STATE OF WISCONSIN PERSONNEL COMMISSION

DALE R. BRENON,
Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM,
Respondent.

Case No. 96-0016-PC

INTERIM
DECISION
AND
ORDER

NATURE OF CASE

This matter before the Commission involves an appeal of a suspension without pay and, later, a discharge brought pursuant to §230.44(1)(c), Stats. The Commission entered its decision and order with respect to the merits on February 12, 1998, but retained jurisdiction to consider and work out any remaining remedial entitlements. After a protracted period of time involving many failed attempts to even reach agreement on the amount of appellant's gross back pay, the parties agreed to table all motions and proceed toward resolving the matter by hearing. A hearing on the issue of remedy was held May 18, 1999. The parties agreed to the following subissues: "(1) What is the sum of appellant's back pay and other credits? (2) What is the sum of respondent's mitigating damages and setoffs? and (3) What is the total sum of appellant's remedy?" The parties gave oral arguments at the conclusion of the hearing.

FINDINGS OF FACT

1. By letter dated February 9, 1996, the University of Wisconsin-Milwaukee (UWM) terminated the employment of Dale Brenon with them, effective February 11, 1996. Just prior to that, on January 22, 1996, Brenon had been suspended by UWM for ten days without pay.

2. Brenon began employment at UWM in October 1974 as a police cadet. At the time of his termination, Brenon was serving with permanent status in class as a police sergeant.

3. Brenon appealed the actions taken against him by UWM to the Personnel Commission. The Commission rejected the suspension and modified respondent's (UWM's) decision terminating Brenon to ten days without pay in an Interim Decision and Order issued February 12, 1998.

4. The respondent did not reinstate appellant to his former position in accordance with the Commission order nor has it offered appellant any position since his termination in February 1996.

5. After his employment with UWM was terminated, appellant applied for the following positions in 1996: American Family Insurance Group - April 10, 1996; a driver position at the Blood Center of Southwest Wisconsin - April 24, 1996; Alpha Omega Security (where he was hired in July 1996); Director of Security, regional shopping mall, Denver, CO - October 10, 1996; security position, U.S. facility, Marshall Islands - October 18, 1996.

6. In July 1997 appellant applied for a civil service investigator position with Milwaukee County. Appellant received the following response: "Milwaukee County Civil Service Rule II, Section 7(2) provides that the Director of Human Resources may refuse to examine an appellant who: (d) has been dismissed for good cause from the public services. We are refusing to examine you because you were terminated for cause from the University of Wisconsin-Milwaukee."

7. Appellant appealed Milwaukee County's refusal to examine him to its Civil Services Commission. After a hearing in October 1997, the Commission sustained the refusal to examine appellant and referred the matter back to the Human Resources director for "appropriate action" to dispose of the matter.

8. In November 1997, appellant applied for a Communications Dispatcher position at North Shore Public Safety Communications Center, Whitefish Bay, WI. By

letter dated February 2, 1998, appellant was advised that his name was not included in the list of eligible candidates.

9. Since April 1999, appellant has worked for Dominican Management Services, Plymouth, MN, as a security agent at the apartment where he resides.

10. Between January 1996 and December 31, 1998, appellant's yearly income was $9,000 to $12,000.

11. During the period in question, appellant did not visit a state job service office or seek unemployment benefits, but he did attempt to obtain work through an employment agency.

12. Appellant's back pay without setoffs, between February 11, 1996, to May 1999, is $190,272.34. This total sum includes a quarterly 12 percent interest rate computation.[1] In addition, appellant has a credit of $391.70 for June and July 1999 health insurance premiums.

13. With setoffs, based on income tax returns and earning statements, appellant's back pay totals $159,533.64 (Resp. Exh. 21, 26, 27 and 28).

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.44(1)(c), Stats.

2. Respondent has the burden to show that appellant failed to exercise reasonable diligence to mitigate his damages, and that there was a reasonable likelihood that appellant might have found comparable work by exercising reasonable diligence.

3. Respondent has failed to sustain this burden.

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[1] The parties stipulated to respondent's exhibit R-20, a spreadsheet showing appellant's estimated back pay without setoffs, computed quarterly, between February 11, 1996, and May 22, 1999.

OPINION

At the start of the hearing on May 18, 1999, the parties stipulated to appellant's estimated back pay without setoffs through May 22, 1999 (Resp. Exh., R-20). Appellant never disputed this calculation of back pay, except to the extent that appellant had prepaid health insurance premiums for the months of June and July 1999 - a sum of $195.85 per month; and this was acknowledged by respondent. So the remaining legal issue concerns mitigating damages and setoffs.

