STATE OF WISCONSIN CIRCUIT COURT BRANCH 7 DANE COUNTY

AVELINO PONTES,

Petitioner,

v. Case No. 01-CV-3588

WISCONSIN PERSONNEL COMMISSION and WISCONSIN DEPARTMENT OF TRANPORTATION,

Respondents.

DECISION AND ORDER

Petitioner, Avelino Pontes, seeks review of two decisions of the Wisconsin Personnel Commission: one denying him relief under the Wisconsin Fair Employment Act,[1] and the second, denying his motion for rehearing.[2] *See* Wis. Stat. §§ 111.31 – 111.395, 227.49. In the first decision, the Commission found that the Department of Transportation (DOT) did not discriminate or retaliate against Mr. Pontes in regards to his termination after a probationary period, nor did the DOT unlawfully discriminate in regards to an alleged forgery of his signature on his final time sheets. In the latter decision, the Commission found that a rehearing was not warranted since petitioner did not meet the standards established in Wis. Stat. §227.49(3).

[1] *Pontes v. DOT*, 99-0086-PC-ER, 10/18/01.
[2] *Pontes v. DOT*, 99-0086-PC-ER, 12/4/01

RECEIVED
OCT 11 2002
PERSONNEL COMMISSION

BACKGROUND[3]

Petitioner, Avelino Pontes is black and a native of Guinea. He has earned a B.S. in Mechanical Engineering and Statistics. Effective December 7, 1998, Mr. Pontes was appointed to an Information Systems Programmer Analyst – Intermediate position in the DOT's Bureau of Automation Services. The appointment came via an interdepartmental transfer from the Department of Health and Family Services, and was subject to a six-month permissive probationary period. Steve Borth, an Information Systems Supervisor at the DOT, interviewed and hired Mr. Pontes.

At the time he was hired, Mr. Pontes, concededly, did not have all of the skills necessary for the position. Nonetheless, both parties felt that petitioner could acquire the necessary skills to meet the goals laid out in a document entitled "Performance, Appraisal & Development Report." *See* Ex. R3. Among the goals and expectations outlined in the document are that Mr. Pontes be able to "[d]irect and/or assist in the strategic development and implementation of complex departmental information technology systems," and "[p]erform lead analyst/ programmer functions on complex information technology systems. *Id.*

Shortly after petitioner was given his first assignment, problems arose. Darren Powers, the DOT employee assigned to act as Mr. Pontes' mentor in some areas, and Catherine Puisto, a DOT co-worker and project leader on Mr. Pontes' first project, began to note difficulties with petitioner. Among the problems were lack of communication, difficulty in meeting deadlines, poor performance and poor understanding of the work he was doing. Around this time, late December 1998, Mr. Borth took certain measures to

[3] The facts are taken from *Pontes v. DOT*, 99-0086-PC-ER, 10/18/01 pp. 1-10.

more closely monitor Mr. Pontes' performance, including keeping of a log of Mr. Pontes' performance on an almost daily basis and giving Mr. Pontes an interim evaluation. *See* Ex. R4. The concern of his fellow employees and his supervisor must have become apparent to Mr. Pontes because on March 22, 1999 he sent a letter to Mr. Borth informing Mr. Borth that petitioner did not feel he was being treated the same as other employees. *See* Ex. C2, pp. 2-3. In particular, Mr. Pontes felt he was being scrutinized more carefully than others in the department.

By the spring of 1999, Mr. Borth did not find Mr. Pontes' improvement to be sufficient. On May 7, 1999, Mr. Borth advised petitioner that his performance was unsatisfactory, and his employment was terminated effective May 22, 1999. During this meeting, Mr. Borth felt Mr. Pontes had become agitated to the extent it was necessary to contact capitol police to ensure he did not act out or commit some other untoward act.

Since Mr. Pontes had been terminated and was no longer on the DOT premises, Mr. Borth later prepared, signed and initialed (with Mr. Borth's initials) time sheets for Mr. Pontes to ensure that he would be paid. There was some confusion concerning the use of vacation time, but the error was corrected and petitioner was not charged vacation time.

Mr. Pontes was replaced by a white person, not of foreign birth.

On May 20, 1999, Mr. Pontes filed a complaint with the Personnel Commission against the DOT and Mr. Borth alleging unlawful discrimination on the basis of race, color and national origin, and unlawful retaliation by the DOT for protected activities, i.e. writing the March 22 letter. He later amended his complaint on December 3, 1999 to include unlawful discrimination and retaliation in regards to the "forgery" of his time

sheets. The parties agreed to try these two issues before the Personnel Commission, which hearing was held on December 4-6, 2000 and February 1, 2001. The Personnel Commission found that the DOT had not unlawfully discriminated or retaliated against Mr. Pontes.

