STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JERRY A. FABERT, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Respondent.

Case 9
No. 66687
PA(sel)-37

Decision No. 32089

Appearances:

Jerry A Fabert, appearing on his own behalf.

Michael D. Scott, Attorney, Office of Legal Counsel, P. O. Box 7921, Madison, WI 53707-7921, appearing on behalf of the Department of Natural Resources.

ORDER GRANTING MOTION TO DISMISS

This matter, which arises from a hiring procedure, is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss the appeal as moot. All materials necessary for issuing a ruling on the motion had been received on April 19, 2007.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. For approximately 25 years and until 2003, the Appellant worked in Respondent's Spooner office. He filled a position that had a working title of Information Technology Team Supervisor and was classified at the Information Systems Supervisor 2 level.

2. In July 2003, after being advised that the Spooner position was being eliminated, Appellant, in order to avoid separation from State service, displaced[1] the incumbent in a DNR Information Systems Supervisor 2 position in Milwaukee.

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[1] Pursuant to ER-MRS 22.08(1)(a), Wis. Adm. Code: "All employees who have received a notice of layoff have the right to transfer . . . 2. Within the agency, to any vacancy in the approved layoff group from which the employee is being laid off for which the employee is qualified to perform the work . . . ."

3. Appellant was laid off from his Milwaukee position in November 2003 and consequently obtained restoration rights.[2] He was unemployed until June 2004 when he was hired to fill an entry level position with the Department of Revenue as a Field Agent. He was initially headquartered in Wisconsin Rapids but later worked out of Hudson.

4. Appellant has maintained his permanent residence in Spooner throughout the relevant time period.

5. In June 2006, DNR posted a job vacancy in Spooner for a position that was classified as a Natural Resources Program Supervisor and had a working title of Finance/Information Technology Team Supervisor. The position was initially posted for "at risk" employees but was later posted without restriction. Fabert submitted application materials upon the second posting, received an examination score and was scheduled for a competitive interview.

6. Fabert filed his appeal in January 2007, contending that because of his earlier layoff and because he was qualified for the position, he had restoration rights to Spooner vacancy. Fabert contended that he should have been hired to fill the position without competition and he asked "to have the Department of Natural Resources cease the competitive filling process they are engaged in and offer appellant appointment to this vacant position per his mandatory restoration rights."

7. Respondent notified Fabert and the other applicants in February 2007 that it had decided not to fill the Natural Resources Program Supervisor position that is the subject of the appeal. The decision to cancel the vacancy has not been appealed.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. Respondent, as the moving party, has the burden to show that the claim before the Commission should be dismissed as moot.

2. The Respondent has met that burden because even if Appellant could prevail on the question of whether his restoration rights were violated in 2006, Appellant does not contest the 2007 decision to cancel the vacancy and his restoration rights ran out on the last day of 2006.

3. The appeal is moot.

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[2] The period of eligibility for restoration "shall begin with the date of separation from the position in which the eligibility was earned and end with the last day of the 3rd year after the date of separation." Sec. ER-MRS 16.025(3), Wis. Adm. Code.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER[3]

Respondent's motion is granted and this matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 8th day of May, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

[3] Upon issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

Wisconsin Department of Natural Resources (Fabert)

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

This matter, arising from the process used to fill a vacant position, is before the Commission on a motion to dismiss the case as moot. Respondent contends that

> [b]ecause the position is no longer being offered and will not be filled, determining whether or not the Appellant had restoration rights to the position cannot have any practical effect. Moreover, even if Appellant were successful and could show that he had restoration rights to the position, and that he did not have a responsibility to assert those rights [in a manner other than what occurred], the remedy he seeks is not available, since the position is gone.

In its recent ruling in DVA (DEMOYA), DEC. NO. 32026-8 (WERC, 2/07), the Commission quoted STATE EX REL. OLSON V. LITSCHER, 2000 WI APP 61, 233 WIS. 2D 685, 608 N.W.2D 425 for the proposition that "[a]n issue is moot when its resolution will have no practical effect on the underlying controversy. . . . In other words, a moot question is one which circumstances have rendered purely academic."

There is no dispute that the hiring process for the Natural Resources Program Supervisor vacancy in Spooner, a vacancy that was initially posted in June 2006, was halted before a selection decision had been made and that the position no longer exists. In addition, Fabert concedes that he is not seeking review of the February 2007 decision to cancel the hiring process.