The statutory basis for awarding relief in cases such as this, where an employe has been removed from his position in violation of the state classified service law, is provided in §230.43(4), Stats.:

> If an employe has been removed...from...employment in contravention, or violation of this subchapter, and has been restored to such...employment by order of the commission..., the employe shall be entitled to compensation therefore from the date of such unlawful removal.... *Interim earnings or amounts earnable with reasonable diligence shall operate to reduce back pay otherwise allowable....* The employe shall be entitled to an order of mandamus to enforce the payment on other provisions of such order. (Emphasis added.)

Very little guidance is provided in case law in regard to the proper interpretation or application of this statutory language. In *State ex rel. Schilling and Klingler v. Baird,* 65 Wis. 2d 394, 398-99, 22 N.W.2d 666 (1974), a case involving the suspension of two county deputy sheriffs, the court stated:

> This court has held that the burden of establishing the lack of reasonable and diligent efforts by the employees to seek other employment is on the employer. *Schiller v. Keuffel & Esser Co., supra,* page 553; *Barker v. Knickerbocker Life Ins. Co.* (1869), 24 Wis. 630, 638. Thus the question of whether such opportunities exist is primarily a question of fact and as such relates not to the existence of a legal duty on the part of Klinger and Schilling, but to the sufficiency of the evidence proving a violation of that duty. . . .

This court stated the rule in *Barker v. Knickerbocker Life Ins. Co., supra*, page 638, as follows:

> "...The rule in such cases is that although damages may be so reduced, yet the burden is on the defendant to show affirmatively that the plaintiff might have had employment and compensation elsewhere..."

In *Warren v. DHSS*, 92-0720-PC, 92-0234-PC-ER, 5/14/96, the Commission concluded that the mitigation of damages language in §230.43, Stats., paralleled language set forth in the Wisconsin Fair Employment Act (WFEA) in §111.39(4), Stats. Also, the "reasonable diligence" requirement to mitigate damages has been applied in deciding back pay issues in non-public employe and Family and Medical Leave Act (FMLA) cases, and in Title VII cases. *Marten Transport, Ltd. v. DILHR*, 171 Wis. 2d 147, 491 N.W.2d 96 (1992), *Kelley Co. Inc. v. Marquardt*, 172 Wis. 2d 234, 493 N.W.68 (1992), *Hutchison v. Amateur Elect. Supp., Inc. et al.*, 66 FEP Cases 1275 (7th Cir. 1994).

In *Hutchison v. AES, supra*, the court said that once a plaintiff has established the amount of damages resulting from the employer's conduct, the burden of going forward shifts to the defendant to show the plaintiff failed to mitigate damages or that the damages were, in fact, less than the plaintiff asserts; and that "[t]o establish the affirmative defense of a plaintiff's failure to mitigate damages, the defendant must show that: (1) the plaintiff failed to exercise reasonable diligence to mitigate her damages, and (2) there was a reasonable likelihood that the plaintiff might have found comparable work by exercising reasonable diligence (citation omitted)." With these cases as guidelines, we address the issue of mitigation of damages and setoffs, since appellant's gross back pay is not in dispute.

I. Mitigation of Damages

First, respondent contends that appellant failed to seek a job as a law enforcement officer and that appellant's back pay should be reduced by the amount he could

have earned as a law enforcement officer during the period of time in issue – some forty thousand dollars per year (Resp. Exh. 23).[2] Respondent's expert witness in the field of Employment and Hiring Standards (for Wisconsin law enforcement positions) testified about jobs posted in a monthly Department of Justice (DOJ) Law Enforcement Bulletin (Resp. Exh. 16); and that he believed appellant "could have been a competitive applicant [for such positions] in the sense that he was an experienced officer." Respondent argues that appellant did not call or visit the State Job Service office where these bulletins were available. The Commission does not find this argument and this testimony provided by the expert witness persuasive for the following reasons.

The expert witness testified that between February 1996 and the present there were a high number of qualified applicants for any given position. Further, the expert witness testified that appellant lost his police officer certification when terminated by UWM and that the DOJ Training and Standards Bureau would be required to notify any employer that appellant would need 120 hours of training for certification as a law enforcement officer.

Also, respondent's expert witness testified that, other than the Board standards, he did not know what qualifying rules, county or city, impact on the positions listed in the bulletin and did not know if appellant was eligible for any of them. While appellant did not go to the State Job Service office, he did register at an employment agency, circulate his resume, and look for positions noticed in newspapers. In addition, appellant's rejection by Milwaukee County (Finding of Fact 7) made it plain he was not apt to be a successful candidate for a law enforcement position.

