appl. from Siebers v. DHSS, 87-0028-PC, 4/22/89

STATE OF WISCONSIN: CIRCUIT COURT BRANCH I : OUTAGAMIE COUNTY

Case No. 89 CV 00578

NORBERT SIEBERS,

Petitioner,

-vs-

WISCONSIN PERSONNEL COMMISSION,

Defendant.

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Personnel Commission

DECISION

Petitioner seeks a review of the Personnel Commission's April 28, 1989 Decision and Order affirming the Department's decision to set Petitioner's hourly rate at $8.352 per hour instead of $8.522 per hour as a Facilities's Repair Worker 3.

An agency's findings of fact are conclusive if supported by substantial evidence in the record. Gilbert v. Medical Examining Board, 119 Wis. 2d 168, 195, 349 N.W.2d 68, 80 (1984). The commission determines the weight of the evidence and the credibility of the witnesses. Samens v. LIRC, 117 Wis. 2d 646, 660, 345 N.W.2d 432, 438 (1984). There is no dispute as to the facts; the parties submitted a factual stipulation. Petitioner took a Civil Service exam and was interviewed on January 6, 1987. Petitioner was offered the job at $8.522 per hour in a January 8, 1987 telephone conversation. Petitioner informed his supervisors he had accepted the position and on January 12, 1987 a confirmation

letter was sent to Petitioner setting the effective date of appointment as February 2, 1987. The Comparable Worth Bill changed the salary rate for this position to $8.352, effective February 1, 1987. Petitioner reported for work on February 2, 1987. A memorandum discussing the new salary ranges affected by the Comparable Worth Study was received February 11, 1987, that same date Petitioner was informed of the decreased pay, and on July 1, 1987 Petitioner received a raise bringing his wages up to $8.603 per hour.

Petitioner argues that equitable estoppel applies against the State. Although an administrative agency's conclusions regarding statutory interpretation are entitled to deference on appeal when the agency's experience, technical competence and specialized knowledge aid in its interpretation, a court is generally not bound by an administrative agency's conclusions of law, Robert Hansen Trucking, Inc. v. LIRC, 126 Wis. 2d 323, 331, 374 N.W.2d 151, 155 (1985). This case presents a question of interpretation of case law on general principles of equitable estoppel and does not involve interpretation of a statute with which the agency has familiarity. Because this Court finds that the Commission's decision incorrectly interpreted equitable estoppel case law, this Court reverses the Commission's Decision, and finds for Petitioner.

Equitable estoppel has three elements: "(1) Action or nonaction which induces, (2) reliance by another, (3) to his or her detriment." City of Madison v. Lange, 140 Wis. 2d 1, 6, 408 N.W.2d 763 (1987), [quoting Gabriel v. Gabriel, 57 Wis. 2d 424,

429, 204 N.W.2d 494, 497 (1973).]

The party asserting equitable estoppel must prove it by clear and convincing evidence. The uncontroverted facts show that the elements of equitable estoppel are present. The State's action involved a promise of employment at $8.522 per hour. Petitioner, in reliance on the State's representations about the job and its terms, including the salary term, gave up his current job which, although it was of a limited term, was a "job in the hand". It is pure speculation whether Petitioner would or would not have accepted the position if he had been informed that the salary was gong to be $8.352, instead of the promised $8.522 per hour, because those are not the facts before us.

Petitioner was offered a job, he accepted it, and consideration was given in the form of a promise to pay $8.522 an hour in exchange for a promise to do that job for that level of pay. This Court does not agree with the Commission that the facts show no reliance on Petitioner's part. Quitting a job and showing up for the new position show Petitioner's reliance on the offer. An offer, acceptance and consideration form a contract, Briggs v. Miller, 176 Wis. 321, 325, 186 N.W. 163 (1925). Only after giving up a better paying job, accepting the new job and showing up for work at the new job did Petitioner learn that the salary would be $8.352 per hour, $.17 less per hour than the job offer to which he had agreed.

