STATE OF WISCONSIN | CIRCUIT COURT BRANCH 1 | COUNTY OF DANE

ROBERT CHIODO
Petitioner,

v. Case No. 01CV1662

WISCONSIN PERSONNEL COMMISSION
Respondent.

**DECISION AND ORDER**

## I. INTRODUCTION

Pursuant to Wis. Stat. §§ 227.52 through 227.57 and in conjunction with Wis. Stat. § 111.375(2), Robert Chiodo, the Petitioner, seeks review of a Wisconsin Personnel Commission (WPC) decision under the Wisconsin Fair Employment Act (WFEA), which dismissed his action based on age discrimination and retaliation on mootness grounds. For the reasons discussed below, the Court sustains the WPC decision.

## II. FACTS

The events leading up to this decision extend back over a decade. On 1 January 1987, Chiodo accepted an employment offer from the University of Wisconsin-Stout (UW-Stout) as Associate Director of Computer Services. Two years later, when Chiodo's immediate supervisor received a special assignment, the Petitioner agreed to serve as the acting Director of Administrative Computing while a replacement was found. From 24 April to 1 October 1989, Chiodo operated as director without any apparent problems. (Br. of Wisconsin Personnel Commission, 1-2.) (Hereafter, Br. of WPC.)

On 9 July 1990, Jan Womack, the Assistant Chancellor of Administrative Services appointed Rex Patterson as the new Director of Administrative Computing. Patterson, at the time assigned, was thirty-seven years old; Chiodo was fifty-six.[1] Chiodo found himself during the period of 9 July 1990 to 14 November 1991 on medical leave.[2] Despite his absence, Chiodo filed a WFEA complaint against UW-Stout alleging that the University failed to hire him as Director of Administrative Computing due to his age. UW-Stout, through Womack, asserted that Patterson received the position in view his "superior communication and interpersonal skills. On 25 June 1996, however, the WPC determined that UW-Stout did, in fact, discriminate against Chiodo on the basis of age. (Id., 2.)

The WPC issued its written decision on the 1990 complaint in July 1997. In its conclusion the WPC found that had Womack appointed Chiodo to acting Director of Computing Services, he would have received, as Patterson did, the position of Director of Computing Services. As a result of this finding, the WPC order UW-Stout to place Chiodo as the Director of Computing Services when the position reopened or a comparable post emerged. The order also specified that Chiodo should receive back pay and benefits from July 1990 until the University placed him in the required job. Additionally, the WPC ordered UW-Stout to pay Petitioner's attorney fees and costs. As a result, the University appointed Chiodo as Director of Computing Services in early 1998 and, after appealing a court decision supporting the WPC, reached a settlement

[1] On 9 July 1990, Patterson became acting director and not until 1 July 1991 did he received the position permanently. (Br. WPC, 2.)
[2] Chiodo, prior to his medical leave of absence suffered two heart attacks. (Pl./Pet'r's Opening Br. in Supp. of Pet. for Review, 1.)

agreement paying the Respondent $196,003, all relevant benefits, and attorney fees of $160,109.94. (Id., 2-3.)

All was not well, however. Prior to the resolution of the 1990 complaint, Chiodo had, in July of 1993 filed an additional WFEA complaint against UW-Stout. This time, Chiodo alleged that the University retaliated against him when its employees failed to select him for the position of Director of Computing Services, which had again become vacant in early 1993. Later, the Respondent amended the complaint to include age discrimination and concomitantly retaliation. A WPC equal rights officer, after investigating Chiodo's claim, concluded that probable caused existed regarding the claims forwarded by Petitioner. (Id. 4.)

