

STATE OF WISCONSIN

:

CIRCUIT COURT
BRANCH II

:

OUTAGAMIE COUNTY

WENDELL McLESTER,

Petitioner,

vs.

PERSONNEL COMMISSION,
STATE OF WISCONSIN,

Respondent.

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**Personnel
Commission**

MEMORANDUM DECISION

Case No. 82-CV-1315

This is a petition to review a decision and order of the Wisconsin Personnel Commission (hereinafter referred to as the Commission) dated October 14, 1982, pursuant to Chapter 227 of the Wisconsin Statutes. The Commission has determined there is no probable cause to believe petitioner, WENDELL McLESTER, was discriminated against on the basis of his race with respect to the termination of his employment with the Upper Great Lakes Regional Commission (hereinafter referred to as the UGLRC).

FACTS

Wendell McLester, an American Indian, was employed for approximately eight (8) years with the UGLRC as a field representative in the Green Bay, Wisconsin office. McLester was a federal employee, although he was first appointed to the post on the recommendation of Governor Patrick Lucey in 1971. The position was not a classified civil service position.

McLester's employment record reveals that there was some concern as to the adequacy of his job performance over the years. Nevertheless, he was retained as an employee of the UGLRC until the appointment of Bruce Hendrickson as the Governor's Alternate to the UGLRC. At the request of Hendrickson, the Federal Co-Chairman of the UGLRC, William Bechtel, notified McLester by letter that he was being terminated as a field representative effective February 26, 1979. Bechtel informed McLester that his termination was the result of a major reorganization in the structure of the UGLRC.

Shortly after his discharge, McLester was contacted by Richard Berwerger and James Melin. The two men told McLester that Hendrickson, while serving as Mayor of Ashland, had made numerous derogatory remarks directed at Native Americans and had, on one occasion where the City of Ashland had failed to obtain a UGLRC grant, named McLester as the person responsible for diverting those funds to the reservations.

McLester filed a complaint with the Wisconsin Personnel Commission on March 15, 1979, charging Hendrickson and the UGLRC with racial discrimination in violation of Sec. 111.37, Stats. After an investigation, an initial determination of no probable cause was issued. Petitioner then appealed to the Commission. A hearing was held in March, 1981, and the Commission thereafter concluded there was no probable cause to believe McLester's termination was the result of discrimination and ordered the complaint dismissed.

DECISION

Petitioner maintains that the Commission relied upon certain findings unsupported by substantial evidence in the record in reaching its decision. Petitioner also argues that the Commission failed to confine its inquiry to the issue of probable cause. Finally, Petitioner contends the Commission, in justifying McLester's termination, unconstitutionally relied upon the assertion that he could, in effect, be discharged with or without just cause.

I.

Section 227.20, Stats., governs the scope of judicial review in cases such as the one now before this Court. That section reads, in relevant part:

(6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

Petitioner first argues that finding Number Twelve (12) of the Commission is contrary to the record in this case: Finding Number Twelve (12) reads:

"The testimony of other City Council members, including the City Treasurer, the Police Chief and Hendrickson is credible - that no discriminatory comments were made by Hendrickson." The record, however, clearly reveals that Hendrickson never did testify before the Commission.

Similarly, in its decision, the Commission states: "The record is clear and unequivocal on the fact that Hendrickson had no anti-Native American bias . . .". Petitioner points out that, in addition to the discriminatory statements allegedly heard by Berwerger and Melin, another council member apparently told the Personnel Commission Investigator that he vaguely remembered Hendrickson once use the term "bow bender" or "drunken Indian" in a joking manner. This alleged incident was not refuted in testimony presented to the Commission.

As to these two alleged errors, the Court concludes they are not sufficient to justify reversal and remand of the Commission's decision. Sec. 227.20(6), Stats., set forth above, clearly allows judicial reversal only where "the agency's action depends on any finding of fact that is not supported by substantial evidence" (emphasis added). In the present case, the Commission's decision is clearly based on the finding that Berwerger and Melin were not credible witnesses. As McLester's discrimination claim is based entirely on their allegations, such a finding by the Commission is clearly sufficient to support a determination of no probable cause. Moreover, the Court is satisfied the Commission's finding regarding the testimony of Berwerger and Melin is not affected by these two apparent misstatements in the Commission's written decision. Finally, even if the Commission did not explicitly discuss the investigator's testimony as to one council member's vague recollection of a "joke" using a derogatory term, the Court finds such an oversight does not compel reversal of its decision.

II.

Petitioner charges that the Commission wrongly required him to prove discrimination, when he was merely required to make a showing of probable cause. Petitioner points out that the initial determination in this matter found McLester was not terminated due to reorganization within the UGLRC (the reason proffered by Bechtel in the letter to McLester). Rather, the investigator found McLester was not retained because of his allegedly unsatisfactory work record. Petitioner apparently believes this finding of a pretextual reason being given for his termination, together

with the accusations of Berwerger and Melin, were sufficient to establish probable cause.

In its decision, the Commission correctly noted the issue before it, i.e. whether:

. . . there is reasonable ground for belief supported by facts or circumstances strong enough in themselves to warrant a prudent person in the belief that discrimination probably has been or is being committed. Wis. Adm. Code, sec. P.C. 4.03(2).

The Court finds the Commission properly applied this standard.

The Commission apparently did not completely discount reorganization within the UGLRC as a reason for Petitioner's termination. It found that "[i]n addition to the reasons for termination stated in the official letter of termination, there had been concerns with respect to aspects of complainant's job performance". Furthermore, the Commission was presented with substantial evidence that Berwerger and Melin were not credible. In light of the totality of the evidence, the Commission obviously concluded Petitioner's claim was not plausible and should be dismissed. The Court finds absolutely nothing in this record to suggest the Commission improperly held Petitioner to some higher burden of proof.

III.


Lastly, Petitioner contends the Commission's finding that, as a political appointee, he could be terminated with or without just cause cannot be sustained on this record. Petitioner maintains that the Commission's employment of this erroneous conclusion violates his constitutional rights under the First and Fourteenth Amendments and wrongfully ignores the UGLRC's alleged use of a pretext.

The Court finds this argument to be without merit. As discussed above, the Commission's action depended solely on its finding that Petitioner's two witnesses were not credible. Furthermore, the Commission apparently did not agree with the investigator that the UGLRC employed a pretext in terminating McLester. The issue before the Commission was not whether McLester was terminated for just cause, but rather, whether there was reasonable ground to believe he was terminated as a result of discrimination. The Court concludes the Commission justly and properly made that determination.

For the reasons discussed above, the decision and order of the Wisconsin Personnel Commission dated October 14, 1982, must be affirmed. It is so ordered.

Dated this 30 day of July, 1984.

BY THE COURT:



Andrew P. Cotter
Circuit Court Judge