To apply equitable estoppel against a governmental unit, the acts of the State Agency must amount "to a fraud or a manifest

abuse of discretion." Surety Savings & Loan Assoc. v. State, 54 Wis. 2d 438, 445, 195 N.W.2d 464 (1972). It was this degree of conduct, amounting to fraud or abuse of discretion that the Commission did not find in its decision below; resulting in it denying equitable estoppel to Petitioner. The Commission determined that the salary information given Petitioner of $8.522 per hour was accurate information when given; therefore, there was no fraud or abuse of discretion.

However, case law provides further interpretation of what conduct may warrant asserting equitable estoppel against a governmental unit. In State v. City of Green Bay, 96 Wis. 2d 195, 203, 291 N.W.2d 508 (1980) the Wisconsin Supreme Court explained that the word fraud as used in this context is not used in its ordinary legal sense; the word fraud in this context is used to mean inequitable:

> The term `fraud' used by the court is not to be construed here as it is used in the ordinary sense--as an artifice, a malevolent act, or a deceitful practice.
> `The meaning here [in the application of the doctrine of estoppel] given to fraud or fraudulent is virtually synonymous with `unconscientious' or `inequitable.'

Further assistance is given in City of Madison v. Lange, 140 Wis. 2d 1, 7, "Before estoppel may be applied to a governmental unit, it must also be shown that the government's conduct would work a serious injustice and that the public interest would not be unduly harmed." [Quoting Dept. of Revenue v. Moebius Printing Co., 89 Wis. 2d 610, 638, 279 N.W. 2d 213, 225 (1979).]

A contract requires an offer, acceptance and consideration.

See Briggs, supra. Those three elements were present and a contract was created on January 10, 1987 when the letter of appointment was sent to Petitioner. Petitioner here, once the offer acceptance and mutual promises were made, is similar to the employees already working in that classification. Reducing Petitioner's salary because his reporting date on February 2nd, only one day after the effective date of the Comparable Worth Legislation and after the employment contract between the State and this individual was created, works a severe injustice to this individual if equitable estoppel is not applied against the State in this instance.

It is certainly in the public interest to implement the concept of comparable worth in the Civil Service arena, but future job applicants would be told of the salary for this position before they accept the position, and give up other employment, unlike the Petitioner here. The public interest will not be unduly harmed if equitable estoppel is applied in this case. It is simply inequitable to lower an employee's salary, even by only $.17 per hour, after he or she has quit another job and reported for work at the new job, in reliance on the promised salary.

The Petitioner draws our attention to two Dane County Circuit Court cases where equitable estoppel was applied against the State. Porter and Landaal, being Circuit Court Cases, are not binding on this Court. The Commission distinguished both of those cases (Porter v. DOT, No. 79 CV 3420, 3/24/80 and Landaal v. State of Wisconsin, No. 138-392, 11/21/73) on the basis that the State's conduct in those cases was a result of bad information given.

either from a misrepresentation of the Civil Service Code in Landaal or a representation made with no attempt to verify the accuracy of the representation in Porter. The Commission distinguishes these cases from the instant case on the grounds that the representation in this case was accurate when made but the standard in Green Bay explains that fraud in this context means inequitable. The representation to Petitioner may have been accurate when made, but the injustice that results to the individual is the same regardless of the truth of the representation.

The injustice to Petitioner did not continue indefinitely, however. He received a raise to $8.603 per hour on July 1, 1987, above the originally promised $8.522 per hour. Any injustice to Petitioner ceased at that time. Therefore, Petitioner's recovery of $.17 per hour should be calculated from his first day of work, February 2, 1987 to his raise on July 1, 1987.

Dated at Appleton, Wisconsin this 9th day of November, 1989.

BY THE COURT:

HON. JAMES T. BAYORGEON
CIRCUIT JUDGE BRANCH I
OUTAGAMIE COUNTY, WISCONSIN