

JOYCE SEEP,

Petitioner,

-vs-

STATE PERSONNEL COMMISSION,

Respondent.

D E C I S I O N

Case No. 84-CV-1705

SECRETARY, DEPARTMENT OF HEALTH AND  
SOCIAL SERVICES, STATE OF WISCONSIN,

Petitioner,

-vs-

WISCONSIN PERSONNEL COMMISSION,  
STATE OF WISCONSIN,

Respondent.

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JUN 24 1985

Personnel  
Commission

Case No. 84-CV-1920

INTRODUCTION

Case 84-CV-1705 was filed by Petitioner on 25 October 1984. Respondent served its Notice of Appearance and Statement of Position on 8 November 1984.

Case 84-CV-1920 was filed on 8 November 1984.

Both 84-CV-1705 and 84-CV-1920 relate to the same matter. Joyce Seep is requesting that the 10 October 1984 decision of the Wisconsin Personnel Commission relating to her job be enforced.

The Department of Health and Social Services is asking that the Court review the same decision of the Wisconsin Personnel Commission.

All parties stipulated to a consolidation of both cases before the undersigned on 11 through 13 February 1985. Subsequently an order consolidating 84-CV-1920 with 84-CV-1705 was signed by Judge Dennis Costello.

The official record of the State Personnel Commission was filed on 23 November 1985, and on 15 January 1985.

A briefing schedule was first established on 16 January 1985, and later amended by agreement of the parties. All sides to the dispute have presented legal memorandums.

#### FACTS

On 5 February 1983, Joyce Seep signed a Complaint which alleged age and employment discrimination against her employer, the State Department of Health and Social Services. Earlier Ms. Seep had retired, on 8 January 1982, from the position of Institutional Aide at Southern Wisconsin Center for the Developmentally Disabled after 20 years of employment.

The subject employment position (Institutional Aid 2) was covered by Article VIII, Section 7 of a collective bargaining agreement in the context of "Layoff Procedure".

"Any employee who is laid off may file a request within the department for which he/she worked to file a permanent vacancy in an employing unit other than that from which he/she was laid off."

Under Wisconsin Statutes, section 111.90(2), the subject of reinstatement (outside of layoff procedures in the collective bargaining agreement) is addressed as follows:

"Manage the employes of the agency; hire, promote, transfer, assign or retain employes in positions within the agency; and in that regard establish reasonable work rules."

When Ms. Seep resigned her employment she had an accrued sick leave balance of 4 hours and 27 minutes. This accrued at the rate of 4 hours every 2 weeks. During 1980 and 1981 it was established by a review of her work attendance records that there was a pattern of taking sick leave more or less as it accrued. The actual records are in the record filed with the Court. Further the single days of sick leave were taken in conjunction with vacations and/or other days off.

It was determined by the Commission that abuse of sick leave was widespread during Ms. Seep's employment. At no time during her employment was Ms. Seep confronted with any allegation of abuse of her sick leave by a management person.

Management on behalf of the employer attempted to deal with this issue first in 1976. However, no contact with Ms. Seep was made as a result of this management effort. In fact, Ms. Seep never took more sick leave than she had earned -- rather she took sick leave more or less as it was earned.

After Ms. Seep retired, her employer became much more assertive in addressing the issue of "abuse of sick leave". On 3 January 1983,

Ms. Seep made application for reinstatement under the employment contract and in accord with data given to her back in 1982 at her termination or closing interview with Mr. Thomas Wall. At the reinstatement interview (also with Mr. Wall) the subject of sick leave abuse was not gone into.

The employer denied Ms. Seep's application for reinstatement in a letter dated 18 January 1983. This was because of a low level of accrued sick leave in her reserve account.

The employer did reinstate other employees (much younger than Ms. Seep) who it felt had abused sick leave. This was between the time when Ms. Seep retired and the time she sought reinstatement. The employer contends, however, that it wasn't the age (55) of Ms. Seep, but rather a decision made shortly before 3 January 1983, to deny reinstatement to past sick leave abusers which was the reason for not reinstating Ms. Seep. This change in policy was never reduced to writing or communicated to anyone other than Mr. Janis (the personnel manager).