At a pre-hearing conference on 29 November 1994 conducted by the equal rights officer, Chiodo and UW-Stout agreed to consolidate the 1990 and 1993 complaints. The parties also resolved that the 1993 complaint's issue would center on whether '"respondent discriminate[d] against complainant on the basis of his age and/or retaliate[d] against him for engaging in fair employment activities when respondent did not hire complainant for the position of Director of Computer Services "' (Id.) Furthermore, the "agreed issue for hearing", as found in the WPC's conference report and notice of hearing, contained nothing in reference to Chiodo's terms and conditions of employment following his medical leave of absence. Prior to the hearing, though, the Petitioner requested that the 1993 complaint be held in abeyance so he could seek redress under the federal Age Discrimination in Employment Act (ADEA).[3] As stated above, the 1990 complaint was resolved in 1997 and on 20 July 2000, Chiodo notified the WPC of the dismissal of his federal action based on his 1993 action.

On 20 July 2000, UW-Stout moved the WPC to dismiss the 1993 complaint on the basis of mootness. The University asserted that any resolution of the 1993 action would have no practical effect on an existing controversy. Primarily, UW-Stout pointed to the fact that Chiodo had, as a result of his 1990 action, been assigned to the position he sought, had received his full back pay due him, been granted a ruling recognizing the fact that UW-Stout employees had discriminated against him and, among other things, received reimbursement for attorney fees. After careful review, the WPC agreed with the arguments presented by UW-Stout's counsel concerning mootness and dismissed the action accordingly. (WPC Br., 5.)

## III. STANDARD OF REVIEW

a. Wis. Stat. § 227 Review

Wis. Stat. § 227.57(6) cautions a court that it may not substitute its judgment for that of a reviewing agency or board. Instead, a court must ascertain whether the agency's findings of fact have grounding in substantial evidence. See id. If a court finds a board's decision based on substantial evidence, it may not set aside the findings of fact. See id. Concerning statutory interpretation, however, a court is not bound by an agency's reading. See UFE Inc. v. LIRC, 201 Wis.2d 274, 284, 548 N.W.2d 57, 61 (1996).

A court should, though, defer to an agency's interpretation when the legislature has charged the bureau with the duty of administering the statute in question. See id. Moreover, if the agency's perception of the statute proves long-standing, a court must afford great weight to the interpretation. See id. Additionally, if a commission or board employs its expertise or specialized knowledge in forming the approach a court again

[3] This occurred on 8 June 1995.

must give great weight to the presented understanding. See id. A court should also grant great weight to a bureau's reading of a statute if it provides uniformity and consistency in the application of the statute. See id. Finally, a court should also give great weight to an agency's interpretation if it is intertwined "with factual determinations or with value or policy determinations." Kennenberg v. LIRC, 213 Wis.2d 373, 385, 571 N.W.2d 165, 171 (App. Ct. 1997).

Due weight is required only when an agency has some experience in an area, but has not developed the requisite expertise and knowledge required for great weight deference. See UFE Inc., 201 Wis.2d at 286, 548 N.W.2d at 62. As such, an agency's position in a matter proves relatively equal to that of a court's. See id. Simply outlined, under great weight deference a court must uphold a judgment of an agency if it is not contrary to the clear meaning of the statute—even if a the court concludes another interpretation proves more reasonable. See id. at 287, 548 N.W.2d at 62. Under due weight deference, however, a court should sustain a board's resolution only if it comports with the purpose of the statute involved and the bench concludes that no other, more reasonable, interpretation exists.[4] See id.

b. Mootness

In Wisconsin's Environmental Decade, Inc. v. Public Service Commission, 79 Wis.2d 161, 171, 255 N.W.2d 917, 923-24 (1977), the state's supreme court turned to a decision it wrote in 1943 to outline the elements for a motion to dismiss for mootness. The supreme court stated:

> In Duel v. State Farm Mutual Automobile Insurance Co., 243 Wis. 172, 174-75, 9 N.W.2d 593 (1943), the court expressly held that a motion

[4] The Court need not delve into *De novo* review's standard since it clearly proves inapplicable in this action.