The relevant circumstances are comparable to those that exist when after an appeal of a disciplinary action has been filed, the employer withdraws the discipline. In both KLEMMER V. DHFS, CASE NO. 97-0054-PC (PERS. COMM. 4/8/98) and FRIEDRICHS V. DOC, CASE NO. 96-0023-PC (PERS. COMM. 11/22/96) the appeals were deemed to be moot once the discipline had been withdrawn. At that point, the appellants in those cases reverted to the same employment status they had held before the discipline had been imposed.[4]

We note that the present matter does not raise circumstances comparable to those in WING V. UW & DP, CASE NOS. 79-148, 173-PC (PERS. COMM. 10/4/82) which was an appeal alleging the employer had failed to exercise "every effort . . . to restore the employe[e] to a position commensurate to his or her former status . Any such employe[e] . . . shall be placed on the appropriate employment lists." Pers 5.03(3)(h), Wis. Adm. Code (1976). Wing's position had been reallocated downward several years earlier and, pursuant to the applicable rules at the time, he had 3 years to reinstate to previous class level following the reallocation. Pers 16.03(4), Wis. Adm. Code (1976). In his appeal, Wing contended the employer had not

[4] If, after having withdrawn the discipline so that the employee returned to his/her previous employment status, the employing agency decided to impose new discipline for the same underlying conduct, the new discipline could be the subject of a new appeal.

made “every effort” to reinstate him within the 3-year period, thereby failing to comply with

Pers. 5.03. At some point after the 3-year period had run, the employer moved to dismiss the appeal as moot, contending that any reinstatement eligibility Wing may have once held had expired due to the passage of time. The agency also contended that there had been no vacancies to which Wing’s reinstatement eligibility applied. The Commission rejected the motion to dismiss the appeal as moot, noting:

> This argument necessarily rests on the premise that the Commission could not require an extension of eligibility if it were to determine that the appellant’s rights had been violated by the respondents. The respondent argues that this result is required by the fact that the period of eligibility is fixed by rule.
>
> The potential effect of the respondent’s position is to insulate certain kinds of agency action or inaction, in violation of state law, from any administrative review. It must be questioned whether it was intended that the three year restriction applies to situations where it might be determined on appeal that during the initial period of reinstatement eligibility the employe[e] was denied certain of his or her rights with respect to eligibility for reinstatement. Another possible alternative is that the time period with respect to which it might be determined that the employe’s rights to reinstatement eligibility were denied would be considered tolled. In any event, the Commission is not prepared to conclude at this stage of the proceeding that it lacks any capability to require a reasonable remedy. . . .
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> The appellant in this case also is entitled to a determination of whether his civil service rights were violated. There also is a strong policy reason here against a conclusion of mootness, as it theoretically could encourage delay with respect to an agency’s handling of an employe[e]’s reinstatement eligibility rights.

The Commission’s analysis in WING was premised on the fact that the employee sought to determine if his employer had made “every effort” during the 3-year period of reinstatement eligibility. The Commission effectively reserved ruling on the question of whether, if it found the employer had failed to make the requisite effort, Wing could be awarded a further period of reinstatement eligibility.

In contrast, Fabert’s appeal is premised on a specific hiring action and the Commission is unaware of any provision in the current civil service law that imposes a comparable “every effort” restoration requirement on DNR. Fabert’s appeal seeks only to address the decision in 2006 not to recall him to the announced vacancy in a Natural Resources Program Supervisor position in Spooner. Fabert contends that, at that time, DNR violated his restoration rights arising from Sec. ER-MRS 22.10(2), which provides:

> When a vacancy occurs in the agency in the approved layoff group from which the employee was terminated as a result of layoff . . . the employee shall be recalled in inverse order of layoff, providing the employee is qualified to

perform the work . . . .

The specific hiring action that is the subject of Fabert's appeal has now been cancelled, so the question of whether Fabert had a right to be recalled/restored in 2006 is moot, just as the question of whether a disciplinary action had been based on just cause becomes moot once the disciplinary action has been withdrawn. Despite the cancellation of the vacancy and the Respondent's motion to dismiss the appeal, the remedy that Fabert seeks in this appeal is still "an offer of reappointment without competition to the Finance/Information Technology Team Supervisor position" in Spooner. If the Commission denied Respondent's motion, if the matter proceeded to hearing and if there was a finding on the merits for Fabert, the only remedy the Commission could impose at that point would be to "reverse and remand" the 2006 decision.[5] The 2007 cancellation decision would remain in effect so remanding the matter could be of no consequence in terms of the Spooner position. In addition, Fabert's three years of restoration rights ended in 2006 and he did not file his appeal until January 2007, so there is no chance that his appeal would have tolled the lapse of those rights.

Resolution of Fabert's allegation regarding the 2006 transaction would have no practical effect and is purely academic because he does not seek review of the 2007 decision not to fill the position and because his three-year right of restoration that arose from the 2003 layoff ended at the close of 2006.

Dated at Madison, Wisconsin, this 8th day of May, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/

[5] Pursuant to Sec. 230.44(4)(c), Stats., the Commission "shall either affirm, modify or reject the action which is the subject of the appeal. If the commission . . . rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision." However, back pay under Sec. 230.43(4), Stats., would be unavailable because there had been no "removal, demotion or reclassification." SEEP V. STATE PERS. COMM., 140 WIS.2D 32, 409 N.W.2D 142 (CT. APP. 1987).

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Susan J. M. Bauman, Commissioner