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STATE OF WISCONSIN : IN CIRCUIT COURT : DANE COUNTY

#88-CV-0366

RECEIVED

PATRICK D. BAGGOTT,
Petitioner,

AUG 18 1988

MEMORANDUM

vs.

**Personnel
Commission**

DECISION

WISCONSIN PERSONNEL COMMISSION,

Respondent.

This review of a decision of the respondent, the Wisconsin Personnel Commission, was requested by the petitioner, Patrick D. Baggott, pursuant to ch. 227, Stats. The Commission heard an appeal filed by Baggott, an employee of the Department of Natural Resources (DNR), in which Baggott challenged the actions of the DNR in determining his new civil service classification. The Commission decided that the petitioner was appropriately classified at the Environmental Specialist (ES) 5 level, not the ES 6 level, and that the effective date of the reclassification should be September 28, 1986. Baggott is now seeking review only of the Commission's determination regarding the effective date of his reclassification to the ES 5 level.

FACTS

The record from the Commission shows that the petitioner has been performing essentially the same employment duties with the DNR's Bureau of Air Management since December of 1983.

From 1/8/84 until the occurrence of the events which are the subject of this action he was classified at the ES 3 level.

Sometime between November 1984 and January 1985, the petitioner made an oral request of his supervisor, Beecher Daniels, that his position be reclassified from the ES 3 level to the ES 5 or ES 6 level and that his position description (PD) be updated to accurately reflect his job duties. Daniels wrote a PD de-emphasizing and omitting some of the petitioner's more complex duties. The petitioner was dissatisfied but he did sign the PD. Daniels consulted with Greg Samp of the DNR personnel bureau, who advised Daniels not to initiate a reclassification request because of a personnel management reallocation survey of the entire ES series being conducted at that time. Daniels did not initiate a request and informed the petitioner of his decision around March of 1985, adding that he would seek a reclassification of Baggott's position to a higher level as soon as practicable after the survey was completed. As a result of the reallocation survey, Baggott's position was upgraded to the ES 4 level effective April 14, 1985.

The petitioner strongly objected to Daniels' strategy but did not file an appeal with the Commission of the reallocation to the ES 4 level. In October or November of 1985 he again orally requested that Daniels initiate a reclassification request

to the ES 5 or 6 level. Daniels and Baggott redrafted the PD, and Daniels again consulted with Greg Samp. Samp advised Daniels not to submit a reclassification request because it was too soon after the survey and reallocation of Baggott's position. Daniels did not initiate a request and advised the petitioner of his decision. The petitioner objected to this finding of the Commission and contends that he was lead to believe a request had been submitted to Samp.

In a memo to Daniels dated July 28, 1986, Baggott again requested that his position be reclassified to the ES 5 or 6 level. This was the first time the petitioner made a request in writing. Reclassification to the ES 5 level was approved effective September 28, 1986, and on January 30, 1987 the petitioner filed an appeal of the respondent's actions in regard to the reclassification.

The petitioner argued on appeal to the Commission that the effective date of his reclassification to ES 5 should be January of 1985, which corresponds to the time of his initial requests for reclassification and the resulting April reallocation of his position to the ES 4 level. He argued that the respondent should be equitably estopped from enforcing the September 28, 1986 effective date of the reclassification. His theory is that he relied on actions and representations made by Beecher Daniels, and Greg Samp, that were fraudulent and an abuse of discretion, and that such reliance was to his

detriment. The detriment he claims is that his reliance prevented him from taking independent action through the appeal process in pursuit of reclassification from the time of the reallocation to ES 4 to July 1986 when he made the written request which ultimately resulted in reclassification to the ES 5 level. The Commission concluded that there was no fraud or abuse of discretion that would substantiate the petitioner's theory, and that because he could have but did not appeal the reallocation or any of his supervisor's decisions within the 30-day appeal limit, the effective date of the reclassification was appropriately September 28, 1986.

STANDARD OF REVIEW

On review under ch. 227, Stats., this Court will consider an administrative agency's findings of fact conclusive if supported by substantial evidence in the record. If the evidence from the entire record, including the inferences therefrom, is found to be such that a reasonable person, acting reasonably, might have reached the decision, this Court will not disturb the agency's findings. Copland v. Department of Taxation, 16 Wis.2d 543, 554, 114 N.W.2d 858, 863 (1962). Although questions of law are always reviewable de novo by this Court, Jaeger Baking Co. v. Kretschmann, 96 Wis.2d 590, 594, 292 N.W.2d 622 (1980), some deference must be given the agency in those

areas in which it has specialized knowledge and expertise. Bucyrus-Erie Co. v. ILHR Department, 90 Wis.2d 408, 417, 280 N.W.2d 142 (1979). Finally, the credibility of witnesses and the weight of the evidence are matters exclusively within the province of the deciding agency. Berkan v. State Board of Personnel, 61 Wis.2d 644 (1974).