Mr. Pontes petitioned the Commission for a rehearing, but was denied because the petitioner, in the view of the Commission, "ha[d] not established any material errors of fact or law or ... 'discover[ed] ... new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence,'" and therefore, failed to meet the standard for rehearing. *Pontes v. DOT*, 99-0086-PC-ER, 12/4/01, p. 4 (*citing* Wis. Stat. §227.49).

Petitioner seeks judicial review of both decisions.

DECISION

A. STANDARD OF REVIEW

In a review of an agency decision by a court under Wis. Stat. §§ 227.52 and 227.53, review of the facts is limited to review of the agency's actions, based on the record before the agency. *See* Wis. Stats. § 227.57. "The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion." Wis. Stats. § 227.57(3).

Review of facts is subject to the "credible and substantial evidence" standard.

> If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

Wis. Stat. § 227.57(6).

> [W]e will uphold the hearing examiner's findings of fact as long as they are supported by substantial evidence in the record. The test is whether, taking into account all of the evidence in the record, "reasonable minds could arrive at the same conclusion as the agency." The findings of an administrative agency do not even need to reflect a preponderance of the evidence as long as the agency's conclusions are reasonable. If the factual findings of the administrative body are reasonable, they will be upheld.

Kitten v. DWD, 252 Wis.2d 561, 569, 644 N.W.2d 649 (2002) (citations omitted).

Review of an agency's determinations of law is somewhat different. A reviewing court applies different standards depending on the agency's expertise and experience with the matter in question. *See Bd. of Regents v. State Personnel Commission*, 2002 WI 79, ¶ 28, __ Wis.2d __, 646 N.W.2d 759.

> First, if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to 'great weight.'" Second, if the agency determination is very nearly one of first impression, the agency determination is entitled to "due weight." Third, if the issue is one of first impression for the agency and the agency lacks special expertise or experience in its determination, our standard of review is de novo.

Id. (*citing Kelley Co. v. Marquardt*, 172 Wis.2d 234, 244, 493 N.W.2d 68 (1992).

If a matter is within the delegated discretion of an agency " the court shall not substitute its judgment for that of the agency on an issue of discretion." Wis. Stat. § 227.57(8). The agency's decision will be upheld if "the exercise of discretion was made based upon the relevant facts, by applying a proper standard of law, and represents a

determination that a reasonable person could reach." *Verhaagh v. LIRC*, 204 Wis.2d 154, 160, 554 N.W.2d 678 (Ct. App. 1996) (citations omitted)

"The party seeking relief through judicial process bears the burden of proof." *Currie*, 210 Wis.2d 380, 387, 565 N.W.2d 253 (Ct. App. 1997) (*citing Loeb v. Board of Regents of Univ. of Wisconsin*, 29 Wis.2d 159, 164, 138 N.W.2d 227 (1965)).

While neither party appears to contest the particular legal standards applied by the Wisconsin Personnel Commission, it is worth noting that the Commission has extensive experience and a high degree of competence in dealing with the Wisconsin Fair Employment Act (WFEA). *See* Wis. Stat. §§ 111.31-111.395. Thus, its interpretation of the law should be accorded "great weight" deference under our agency review standard. Furthermore, the interpretations of the statute made by the Commission are entirely consistent with established Wisconsin law.

In an action under the WFEA alleging discrimination and proceeding under a disparate treatment theory, such discrimination may be proved either directly or indirectly. If a party is seeking to prove discrimination indirectly, the complaining party must "establish a *prima facie* case, which then raises a presumption of discrimination. To rebut the presumption, the defendant need only articulate a legitimate, nondiscriminatory reason for the action taken. The complainant then must be given the opportunity to prove that the proffered reason is merely a pretext for discrimination." *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis.2d 168, 172, 376 N.W.2d 372 (Ct. App. 1985). To establish *a prima facie* case, the complainant must show that (1) the complainant is a member of a protected class, (2) the complainant was discharged, (3) the complainant was qualified for

the job, and (4) the complainant was replaced by a person not within the protected class. *See id.* at 173.

The Personnel Commission held that Mr. Pontes had sufficiently made out his *prima facie* case. Mr. Pontes is (1) a member of a protected class, (2) he has been discharged, (3) the DOT admits he was qualified for the job, and (4) he was replaced by a person not within the protected class in question. With this, a rebuttable presumption of unlawful discrimination arises.

