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Personnel
Commission

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 8

NANCY COZZENS-ELLIS,

Plaintiff,

vs. Case No. 88 CV 5743

WISCONSIN PERSONNEL COMMISSION,

Defendant.

DECISION AND ORDER

This matter is before me on appeal from a decision of the Wisconsin Personnel Commission (Commission). The petitioner, Nancy Cozzens-Ellis, contends that the Commission erroneously decided that her appeal be dismissed. After reviewing the record, the parties' submissions, the relevant law, and considering oral argument, I conclude the Commission's decision must be affirmed. The reasons follow.

FACTS

The facts are undisputed. Ms. Cozzens-Ellis is employed by the University of Wisconsin in the classified civil service in the Department of Police and Security. Chief Ralph Hanson was the head of this department at all relevant times to this proceeding.

Cozzens-Ellis was among those employees certified for consideration for promotion to Security Supervisor 1

positions within the Department. On May 4, 1987, Chief Hanson selected two candidates, Ms. DePagter and Mr. Simmons for promotion and Cozzens-Ellis was notified verbally on May 5, 1987, that these two were selected for promotion. On May 5, 1987, a letter was placed in her work mailbox saying she had not been selected. Although she knew there was a letter in the mailbox for her, Cozzens-Ellis did not open the mailbox or the letter for several days.

Ms. DePagter began earning Security Supervisor 1 pay as of May 10, 1987, and first reported to her new job on May 13, 1987.

Cozzens-Ellis filed a charge of discrimination with the Commission against the University on June 11, 1987. She charged that she did not receive a promotion because of nepotism. The University moved to dismiss on grounds that the appeal was not timely.

An evidentiary hearing was held on November 11, 1987. The hearing examiner concluded that the effective date of the promotion was May 10, 1987, and that the appeal was not filed within the time limit of sec. 230.44(3), Stats. Cozzens-Ellis appealed to the Commission.

On September 26, 1988, the Commission issued its Final Decision and Order, concluding that the effective date of the action was May 4, 1987, the date upon which Chief Hanson selected the successful candidate and rejected the petitioner for promotion. Cozzens-Ellis appeals the attendant order dismissing her petition.

STANDARD OF REVIEW

On summary judgment, the moving party has the burden of establishing the absence of a genuine issue as to any material fact. Kremers-Urban Co. v. American Employers Insurance Co., 119 Wis. 2d 722, 734, 3521 N.W.2d 156 (1984). Because summary judgment is a drastic remedy, any reasonable doubt as to the existence of a genuine issue of material fact must be resolved against the granting of the motion. Heck & Paetow Claim Service, Inc. v. Heck, 93 Wis. 2d 349, 356, 286 N.W.2d 831 (1980). Summary judgment is not a trial on affidavits. Nelson v. Albrechtson, 93 Wis. 2d 552, 555-556, 287 N.W.2d 811 (1980).

Summary judgment procedure requires that I first look to the pleadings to determine whether a cause of action has been stated. Then I must examine the moving party's affidavits and other proof to determine whether a prima facie showing has been made which would entitle that party to judgment as a matter of law. Then the opposing party's affidavits and other proof must be examined to determine whether a defense has been raised or material factual issues exist which would entitle that party to a trial. Riccho v. Oberst, 76 Wis. 2d 545, 551, 251 N.W.2d 781 (1977).

Parties may not rest upon mere allegations or denials contained in the pleadings, but must, by affidavits or otherwise, set forth specific facts which establish the

existence of disputed issues of material fact. Maynard v. Port Publications, 98 Wis. 2d 555, 561, 297 N.W.2d 500 (1980); Section 802.08(3), Stats.

DECISION

Section 230.44(3), Stats., provides, in material part that:

> Time limits. Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified on the action, whichever is later.... (Emphasis added).

The parties agree that Cozzens-Ellis had notice on May 5, 1987, and that the appeal was not filed until June 11, 1987. Yet, petitioner contends the appeal was timely because the "effective date of the action" was May 13, 1987, when the successful job candidate reported to work at the new position. She argues that "effective date of the action" is ambiguous thus requiring construction consistent with the statutes legislative intent. Cozzens-Ellis also asserts that even if she did not file her appeal in a timely fashion, sec. 230.44(3), Stats., should be tolled in equity because she reasonably relied on the Wisconsin Administrative Code's definition of "appointment" as being the date when the employee first reports to the new job.

The respondent argues that the Commission's interpretation and application of the statute is reasonable and rational and that this court should defer to the

expertise of the Commission in its review of personnel decisions under sec. 230.44(3), Stats. Furthermore, the Commission argues that the theory of equitable tolling is inapplicable here since the petitioner never alleged that the University took any fraudulent action, after denial of the promotion, which prevented her from discovering the alleged wrong.

I agree that the statutory language is ambiguous. Reasonable persons could disagree as to what constitutes "effective date of the action" for the purposes of sec. 230.44(3), Stats. Therefore, I look to its history and the object of the statute to determine the intent of the legislature. State v. Skow, 141 Wis. 2d 49, 53, 413 N.W.2d 650 (Ct. App. 1987).

Petitioner argues that the Commission erred in not considering sec. ER-Pers 1.02(1), Wis. Adm. Code in interpreting "effective date of the action." Section ER-Pers 14.01, defines a promotion as follows:

> Promotion means the permanent appointment of an employee with permanent status and class to a different position in a higher class that the highest position currently held in which the employee has permanent status in class. (Emphasis added).