ANALYSIS

The question presented in this review is whether the Commission erred by concluding that the respondent should not be estopped from enforcing the September 28, 1986 effective date of the petitioner's reclassification to the ES 5 level. In Advance Pipe and Supply v. Revenue Dept., 128 Wis.2d 431 (Ct. App. 1986) the Court of Appeals wrote:

- "Equitable estoppel arises when there is (1) action or inaction by one party which (2) reasonably induces reliance by the other party (3) to the latter party's detriment. The party asserting estoppel must prove all of the elements by clear, convincing and satisfactory evidence. The doctrine is not applied as freely against government agencies as it is against private parties."

Estoppel against the state requires that the state action amounts to a "fraud or a manifest abuse of discretion." Surety Savings & Loan Association v. State, 54 Wis.2d 438, 445 (1972). The Commission found that there was no fraud or abuse of discretion by the respondent, and thus no estoppel. Since the dispute between the petitioner and respondent centers on what

responsibilities and rights each had in regard to the reclassification, I will examine the applicable civil service statutes and administrative regulations. ←

The administrative system provided for in regard to the reclassification of positions is contained in Wis. Admin. Code ER 3.03:

(1) Appointing authorities shall notify the secretary of any changes in the duties or responsibilities of individual positions which may affect the classification level of the position. Notification shall be in accordance with the procedures established by the secretary.

(2) All requests for classification actions which are not specifically delegated to appointing authorities must be reviewed and a specific class recommended by the appointing authority prior to a review by the secretary, except in those cases where the action is initiated by the secretary.

(3) When a non-delegated reclassification request submitted in writing is not recommended for approval by the appointing authority, the employee shall be notified in writing by the appointing authority....

Sec. 230.80(lm) Stats., defines "appointing authority" as the chief officer of any governmental unit, but provides that reclassification power can be delegated. The DNR Bureau of Personnel is the appointing authority for ES 4, 5, and 6 positions within the DNR.

None of the proceeding law requires a supervisor to initiate reclassification requests on behalf of an employee. In addition, sec. 9170.9 of the DNR manual states that:

"It is the policy of the Department of Natural Resources to pay employees at the appropriate level for the work being performed. Therefore, if a review of the duties and responsibilities assigned to a position indicate an inaccurate classification level, a Reclassification Request should be initiated."

The Commission found that this language was clearly directory, not mandatory, leaving room for a supervisor to exercise his or her discretion in initiating a reclassification request for a subordinate position.

In his brief to this Court, it is the discretion exercised by his supervisor that the petitioner questions. The petitioner claims that the first PD which omitted some of his duties was fraudulent, and that that fraudulent PD influenced Greg Samp's advice to Daniels to not initiate reclass requests in January 1985 and November 1985. The petitioner hypothesizes that if Samp had been aware that the PD was inaccurate, his advice to Daniels would have been different. I can't entertain that theoretical notion. On this review I am limited to determining whether the Commission could have reasonably decided, from the evidence presented, that Daniels and Samp's actions did not indicate fraud or a substantial abuse of discretion. I find that the Commission could reasonably reach that conclusion, especially in light of its expertise and knowledge of the civil service system.

The Commission found that Daniels' decision not to pursue

reclassification from ES 3 directly to ES 5 in early 1985 was done with knowledge of the requirements of the reclassifying system. The reallocation survey was apparently going to result in a change in the petitioner's position from ES 3 to ES 4, only. As the petitioner phrased it in testimony to the Commission, Daniels therefore omitted some of the petitioner's duties from the first PD in order to save up "ammunition" for a later attempt at an ES 5 reclassification. The Commission reasonably concluded that Daniels' approach was within his supervisory discretion, since he believed that the petitioner's position would be upgraded only one level as a result of the allocation, even if all of his duties were listed completely in the PD.

The Commission also found there was no showing that the advice Greg Samp gave to Daniels regarding reclassification requests was in any way improper or that it did not reflect Samp's actual opinion as a personnel specialist. Although Samp would have been obligated to review a reclass request if Daniels submitted one, Daniels was not obligated to submit one. Because there was no showing of fraud or abuse of discretion, the Commission found that no estoppel could be given effect.