When Ms. Seep was not reemployed by SWC, she did secure employment with Upjohn Homecare Services at \$4.85 per hour. With SWC she would have earned \$7.97 per hour.

Ms. Seep complained that SWC abused its discretion under 230.44(1)(d), Stats., in not reinstating her. She also claimed that she was discriminated against because of her age at the time she sought reinstatement. The Commission determined that reinstatement was a form of appointment by the employer. Also the appointing authority has discretion in making an appointment.

LAW

The authority of the Wisconsin Personnel Commission to act in the instant matter is found at 230.44(4)(c), Stats.

"After conducting a hearing on an appeal under this section, the commission shall either affirm, modify or reject the action which is the subject of the appeal. If the commission rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision. Any action brought against the person who is subject to the order for failure to comply with the order shall be brought and served within 60 days after the date of service of the commission's decision."

In addition, 230.43(4), Stats., addresses the issue of back pay.

"Rights of employe. If an employe has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been restored to such position or employment by order of the commission or any court upon review, the employe shall be entitled to compensation therefor from the date of such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled by law but for such unlawful removal, demotion or reclassification. Interim earnings or amounts earnable with reasonable diligence by the employe shall operate to reduce back pay otherwise allowable. Amounts received by the employe as unemployment benefits or welfare payments shall not reduce the back pay otherwise allowable, but shall be withheld from the employe and immediately paid to the unemployment reserve fund or, in the case of a welfare payment, to the welfare agency making such payment. The employe shall be entitled to an order of mandamus to enforce the payment or other provisions of such order."

Judicial review is under the procedure found in Chapter 227

(See 227.15 et al.)

In an action brought to review a decision of the State Personnel Commission, the Court acts in an appellate capacity on the record made before the Commission. International Harvester Co. v. Industrial Commission, 157 Wis. 167 (1914). Additional evidence is not taken in the absence of fraud. Weibel v. Clark, 87 Wis. 2d 696 (1979).

Section 227.18 of the Wisconsin Statutes provides for review of the entire record.

"Within 30 days after service of the petition for review upon the agency, or within such further time as the Court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceedings in which the decision under review was made... The court may require or permit subsequent corrections or additions to the record when deemed desirable." (Emphasis added) Wis. Stats. §227.18.

In compliance with the Wisconsin statutes and in fairness to the Petitioner, a review of the entire record must be made. Only then will a complete record of the information exchanged be available for review and evaluation by the Court.

Under the general reasoning of Section 809.22, Stats., the Court determines that this case is appropriate, given the record and legal briefs, for decision without oral argument.

The findings of fact made by the Commission are conclusive if supported by credible and substantial evidence. Consolidated Papers, Inc., v. DILHR, et al, 76 Wis. 2d 210 (1977). The credibility of the witnesses and the weight of the evidence are for determination by the Commission and not by the Court. Neff v. Industrial Commission, 24 Wis. 2d 207 (1964).

Substantial evidence is such relevant evidence as a reasonable person, acting reasonably, might accept as adequate to support a conclusion. Valadzic v. Briggs and Stratton, 92 Wis. 2d 583 (1979). If there is any credible evidence to support the decision of the Commission, it must be upheld even if contrary to the great weight and clear preponderance of the evidence. E.F. Brewer Co. v. Department of ILHR, 82 Wis. 2d 635 (1978). Because of the expertise of the Commission, great weight is to be accorded its interpretation and construction of applicable statutes. Environmental Decade v. Department of ILHR, 104 Wis. 2d 640 (1981). A court is not to overturn a decision of the Commission just because it would have come to a different decision. Employer Mutual Liability Insurance Co. v. Department of ILHR, 62 Wis. 2d 327 (1974).

The trial court is to review the record to determine whether or not there is credible evidence to sustain the decision made. Eastex Packaging Co. v. Department of ILHR, 89 Wis. 2d 739 (1979). The Commission's decision is not to be affirmed if it is against the credible evidence or is so inherently unreasonable as not to be entitled to any weight. Van Valin v. Industrial Commission, 15 Wis. 2d 362 (1962). As summarized by the Wisconsin Supreme Court:

"The agency's decision may be set aside by a reviewing court only when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences."