> to dismiss for mootness cannot be considered a motion for summary judgment because the motions are different in character and raise different issues. A motion for summary judgment asks the trial court to determine if any fact issues exist to be tried and, if not, to decide the case on its merits. A motion to dismiss for mootness, on the other hand, does not involve the determination if there are any triable issues of fact and does not request a determination on the merits. When a case is dismissed because the issues therein have become moot, the rights of the parties are not adjudicated, and neither party is entitled to judgment. All that is involved when a case is dismissed upon the ground of mootness is a conclusion by the court that the determination sought cannot have any practical effect upon an existing controversy. [See] City of Racine v. J. T. Enterprises of America, Inc., 64 Wis.2d 691, 700, 221 N.W.2d 869 (1974). The purpose of a dismissal for mootness is simply to prevent an unnecessary expenditure of time by the court and parties.

Mootness does apply to Wis. Stat. § 227 reviews. See Wisconsin Environmental Decade, Inc. 79 Wis.2d at 171-72, 255 N.W.2d at 924.

## IV ANALYSIS AND DISCUSSION

Despite the efforts of Petitioner to assert his need for further redress regarding his 1993 claim, the case distills down to the fact that the WPC operated well within its boundaries and followed established procedure when it answered UW-Stouts' counsel's request to dismiss the action for mootness in the affirmative. As illuminated in the Standard of Review above, the Court can set aside an order of a commission such as the WPC only if the agency has "erroneously interpreted a provision of law . " Wis. Stat. § 227.20(5). The pith of this action stems from the law surrounding mootness. After review of the record the Court finds that the WPC relied on a proper interpretation of the doctrine of mootness; moreover, based on the WPC's experience in this area of law and

the intertwined nature of the facts and the law, the Court grants great weight deference to the WPC in this matter.

In framing his arguments concerning the WPC's mootness decision, Petitioner has relied extensively on Watkins v. Dep't of Labor, Indus. and Human Relations, 69 Wis.2d 782, 233 N.W.2d 360 (1975). In Watkins, the Wisconsin Supreme Court held that plaintiffs are, at the least, entitled to an authoritative determination of discrimination. In this case, a state agency passed over the plaintiff simply because of her race. Complicating the issue, though, the "promotion" did not carry additional remuneration, benefits, or status. Instead, the position sought by Watkins simply allowed a social worker to carry a lighter caseload, allowing more involvement in the matters affecting assigned clients. In the interim between Watkins's filing of a complaint and the hearing, the plaintiff received the promotion originally sought. Due to this, the Wisconsin Department of Labor, Industry, and Human Relations found the case moot, since Watkins had obtained the relief prayed for. The supreme court disagreed; holding that the discrimination directed toward Watkins required notice as well as an order to cease further discrimination. See id. at *passim*, 233 N.W.2d at *passim*.

Chiodo goes to great length to argue that Watkins applies to the situation regarding his 1993 complaint. The Court notes that significant differences do exist. First, Watkins, on appeal had yet to receive any recognition of wrong-doing by her employer. As the court stated,

> Presumably the mootness in this case rests upon the claim that a determination on discrimination 'cannot have any practical legal effect upon the existing controversy. It is true that Watkins cannot be awarded any monetary damages for back pay (since there was no difference in pay between the two positions). Nor can an affirmative order requiring immediate transfer be entered (since she has already been transferred).

> But, as the hearing examiner originally recommended, the department can, if discrimination is found, enter an order which would have the practical, legal effect of requiring that Watkins be considered for all future transfers on the basis of her qualifications and ability, and without regard to race. The department can also, if discrimination is found, enter an order requiring that Watkins be treated fairly and equally in the processing of future grievances.

Id. at 793, 233 N.W.2d at 365-66. This Court agrees with the supreme court's determination that "it is harsh to suggest that a finding on discrimination would serve no purpose." Id. The Court points out, however, that the WPC has not made such a "harsh" holding.