PETITIONER'S ABILITY TO APPEAL THE RESPONDENT'S ACTIONS

The Commission found that the petitioner could have appealed any of the decisions made if he was dissatisfied with them. Since he did not do so in a timely fashion, and since the Commission found his forbearance was not the result of reliance on fraud or abuse of discretion, the Commission refused to give effect to an estoppel.

Although the petitioner argues that his reliance on supposedly fraudulent representations and actions prevented him from utilizing the appeals process normally available to the civil service, he also suggests that the system wouldn't have afforded him an adequate means of redress even if he had attempted to use it. I will address the petitioner's concerns.

The decision to reallocate the petitioner's position to the ES 4 level was appealable under sec. 230.44, Stats. The petitioner's argument that he did not appeal the reallocation because he relied on his supervisor's assertion that he would soon initiate a reclassification request has little merit. Since the petitioner testified, and the Commission found, that Baggott was aware of and disapproved of Daniels' actions from the start, he could have voiced his disapproval of the resulting reallocation

by filing an appeal to the Commission. Sec. 230.44 requires appeal within 30 days of the effective date of the action or notification of the action, whichever is later.

The petitioner next asserts that denials of reclassification requests must be in writing, and that since he did not receive written notification of denial after any of his oral requests for reclassification, then the 30 day period for filing appeals under sec. 230.44 Stats. was never commenced, and the Commission was wrong in deciding that the time for appeal had run. The petitioner cites Piotrowski v. DER, case no. 84-0010-PC, decided March 16, 1984 by the Commission. In Piotrowski the Commission ruled that the term "notify" when applied to reclassification or reallocation decisions, must comply with the language of ER-Pers. 3.04:

- "Notice of Reallocation or Reclassification. Approvals or denials of reallocation or reclassification shall be made to the appointing authority in writing. The appointing authority shall immediately notify the incumbent in writing."

Under this provision, the 30 day appeal limit of sec. 230.44, Stats., does not commence until the incumbent has received written notice; however, this provision appears to be dependent on whether a formal reclassification request has actually been submitted. In this case Daniels and Samp merely consulted about the petitioner's position and possible reclassification. Daniels did not initiate formal reclassification requests which

would require the appropriate appointing authority to provide written notification to the petitioner.

The petitioner questions how he could have appealed Daniels' actions without formal written notification, which would have resulted if formal requests were processed up through the appropriate channels. The decision by the Commission does not shed much light on the matter. Sec. 230.44, Stats., provides for appeal to the Commission of decisions made by the Secretary of the Department of Employee Relations, the administrator of the division of merit recruitment within a department, or the designated appointing authority within a department (here, the Personnel Bureau of the DNR), but not specifically for personnel decisions made by an immediate supervisor. However, it is clear that the petitioner could have appealed the reallocation effective in April of 1985; in conjunction with that appeal he could have voiced his concerns regarding the respondent's actions, and that was the appropriate time to do so.

The petitioner argues he didn't appeal the reallocation because he relied on Daniels' statement that he would initiate a reclassification soon. The root of the difficulty here appears to be a difference of opinion as to what constitutes "soon." Since November of 1985, six months after the reallocation, was technically the soonest that the petitioner

could be eligible for reclassification consideration, and since he was doing ES 5 level work at that time, he argues that a formal request should have been initiated. However, the question here is not when Baggott was technically capable of being eligible for reclassification, but whether Daniels and Samp abused their discretion in concluding that a formal request should not yet be initiated.

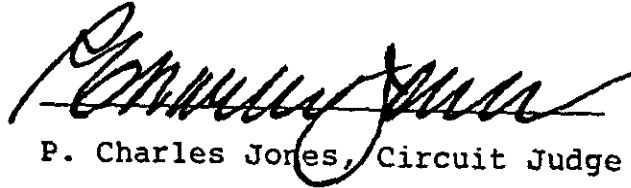
CONCLUSION

The petitioner's argument that he relied on Daniels' representations to his detriment is the basis for his claim of estoppel. However, in order for a claim of estoppel to lie against the state, the state's actions must be fraudulent or an abuse of discretion. This first element was found not to exist by the Commission. The Commission weighed the credibility of the testimony and evidence and found that Daniels and Samp acted within their discretionary powers. The petitioner's claim is based on a difference of opinion with the respondent regarding the exercise of those discretionary powers, particularly in regard to the length of time it ultimately took for the petitioner to get reclassified. Even if there are other conclusions that could possibly have been reached, I must affirm the Commission's decision since it is a reasonable

one in view of the evidence presented.

Dated: August 11, 1988.

BY THE COURT:



P. Charles Jones, Circuit Judge