Hamilton v. ILHR Dept.  
94 Wis. 2d 611, 618 (1980).

If the administrative agency's interpretation has no rational basis, the reviewing court is not to defer to its conclusions of law. Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976).

A decision of the Commission may be set aside if there is a compelling appearance of impropriety. In Guthrie v. WERC, 102 Wis. 2d 306 at 314 (Ct. App. 1982) the Court states:

"A compelling appearance of impropriety may be proved by a single egregious act which creates severe suspicion of the administrative procedure. It may also exist where a number of acts, not individually as egregious in nature, together have a cumulative impact of eroding public trust in an administrative agency . . ."

Further the exercise of discretion by the Commission will not be set aside unless it is apparent that it was used arbitrarily or on the basis of completely irrelevant factors. Behning v. Star Fireworks Mfg. Co., 57 Wis. 2d 183 at 189 (1973). In reviewing discretion the court must look at the process of reasoning which underlies the decision. Our Court in McCleary v. State, 49 Wis. 2d 263 at 277 (1971) said:

"Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards . . ."

Any legal conclusion drawn by the Commission is subject to judicial review. Wehr Steel Co. v. Department of ILHR, 106 Wis. 2d 111 (1982).  
Options available to the Court include:



1. Confirm the entire decision.
2. Set aside the entire decision.
3. Confirm part and set aside part of the decision.

M & M Realty v. Industrial Commission  
267 Wis. 52 (1954) and §227.20, Stats.

#### DISCUSSION

The Court is in agreement with Petitioner's interpretation regarding 230.43(4), Stats. This provision of the Wisconsin Statutes does specifically provide a basis for the Commission to award back pay. In the instant case the employee was not working for the employer when she sought reinstatement to the same position she was in when she retired. None of the 3 prior circuit court cases (Department of Employment Relations v. Wisconsin Personnel Commission, Case No. 79-CV-5099 (Dane Cty. Cir. Ct., 9/81), Nunnelee v. State Personnel Board, No. 158-8464, (Dane Cty. Cir. Ct. 1978), and Employment Relations Commission v. The Personnel Commission (Doll), No. 79-CV-3860, (Dane Cty. Cir. Ct. 8/80) have dealt with this situation.

The effect of the employer's refusal (an abuse of discretion) to reinstate Petitioner had the direct and immediate impact of removing her from employment. This is the situation contemplated in 230.43(4), Stats. Petitioner is, as a matter of law, eligible for pay back and the Commission was in error in holding to the contrary. Petitioner had a right to reinstatement under 230.31(1)(a), Stats. To deny her back pay while at the same time finding that she should have

been reinstated would be inconsistent and simply not just. To secure the job (albeit much later) is only a partial remedy for the wrong committed. Yanta v. Montgomery Ward and Co., 66 Wis. 2d 53 at 61 (1974).

The Court's review of the entire record in this case provides ample support for the finding of the Commission that the Department abused its discretion in not reinstating Ms. Seep. She was qualified and competent as a past employee. Her past use/misuse of sick leave was never dealt with by her employer.

The issue here is not the Court's view regarding employee abuse of a fringe benefit, but rather an examination of the Commission's finding given the record of the case before it.

The record here supports the determination of the Commission on the issue of employer abuse of discretion. This employee was singled out for remonstrance without notice. The policy ostensibly being implemented was never formally articulated or known by the personnel department of the employer. Discrimination in application of the policy is clearly evident from the record. So too is bias against Ms. Seep as opposed to the entire class of persons (sick leave abusers) she represented.

The employer had a right to correct an abusive employee situation. The remedy however, under the facts of this case, was not properly formulated or fairly implemented as relates to Ms. Seep.

Credible and substantial evidence exists in the record to support the Commission's "abuse of discretion" decision.

CONCLUSION

The Court affirms the Commission's "abuse of discretion" decision. The Court finds that the Commission erred as a matter of law in not awarding back pay and that part of the decision is ordered set aside. The issue of back pay is remanded to the Commission with instructions to order back pay to Ms. Seep.

Dated this 20th day of June, 1985.

BY ORDER OF THE COURT:

  
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Dennis J. Flynn, Circuit Judge