The DOT, as required, then made a showing that it had legitimate reason for dismissing Mr. Pontes. Although the burden here is only one of production, the DOT showed to the satisfaction of the Personnel Commission that it had ample basis to determine that Mr. Pontes' work was inadequate. In particular, the commission found that petitioner's work was characterized by from poor communication, lack of timeliness, and general poor performance on assigned projects.

With this showing, the burden returned to Mr. Pontes to prove the DOT's reasons for dismissing him were mere pretext, simply a cover for its real discriminatory purpose. It is here that Mr. Pontes' case failed. In the eyes of the respondent Commission, Mr. Pontes failed to meet this burden of proof. Simply put, the Commission concluded that the evidence did not indicate any pretext, and indeed, showed that the DOT had sufficient work-related justification to deny Mr. Pontes' continuing employment.

B. APPLICATION TO THE FACTS OF THIS CASE

It is with the final step that Mr. Pontes takes issue. His basic contentions appear to be that he was not late with assignments, that he was as competent as at least some

others and that people conspired to remove him from his position. Therefore, petitioner argues, the discontinuation of his employment was not justified; it was merely a pretext.[4]

To prove that he was not taking an inordinate amount of time, Mr. Pontes directs attention to a number of e-mails. He claims that some of these suggest that Mr. Borth's log does not accurately report the dates on which Mr. Pontes received and turned in assignments. Others contain information that changes were required in some programs. From this, petitioner infers the need for a later deadline. The combination, according to Mr. Pontes, establishes that he was not late with his assignments.

The evidence he provides, however, shows too little. For example, petitioner directs attention to a series of e-mails that suggest that the Personnel Commission misunderstood the timeline of the NCOA project. *See* Ex. C4, pp. 9-21. The selection of e-mails does not prove much. First, contrary to Mr. Pontes' assertions, his December 7th e-mail does not show that the NCOA project did not start on the 7th, it only shows that he was aware of the project. Merely because he was busy, does not mean that the clock has not started running. Second, nowhere in petitioner's selection of e-mails is it made clear that the deadline established is a "tight" one, i.e. there is no way to determine whether enough time was built into the deadline to deal with problems that may potentially arise. The DOT was aware that Mr. Pontes was new, inexperienced, and required training and mentoring. There is no showing that his inexperience was not factored into his deadlines. Likewise, there is no way for this court to determine how much of an impact, if any, the required changes cited by petitioner would have had on the deadlines. In fact, the testimony of Mr. Borth and e-mails of Ms. Puisto offer the only direct proof that things

[4] Mr. Pontes' arguments are so fact-intensive that some effort will be made in this decision to address his more salient contentions. It is not possible or productive to review his every allegation.

were not being done in a reasonably timely fashion. *See e.g.*, Ex. C5, p.28 ("[we have had] a total of 6 working days which he could have spent on the NCOA changes. I have received no deliverables to date."). Third, although petitioner obviously disagrees with his former supervisors concerning what constitutes finishing a job, his e-mails do not establish that he has satisfactorily completed his assignments. Mr. Pontes seeks to describe the end of an assignment as his turning in of code. His supervisors, however, wanted him to follow procedures that at times included additional activities, e.g. a code walkthrough with his project leader. *See* Tr. I. 33-34. The e-mails he offers merely stated that he has turned in some materials that were incompletely tested, insufficiently discussed with his project leader and not in conformity with requests of his project leader. *See* Ex. C4, pp. 17-21, C5 p. 28. In sum, the e-mails petitioner cites do not rebut the criticisms of his supervisors.

Petitioner also argues that other people, most importantly, Ms. Puisto, were incompetent. Mere citation to several e-mails showing that Ms. Puisto was confused on details does not establish that she was incompetent. *See e.g.*, Ex. C7 p. 57. Much less does it allow for reasoned comparison between the competence levels of petitioner and Ms. Puisto. Here again petitioner shows ambiguous evidence, while failing to consider the testimony given by Mr. Borth and Ms. Puisto, among others. *See e.g.*, Tr. IV, p. 189. The Commission seeing and hearing from these people directly is much better equipped than a court sitting in review to determine the credibility on competing evidence. The relevancy of another employee's performance is also quite limited.

Mr. Pontes' contention that people were "incited" against him by Mr. Borth's urging to "keep the expectations high" is similarly inadequate. Petitioner merely explains

his understanding of the language used and ignores the testimony of Ms. Puisto as to what the comment meant and how she understood it. *See* Tr. IV. 33.