Finally, the Commission issued a decision in February 1998, affirming an October 1997 proposed decision and order to reinstate appellant, but respondent elected not to abide it; and to the present date, respondent has not offered appellant any position in its coordinate responsibility to mitigate damages. Based on the evidence presented and

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[2] The $40,000/year amount was based on information provided to the author of R-23 by respondent's UWM Legal Services office.

for reasons stated, the Commission concludes that respondent failed to establish appellant violated his duty to mitigate damages.

Alternatively, respondent argues that its damages should be reduced by the amount appellant earned during the period in issue. Based on this calculation (Resp. Exh. 21, 26, 27 and 28), appellant's back pay with setoff of his earnings from February 11, 1996, to May 22, 1999, is $159,533.64 (Finding of Fact 13). The Commission agrees. One of the purposes of back pay is to make the individual victim of an unlawful employment action whole by putting the victim in nearly the same financial position had the unlawful employment action not occurred. Appellant argues that he could have earned this income even if he had been employed by respondent, but he offered no evidence that prior to termination he did work outside his regular job at UWM.

Respondent also argues that appellant's back pay should be reduced with setoffs totaling $110,332.80, as disclosed in appellant's bank statements as deposits during the period in issue. In support, respondent presented a spreadsheet (Resp. Exh. 24) with setoffs (column H) based on appellant's 1996-1998 bank statements (Resp. Exh. 15). The spreadsheet was prepared and explained in testimony by a UWM financial and personnel division administrator. Respondent presented no other evidence to substantiate this claimed setoff. When questioned about these bank statements, appellant testified that the bank deposits included funds obtained from multiple monthly credit card advances and loans from relatives. Appellant testified that he kept his accounts current by implementing the "robbing Peter to pay Paul" principle - covering one credit card advance by obtaining another one. Appellant also testified that he reported all earned income on his income tax return forms. Respondent's only rebuttal is its assertion that appellant's testimony was a falsification. Clearly the evidence presented failed to establish respondent's defense of bank deposit setoffs.

II. Matters of Procedure

During the adverse examination of appellant, respondent asked appellant whether he had a practice of making copies of certain documents and his counsel objected on the basis of relevancy. In response to the objection, respondent stated that it pertained to the issue of mitigation of damages. Respondent further explained that, through this line of questions to appellant and the testimony of another witness, it would show that UWM would have terminated appellant for misconduct in June 1996 if he had still been employed there; and that under the "after acquired evidence" theory, appellant's back pay damages should be cut off in June 1996, the date appellant would have been terminated by respondent because of the evidence acquired after the termination in issue.

After a recess, the examiner sustained the objection without explanation. The examiner granted respondent's request to make an offer of proof for the record, which included respondent's exhibit R-22, calculations of respondent's back pay liability based on the after-acquired evidence theory.

The Commission concludes that this ruling of the examiner was proper.[3] To have allowed this evidence would have unfairly required appellant to have tried to address a significant new issue in this case—in a nutshell, whether he had violated work rules by having improperly removed documents from the workplace, and whether such conduct would have led to his discharge in June 1996—without any prior notice that it would be raised in this proceeding.

Respondent argues that appellant should have been on notice because he had been questioned on the subject during a June 1996 deposition, and respondent's attorney had mentioned this in a July 20, 1998, letter to the Commission in opposition to appellant's motion for reinstatement. This letter includes the following:

> In addition, the State of Wisconsin has a separate legal action pending against Brenon. Because of the circumstances of that litigation, his presence in the workplace would be disruptive and cause irreparable harm to

[3] The following discussion is added to explain the rationale for the examiner's ruling and to address respondent's objection to this ruling in the proposed decision and order.

> the university. After Brenon was terminated, it was brought to my attention that during his employment, he very likely had copied and removed documents from the workplace containing confidential student and employee information which he had no right to remove. Informal attempts to convince him to return all copies of such documents were unsuccessful. In order to protect the privacy of individuals named in said records and mitigate potential liability for UWM because of Brenon's actions in this regard, the State of Wisconsin has commenced a replevin action in Milwaukee County Circuit Court.
>
> Brenon's presence in the workplace would give him access, in the course of fulfilling his job responsibilities, to the same types of confidential materials he has had access to in the past. . . .
>
> *If ordered to return Brenon to the workplace at this time, UWM would be forced to consider initiating a formal investigation, possibly resulting in disciplinary action against him,* for unauthorized possession of university property with regard to the records issue. This would unnecessarily complicate all pending matters. In the interests of judicial efficiency the parties should be permitted to pursue the replevin action *and* the appeal process, accepting that an order to remit backpay may result. (emphasis added)