Section ER-Pers 1.02(1), Wis. Adm. Code, provides:

> 'Appointment' means the action of an appointing authority to place a person in a position within the agency in accordance with the law and these rules. An appointment shall be effective when the employee reports for work or is in paid leave status on the agreed starting date and time. Acting assignments under Ch. ER-Pers 32 are not appointments.
> (Emphasis added).

According to the petitioner, the Commission's holding conflicts with the definition of "appointment" set forth in sec. ER-Pers 1.02(1).

The respondent, however, contends that the Commission properly rejected Cozzens-Ellis' argument in its decision when it noted:

> [I]n the Commission's view, the subject matter of this appeal is inextricably tied to respondent's failure to have promoted appellant. There presumably would have been no basis for an appeal of Ms. DePagter's promotion if appellant had not been passed over in the process. Looking at the action appealed as the failure or refusal to promote appellant, it does not follow that the effective date would be the effective date of someone else's--i.e., Ms. DePagter's--promotion. Rather, the effective date would be the date (May 4, 1987), as set forth at Finding #3, when Chief Hanson selected the other candidate, and necessarily rejected the appellant, for promotion.

The Wisconsin Supreme Court has stated:

> ...the construction and interpretation of a statute by the administrative agency which must apply the law is entitled to great weight and if several rules or applications of rules are equally consistent with the purpose of the statute, the court should defer to the agency's interpretation ....In general, the reviewing court should not upset an administrative agency's interpretation of a statute if there exists a rational basis for that conclusion....(Citations omitted).

Environmental Decade v. DILHR, 104 Wis. 2d 640, 644, 312 N.W.2d 749 (1981).

The Commission concluded that the effective date of action is the date that Chief Hanson decided not to promote Cozzens-Ellis to the Security Supervisor 1 position. This is a rational interpretation of the statute, and, in deference to the Commission should be affirmed.

But even without such deference, I think the Commission's interpretation is correct. Cozzens-Ellis points to the evolution of the statutory language and argues that the legislature had "displayed a very clear intent to expand the appeal rights of employees" and that "[t]he filing periods are intended to meet an employee's interests, not the employer's interests." Cozzens-Ellis asserts that, consistent with the legislature's intent, the effective date of action must be construed as the day that the newly promoted employee starts his or her new job. According to the petitioner, "it is at this point than [sic] an employee can put together the pieces of whether she or he was involved in a tainted hiring process." I cannot agree.

The purpose of sec. 230.44(3), Stats., may be found in sec. 230.01, Stats.:

> Statement of policy. (1) It is the purpose of this chapter to provide state agencies and institutions of higher education with competent personnel who will furnish state services to citizens as fairly, efficiently and effectively as possible.

I agree with the Commission's assertion that the statutory time limit is of great importance, not only to state employees but to the appointing authority as well. Although the petitioner may not agree with the time limitations established under the statute, that is a matter for the legislature, not the courts. As the Wisconsin Supreme Court noted, "[w]here the pathway to recovery has been narrowed by legislation, it is the legislature which alone can broaden that pathway." Frisbie v. ILHR Dep't., 45 Wis. 2d 80, 85,

172 N.W.2d 346 (1969).

Furthermore, the petitioner's argument that the effective date in when the promoted employee reports to the new job rests on the erroneous assumption that the "non-selected" employee would always have knowledge of the promoted employee's starting date. I can envision situations where the rejected employee would not be aware of this fact. Employees might work on different shifts or at different locations so that the rejected employee might never have an opportunity to see the promoted employee in the new position. Therefore, this cannot in logic have been the construction the legislature intended.

Petitioner also contends that, even if she did not file her appeal with the statutory time limit, the statute should be equitably tolled. She claims reasonable reliance on the administrative code's definition of "appointment."

The elements of equitable estoppel are described in Goeltzer v. DVA, 82-11-PC (5/12/82):

> The only circumstances under which [dismissal for filing outside the 30 day limit] can be avoided are those which give [rise] to an equitable estoppel. Equitable estoppel has been defined as 'the effect of voluntary conduct of a party whereby he or she is precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct.' Porter v. DOT, 78-154-PC (5/14/79). In order to establish estoppel against a state agency, ' acts of the state agency must be proved by a clear and distinct evidence and must amount to fraud or a manifest abuse of discretion. Surety Savings & Loan Ass'n v. State of Wisconsin (Division of Highways, 54 Wis. 2d 438, 195 N.W.2d 464 (1972).

In the present case, the petitioner never alleged that

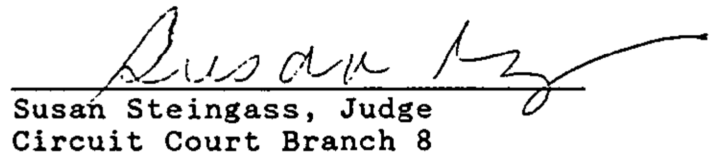
the University took any action after denial of the promotion that amounted to fraud or precluded her from asserting any rights to appeal. In fact, she conceded that the University gave her written notice of her rejection on May 5, 1987. Therefore, the elements of equitable estoppel are not present here.

CONCLUSION

The decision of the Wisconsin Personnel Commission is AFFIRMED. IT IS SO ORDERED.

Dated this 17th day of April, 1989.

BY THE COURT:



Susan Steingass, Judge
Circuit Court Branch 8