscionable and inequitable to permit respondent's assertion of the statute as justification for denial of appellant's claim."

It is clear from other statements made in the decision that the words "The appointing authority's oral representation on July 18, 1979", in the above quoted statement referred to Knobeck's statement of July 18, 1978, to Mrs. Porter "that her salary if she accepted the position with the Department would not be less than her present salary."

That the Commission found all three necessary elements of equitable estoppel had been proved is clear from the above quoted statement together with a further statement made at page 13 of its decision. This latter statement reads:

> "The Commission therefore determines that the action on the part of the appointing authority in misrepresenting the appellant'sstarting salary, was a manifest abuse of discretion, that the appellant suffered irreparable injury by honestly and in good faith acting in reliance thereon, and that the respondent is equitably estopped from asserting that the action or decision of the Department of Transportation in fixing the appellant's salary at the minimum rate was in conformance with the civil service law and the rules of the administrator."

The Commission in reaching the decision it did with respect to the holding that equitable estoppel applied relied on the memorandum decision of this Court in Landaal v. State of Wisconsin (Personnel Board), Case No. 13d-397 (November 26, 1973). In that case Landaal, an officer at Central State Hospital, was promoted to another position which had a higher salary range than his present position with the result that he received an increase in salary of $30 per month, making his new salary $657 per month. He performed satisfactorily in his new position, but purely for personal reasons, and before the six month probationary period had expired, he wrote a letter to the Warden requesting a transfer back to his former position in which he stated he understood that he would be able to retain his salary of $657 per month since it was within the maximum salary range of his former position. The Warden

replied by letter granting the request, and stating, "According to Civil Service regulations you will retain your present salary of $657 per month, since it is within the maximum of the Correctional Officer 2 range." The Warden was mistaken in his interpretation of the Civil Service rules, and the proper salary payable to the officer after the transfer back was his old salary. However, Landaal was paid at the rate of $657 per month for 16 months before the mistake was discovered. His pay was then reduced by $30 per month, and the state stated it would seek recoupment of the excess salary payments paid.

This Court held that equitable estoppel did lie against the state in the Landaal case with respect to the recoupment of the $480 salary paid Landaal. The Court quotes this extract from the decision:

> "In so acting, the petitioner acted to his detriment as that term is understood in the law. A person suffers a detriment in law where he foregoes an alternative course of action upon the inducement of another. Here at the time petitioner accepted the reinstatement as Officer 2 on condition he retain his $657 per month salary he had two other alternative options open to him. One was to quit and seek employment elsewhere. The other was to remain in his position as Industries Technician I at the salary of $657 per month until such time, if ever, the warden should elect of his own volition to transfer petitioner back to Officer 2 status prior to the expiration of the probationary period. Clearly, he was induced by the state's action to forego exercising either of these two alternative courses of action and thus acted to his detriment if required to repay the approximate sum of $480 of salary which respondent contends was illegally paid him. . . ."

Here there is no dispute but that Mrs. Porter did rely to her detriment upon Knobeck's statement of July 18, 1978, "that her salary, if she accepted the position with the Department, would not be less than her present salary". She gave up her job as Assembly Secretary I paying her $5.494 per hour to take the position with the Department.

Counsel for the Department has attempted to distinguish the Landaal decision on the ground that in that case 16 months had expired before the state discovered that a mistake had been made while here Mrs. Porter was apprised that a mistake had been made the very first day of her employment by the Department. The Court deems this distinction

is irrelevant because here the detriment Mrs. Porter had sustained was irrevocable in that she had resigned from her higher paying prior employment.

Subsequent to oral argument the Court requested counsel to submit additional briefs on the issue of whether estoppel may ever be used against the state for any purpose other than as a defense against actual, or contemplated, state action. Such requested briefs have been received by the Court.

There is some authority that equitable estoppel generally may only be used as a shield and not as a sword to gain affirmative relief. Dickerson v. Colgrove, 100 U.S. 578, 580-581 (1879); Mortgage Discount Co v. Praefke, 213 Wis. 97, 103, 250 N.W. 846 (1933). In the Dickerson case the United States Supreme Court stated, "It[equitable estoppel] is available only for protection, and cannot be used as a weapon of assault."