The Petitioner's complaint filed in 1993 contains two principle assertions. First, that UW-Stout's employees unlawfully discriminated and retaliated against Chiodo when it failed to hire him as Director of Computing Services in 1993. And, second, the University's personnel unlawfully discriminated and retaliated against the Petitioner in the terms and conditions of his employment after November of 1991. The WPC's decision based on the 1990 complaint dealt not only with these allegations but concomitantly with the claims raised by the 1993 complaint.

When the WPC reached its decision on the 1990 complaint, it acknowledged that UW-Stout's employees had discriminated against Chiodo due to his age. Additionally, the conclusion ordered UW-Stout's administration, faculty, and staff—whoever proved engaged in the unlawful conduct described in the 1990 complaint—to stop such behavior. In Watkins's case, no such judgment existed when the action went before the court. Had the record in Watkins contained more than a mere initial determination of discrimination, which simply permitted her action to move forward, the outcome could easily have paralleled the WPC's finding of mootness in this action. See id. at 787, 233 N.W.2d at

363. As it stands, the WPC, and now the Court, can do nothing that already has not occurred; WPC's order regarding the 1990 lawsuit answered Chiodo's prayer for relief in the 1993 litigation—for both the age discrimination and retaliation claims.

In 1998, after the written WPC decision came out, UW-Stout's administration appointed Chiodo as the Director of Computer Services. Back pay, all relevant benefits, affirmation of discrimination, and an order to stop any further related activities were included in this commission. The WPC's holding finding the 1993 action moot proves well founded in law and the facts. This, coupled with the great weight deference granted to the WPC by the Court, evinces a clear application of the mootness doctrine to the 1993 claims.

The Petitioner has also raised an argument focused his desire to introduce additional evidence of discrimination and retaliation that has emerged since 1993. Chiodo failed to present this evidence to the WPC during its proceedings and now wishes this Court to review it or remand the case to the Commission for further taking of evidence. Wis. Stat. 227.56(1) states,

> If before the date set for trial, application is made to the circuit court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence be taken before the agency upon such terms as the court may deem proper.

All of the evidence Petitioner now desires to introduce occurred during the interim period between the filing of his 1993 complaint and the WPC's hearing. The Court cannot find any good reason for Chiodo's failure to present this evidence to the WPC during the

actual proceeding. The Court pursuant to Wis. Stat. § 227.56(1) exercises its discretion and refuses to remand the case for further taking of evidence.[5]

## V CONCLUSION

The WPC interpretation of the doctrine of mootness comports with the general application of this particular facet of the law. Moreover, but for the Petitioner's aspiration to have the 1993 complaint heard in federal court, this matter would have concluded with the WPC's 1997 decision on Chiodo's 1990 complaint.[6] As it stands, nothing the WPC or this Court could do to redress Petitioner's 1993 complaint has not already occurred. Petitioner's failure to introduce additional evidence regarding discrimination or retaliation, even if he could introduce it, does nothing to suggest a possible alternative outcome in this case; again, the Court, along with the WPC, concludes everything asked for in the 1993 complaint has been granted as a result of the 1990 complaint's disposition. As such, the WPC's dismissal of the 1993 complaint stands.

## VI. ORDER

For the reasons explained above, the decision of the WPC is AFFIRMED.

**IT IS SO ORDERED**

Dated this 13 day of June, 2002

[5] The Court notes that the Petitioner apparently has filed a third complaint, which can be amended to include this evidence if he so desires.

[6] Again, the Court indicates that both parties had agreed to consolidate the 1990 and 1993 complaints. The Court directs the parties' attention to the doctrine of claim preclusion, which provides that "a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which *might* have been litigated in the former proceedings." DePratt v. West Bend Mut. Ins. Co., 113 Wis.2d 306, 310, 334 N.W.2d 883, 885 (1983) (Emphasis added).

BY THE COURT

Judge Robert A. DeChambeau
Dane County Circuit Court-Branch 1

cc. Michael R. Fox
Richard Moriarty
David C. Rice