The commission does not agree that the foregoing notified appellant that the issue of after-acquired evidence (concerning purloined documents) would be litigated as part of the damages phase of this case. Rather, this suggests that the document issue would continue to be pursued in respondent's separate replevin action, and, if appellant were restored to his employment pursuant to the commission's decision, would be raised by a new disciplinary action against appellant. Similarly, while, as respondent contends, the questioning of appellant concerning the documents during appellant's June 1996 deposition, and the filing of the replevin action, should have put appellant on notice that respondent took the document issue seriously, these factors would not have put appellant on notice that the issue would be raised in the context of the damages phase of this case. This conclusion is further supported by the procedural history of this case. Respondent did not raise the after acquired evidence issue during either the second discovery phase of this proceeding relating to remedy, or when the parties agreed to submit the issue of remedy on briefs to the hearing examiner. This briefing process was

complicated by a series of motions and document submissions, and the parties agreed to table all pending motions and resolve the remedy issue by a hearing before the hearing examiner. The parties agreed to the following statement of issues for hearing: "(1) What is the sum of appellant's back pay and other credits? (2) What is the sum of respondent's mitigating damages and setoffs? (3) What is the total sum of appellant's remedy?" Again, there was no mention of after acquired evidence, and appellant was justified in anticipating that the issue of the purloined documents would be addressed in the pending replevin action and/or a new disciplinary action following appellant's restoration to his former job. Finally, appellant points to respondent's statement in a May 14, 1999, memo and settlement offer about what process would be followed if appellant were to be restored as a result of the commission's decision on the merits: "After the final decision we also intend to reinstate your client and initiate the discipline process because of his gross violation of the records policies." (Attachment to appellant's response to respondent's objection to proposed decision and order.) This statement is inconsistent with the notion that appellant should have been aware that the records issue would be raised in the hearing on damages. Respondent objects to the consideration of this document, citing §904.08, Stats.:

> Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution.

This section leads to the result that "[e]vidence of offers to settle and related statements during the negotiations may be admitted if offered to prove any relevant proposition *other* than the validity of the disputed claim or its amount." 7 DANIEL D. BLINKA, WISCONSIN PRACTICE 152 (1991) (emphasis added) Appellant is not offering this statement to prove the validity or amount of his claim, but rather to prove that he was

not on notice that respondent intended to raise the issue of purloined documents during the damages hearing. Therefore, it is admissible. In any event, even if this statement were not considered, there is sufficient other evidence to support appellant's notice argument, as discussed above.

Respondent also contends that even if the hearing examiner's ruling on the after acquired evidence had been proper, the examiner should at least have continued the hearing to obviate the problem of notice to the appellant by giving him time to prepare to respond to the missing documents issue. As appellant points out in his response to respondent's objections to the proposed decision and order, respondent did not request a continuance at the time when the issue of the after acquired evidence was before the examiner. Also, given the long and complex procedural history of this case, including the notice problem discussed above, further postponement was not indicated. There is also a question as to whether it would violate the civil service code to sanction what would be in effect the retroactive addition of reasons for the discharge of the appellant. *See, e. g., Liethen v. WGC,* 93-0095-PC, 10/20/93 (once written notice of reasons for discharge are provided and an employe is discharged on that basis, new charges can not be added as an additional basis for discharge); *Alff v. DOR,* 78-0227-PC, 3/8/79 (respondent could not amend discharge letter to add two charges which were not known to the respondent prior to the discharge letter). However, because the commission concludes that lack of notice precludes litigation of the issue of the missing documents at this point in the remedy process, it will not address the question of whether injecting this issue into this case at this time would violate the civil service code.

Respondent also argues it had an inadequate opportunity for discovery during the remedy stage of this proceeding. At the prehearing conference held on April 28, 1999, the parties agreed to table all motions and to resolve the outstanding issues at a hearing on remedy, which was held on May 18, 1999. To the extent respondent had any outstanding issues on discovery at that time, it waived them by agreeing to proceed in this fashion.

ORDER

Respondent's action of discharging appellant is rejected and this matter is remanded to respondent for action in accordance with this decision. Respondent is required to immediately offer appellant reinstatement to his former position or its equivalent.

The amount of back pay and benefits actually due appellant pursuant to this decision must be recalculated so that it is current as of the date of payment, thereby reflecting the appropriate amount of interest.

Dated: September 1, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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