However, in Chicago, St. P. M. & O. Ry. Co. v. Douglas County, 206, 134 Wis. 197, 114 N.W. 511 (1908) it was stated:

> "[I]t is, however, quite well settled that, when the state makes itself a party to a contract . . . it is subject to the law of estoppel as other parties litigant or other contracting parties."

The Court also considers significant the holding in Janke Construction Co., Inc. v. Vulcan Materials Co., 527 F. 2d (7th Cir. 1976), in which the Seventh Circuit Court of Appeals, construing Wisconsin law, affirmed a decision for the plaintiff in a breach of contract case on the theory of estoppel. According to the court, a plaintiff can thus claim affirmative relief whenever:

> "(1) defendant made a definite promise to plaintiff with the reasonable expectation that the promise would induce action of a definite and substantial character on the part of the plaintiff; (2) that the promise induced such action; (3) that plaintiff acted in justifiable reliance

upon the promise to its detriment; and (4) that injustice can be avoided only by enforcement of the promise."

The conclusion that estoppel can create a cause of action was reached by the Wisconsin Supreme Court in at least two cases dealing with governmental bodies. In State ex rel. O'Neil v. Town of Hallie, 19 Wis. 2d 588, 120 N.W. 2d 641 (1963) the plaintiff sought an alternative writ of mandamus to order the defendant town to issue him a license to operate an outdoor theater. The town had refused to do so apparently to protect the operator of an already existing theater. The Supreme Court reversed the denial of the unit holding that the city had "effectively estopped itself from refusing to license other outdoor theaters unless such evidence [that the new entertainment will differ substantially from that already offered] exist." 120 N.W.2d at 646. In the second case, Bino v. City of Hurley, 273 Wis. 10, 76 N.W.2d 571 (1956), the city had contracted with the owners of a lake to provide water for the community. Subsequently, the city tried to prevent plaintiff/owner's reparian use by passing an ordinance to that effect. The plaintiff's declaratory judgment was granted on both constitutional and estoppel grounds. (Gehl, J., concurring.)

The Court has concluded that equitable estoppel may be applied by Wisconsin courts in favor of parties seeking affirmative relief against the state, or a state agency.

125 N.W.2d 331 (1963); Thorp Finance Corp. v. LeMire, 264 Wis. 220, 228, 58 N.W.2d 641 (1953); 28 Am. Jur. 2d., Estoppel, pp. 721-722, sec. 80.

The Commission in discussing the equitable estoppel issue in the opinion portion of its decision stated at page 8: "There is no evidence here disputing that the appellant acted honestly and in good faith reliance on the appointing authority's conduct. . ." This is as close as the opinion comes to discussing the issue of due diligence. However, a person can act honestly and in good faith in reliance on a representation made by another person and nevertheless not have acted with due diligence.

The Court, therefore, must determine as a matter of law under the stipulated facts whether Mrs. Porter in relying on Knobeck's representation acted without due diligence. Counsel for the Department contends that she did not because of Knobeck's statement to her "that the above rule would apply". "The above rule" has reference to the preceding paragraph of the stipulation of facts wherein Joyce Gelderman had told Knobeck "that if Mrs. Porter were in a classified position that the administrative rules would permit a transfer at the same salary level if the transfer was between positions in classes with the same pay rate or pay rate maximum."

The Court is unable to hold as a matter of law that Mrs. Porter did not act with due diligence in relying on Knobeck's statement that the "above rule" did apply to her. There was no requirement that she investigate to determine whether Knobeck was correctly interpreting the rule.

After full consideration of all the issues in this case the Court has concluded that the Commission's decision and order must be affirmed.

Let judgment be entered affirming the Commission's decision

and order which are the subject of this review.

Dated this 14th day of March, 1980.

By the Court:

George R. Currie

Reserve Circuit Judge

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