As this brief examination of Mr. Pontes' main arguments shows, he has a different reading of the evidence than that of the Personnel Commission. Petitioner does not show, however, that the Commission's conclusion is unreasonable. The Circuit Court in its appellate function does not sit as a *de novo* trial court; it only checks the agency for error, for failure of adequate reason. The Personnel Commission is fully within its delegated powers to assess the credibility of witnesses and to assess the value and meaning of exhibits. In its review the Personnel Commission has determined the testimony of Mr. Borth and Ms. Puisto are to be believed. Nothing in the record sufficiently contradicts the Commission's conclusion to justify a different decision.

Ample evidence exists on the record that Mr. Pontes' performance was inadequate. Mr. Borth testified that petitioner was habitually late and at times failed to complete his assignments at all. *See e.g.*, Tr. IV.180. On several occasions reasonable deadlines were not met. *See e.g.*, Tr. IV.55. On other occasions Mr. Pontes failed to complete required walkthroughs and testing. *See e.g.*, Tr. I.43. Several witnesses testified that Mr. Pontes did not adequately understand the work he was required to do. *See e.g.*, Tr. II.26. Mr. Borth and others also testified that petitioner did not adequately communicate with the parties with whom he was required to communicate, i.e., his supervisors and his assigned mentor. *See e.g.*, Tr. I.100-101. In sum, he failed to meet the requirements of the job. *See e.g.*, Tr. IV.180.

The testimony, thus considered, provides adequate basis for a reasonable person to conclude that the firing of Mr. Pontes was for good reason and not merely pretext.

Petitioner did not met his burden before the Commission in proving pretext, and he has not met his burden before the court in proving that the Commission did not have sufficient evidence to support its conclusions. This conclusion that no discrimination occurred applies both in regards to Mr. Pontes' termination and in regards to the alleged "forgery" of petitioner's signature on his time sheets.[5]

Insofar as petitioner contends the Personnel Commission failed to exercise its discretion adequately, this argument also fails. An agency's use of delegated discretion will not be overturned when "the exercise of discretion was made based upon the relevant facts, by applying a proper standard of law, and represents a determination that a reasonable person could reach." *Verhaagh v. LIRC*, 204 Wis.2d at 160, 554 N.W.2d 678 (Ct. App. 1996) (citations omitted). Mr. Pontes requested that the Commission order the Department of Health and Family Services to allow him to retrieve e-mails allegedly showing that Mr. Borth was aware that Ms. Puisto was incompetent. Such an order, perhaps, could have been allowed in the Personnel Commission's discretion, but is not required, since petitioner did not follow proper procedure for admission under Wis. Adm. Code PC §4.02 and §6.02(2) and the evidence sought is of questionable relevancy. Likewise, the Commission was within its discretion in finding that there were not adequate grounds for rehearing under Wis. Stat. § 227.49.

Finally, Mr. Pontes' new contentions, i.e. failure of due process and/or failure by Mr. Borth to fulfill a ministerial duty, are not appropriate for a reviewing court's consideration under the current circumstances. Neither of these contentions was raised

[5] Furthermore as to the "forgery " claim, the Commission found that there was no damage to petitioner as a result of the submission of his timesheets by Mr. Borth, nor was there a forgery. Petitioner offers no explanation why he should recover when he has not been damaged.

until petitioner's request for a rehearing, and neither is supported by evidence contained in the record. An agency review is confined to the record before the agency and the actions taken by it; therefore, there is no need to address these "issues." Even if a party's arguments or facts may be deemed admitted when not disputed by the opposing party, such is not the case regarding new facts alleged in a brief for an agency contested case review where the review is confined to the record established by the agency. In short, there is no basis for these new contentions.

CONCLUSION

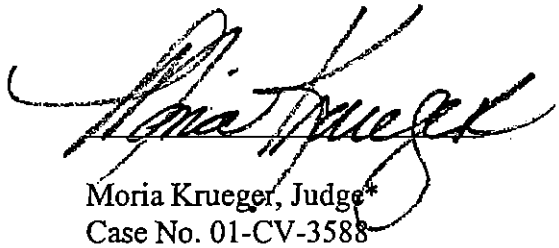
Dissatisfaction with the results along with a different reading of the evidence do not combine to permit a reviewing court to overturn an administrative decision which is consistent with law and based on a reasonable interpretation of the facts. The zeal with which Mr. Pontes presents his case attests to the strength of his belief that he has been wronged, but it does not transform what occurred at the administrative level into reversible error.

ORDER

For the reasons stated in this decision, the findings, determinations and orders of the Commission on October 18, 2001 and on December 4, 2001 are **AFFIRMED**.

Dated this 8th day of October 2002 at Madison, Wisconsin.

BY THE COURT:



Moria Krueger, Judge*
Case No. 01-CV-3588

*Recognition is given to Staff Attorney, Eric Mueller, for his work on this decision.

CC: Avelino Pontes
AAG David C. Rice