

JUN 27 1986

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

MICHAEL PEARSON,

Petitioner,

DECISION AND ORDER ON

vs.

PETITION FOR REVIEW

PRESIDENT, UNIVERSITY OF
WISCONSIN SYSTEM (MADISON),
and WISCONSIN PERSONNEL
COMMISSION, STATE OF WISCONSIN,

Respondents.

Case No. 85-CV-5312

BEFORE HON. RICHARD W. BARDWELL, CIRCUIT JUDGE, BRANCH #1

This matter is before the Court for judicial review, under Ch. 227, Wis. Stats., of a Final Decision and Order of the Wisconsin Personnel Commission (Commission). Petitioner Michael Pearson appeals the portion of the Commission's Decision and Order denying him back pay, front pay and attorneys fees. There is no dispute as to the Commission's Findings of Fact. This petition, then, raises only questions of law.

FACTS

Michael Pearson, at all times material hereto, has been employed as a Locksmith 2 in the UW-Madison Physical Plant. In September of 1984, he applied for the position of Maintenance Supervisor I-Locksmith in the University's Physical Plant Locksmith Shop. Three of the five interviewers would have chosen Pearson for the position. The individual with authority to make the selection chose another candidate, however. That employee now has permanent status in the job.

Pearson appealed the hiring decision to the Commission. The Commission, on September 6, 1985, found that the University abused its discretion by not appointing Pearson to the position. The Commission ordered that Pearson, if still qualified, be appointed to the disputed position (or comparable promotional position) upon its next vacancy. The Commission refused to award petitioner back pay or attorneys fees, however.

DECISION

This case, involving as it does only questions of law, is governed by Sections 227.20(3) and (5), Stats. Those sections provide:

(3) The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion.

(5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

With those standards in mind, the Court proceeds to the back pay issue.

BACK PAY

The remedial authority of the Commission is set forth in Sec. 230.44(4)(c), Stats. That section provides:

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....

Petitioner argues that this remedial authority is broad enough to allow for an award of back pay in this case. Petitioner relies upon Sec. 230.02, Stats. That section provides:

Liberal Construction of Statutes. Statutes applicable to the department shall be construed liberally in aid of the purposes declared in s. 230.01.

This provision applies only indirectly, if at all, to the Commission and its remedial authority. The department referred to is the Department of Employment Relations (DER) and the Commission correctly notes that Sec. 230.44(4)(c), Stats., is only "applicable" to DER in that it defines that department's potential liability as an employer. The Court acknowledges the apparent incongruity in the rule of liberal construction set forth in Sec. 230.02, Stats., expressly including only statutes applicable to DER (and not those applicable to the Commission). However, the wording of the statute governing back pay in this case persuades the Court that the Commission was correct in denying back pay for the petitioner.

Sec. 230.43(4), Stats., identifies those situations in which the Commission can award back pay. That section provides:

RIGHTS OF EMPLOYEE. If an employe has been removed, demoted or reclassified, from or in any position of 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.

This section of the statutes, then, limits the awarding of back pay to certain specific circumstances. This approach stands in sharp contrast to that of the Wisconsin Fair Employment Act (WFEA) (currently codified in Secs. 111.31-111.395, Stats., 1981-82). The applicable provision, Sec. 111.39(4)(c), Stats., is as follows:

If, after hearing, the examiner finds that the respondent has engaged in discrimination or unfair honesty testing, the examiner shall make written findings and order such action by the respondent as will effectuate the purpose of this subchapter with or without back pay....

There are no limitations comparable to those found in Sec. 230.43(4), Stats.

This Court has, on two occasions, considered the provisions of Sec. 230.43(4), Stats., relative to back pay. In Unemployment Relations Commission v. Personnel Commission (Doll), Case No. 79-CV-3860, Dane County Circuit Court (September 2, 1980), we held that the Commission does not have authority to award back pay when it reverses the denial of a request for reclassification. We held that "the plain language of the statute indicates that it is inapplicable in this case." We noted that any employee's right to monetary relief after a successful appeal to the Commission under Sec. 230.44, Stats., is governed exclusively by Sec. 230.43(4), Stats. Since the employee in Doll was not reclassified, we held that the Commission had no authority to award him retroactive pay.

In Wisconsin Department of Health and Social Services and Division of Personnel v. Wisconsin Personnel Commission (Eschenfeldt), Case No. 81-CV-5126, Dane County Circuit Court (April 27, 1983), we reversed an award of back pay to an employe who was denied reclassification (while affirming the Commission's holding that the reclassification request should have been granted). The pertinent portion of that opinion follows:

While this Court admittedly recognizes that the denial of back pay in reclassification requests which should have been granted is unjust because the wronged employe receives no compensation for the wrong endured, the fact remains that the legislature has not rectified this situation since Doll. Accordingly, we have no recourse but to reaffirm our previous holding that the Commission lacks authority to award back pay in denial of reclassification appeals.

In the instant case, the petitioner was not removed, demoted or reclassified. Pearson's case is therefore distinguishable from that of the plaintiff in Seep v. State Personnel Commission, Case Nos. 84-CV-1705, 84-CV-1920, Racine County Circuit Court (June 30, 1985). In Seep, the Court found that the plaintiff had, in fact, been removed from employment.

"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 [back pay]..."

The Court concludes that Sec. 230.43(4), Stats., is inapplicable in this case. Nor is there any statutory provision in Ch. 230, Stats., that allows for an award of "front pay". The Commission

was correct in denying Pearson both back pay and front pay.

ATTORNEYS FEES

The Supreme Court has held that costs cannot be taxed against the state without express statutory authorization. Martineau v. State Conservation Commission, 54 Wis. 2d 76 (1972). There is no provision in Ch. 230, Stats., expressly authorizing an award of attorneys fees. However, the Supreme Court recently held that the Department of Industry, Labor and Human Relations (DILHR) has the authority to award reasonable attorneys fees to a prevailing complainant in an action brought pursuant to the Wisconsin Fair Employment Act (WFEA). Watkins v. LIRC, 117 Wis. 2d 753, 765 (1984). There was no provision in the Act expressly awarding such fees. The Court found the authority to award attorneys fees implied in the language of Sec. 111.39(4)(c), Stats., which authorizes DILHR to "order such action...as will effectuate the purpose of this subchapter..." Petitioner argues for the same result in the instant case. However, the remedial authority set forth in the WFEA is broader than that found in Sec. 230.44(4)(c), Stats. That section provides:

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...

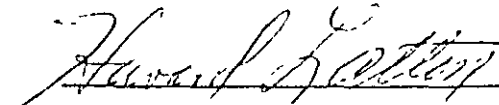
Absent a more expansive statement of the Commission's remedial authority, this Court declines to extend the holding in Watkins

to Ch. 230, Stats. The Watkins decision focuses on the Wisconsin Fair Employment Act - its purposes and its liberal construction provisions. This Court is not convinced that Watkins signals a general departure from the rule set forth in Martineau, supra, and reiterated in Guthrie v. Wisconsin Employment Relations Comm., 107 Wis. 2d 306, 317(1982).

For the reasons set forth above, IT IS ORDERED that the Commission's decision and order denying petitioner back pay, front pay and attorneys fees is affirmed.

Dated June 25, 1986.

BY THE COURT:


Circuit Judge