

STATE OF WISCONSIN

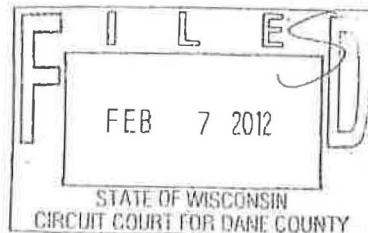
CIRCUIT COURT
BRANCH 1

DANE COUNTY

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN
SYSTEM

and

OFFICE OF STATE EMPLOYMENT
RELATIONS



Petitioners,

v.

Case No. 11 CV 2873

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION

Decision No. 33128C1

Respondent,

DECISION AND ORDER ON PETITION
FOR JUDICIAL REVIEW OF ADMINISTRATIVE
DECISION

Petitioner, Board of Regents of the University of Wisconsin System (UWM¹), advertised an opening for employment in the University of Wisconsin-Milwaukee purchasing department. Applicant M.S.² competed for the position buoyed in part by his status as a veteran of the US Navy. During the final stages of the application process, UWM learned that M.S. had received a "bad conduct discharge" from the Navy raising question as to whether he should receive veterans' benefit points in the hiring process. Upon consultation with co-petitioner, Office of State Employment Relations (OSER), UWM determined that M.S.'s bad conduct discharge made him ineligible for veterans' points because he did not satisfy the definition of veteran in Wis. Stat. § 230.03 (14).

M.S. appealed that decision to a hearing officer with respondent, Wisconsin Employment Relations Commission (WERC), who affirmed the decision by UWM. At the next appeal stage, WERC reversed that decision and found that M.S. was still

¹ The specific hiring entity was the University of Wisconsin-Milwaukee, and so, for the sake of simplicity, we will refer to the petitioner Board of Regents as "UWM."

² The Wisconsin Employment Relations Commission (WERC), in their decision, and the parties in their briefs, are consistent in using the applicant's initials instead of his name. I follow their lead.

eligible for veterans' points and should be hired by UWM for the purchasing position or the next available similar position. Petitioners now appeal the WERC decision to this court under Wis. Stat. § 227.57 (5) & (6).³

ANALYSIS

To receive veterans' preference points when submitting an employment application to the government an applicant must fit under the definition of veteran in Wis. Stat. § 230.03 (14). See, Wis. Stat. § 230.16 (7) (a).

Sec. 230.03 (14)- Definitions

(14) Except as provided in s. 230.16(7m), veteran means any of the following:

(a) A person who served on active duty under honorable conditions in the U.S. armed forces and who was entitled to receive any of the following:

1. The armed forces expeditionary medal established by executive order 10977 on December 4, 1961.
2. The Vietnam service medal established by executive order 11231 on July 8, 1965.
3. The navy expeditionary medal.
4. The marine corps expeditionary medal.

(b) A person who served on active duty under honorable conditions in the U.S. armed forces in a crisis zone, as defined in s. 45.01(11).

(c) A person who served on active duty under honorable conditions in the U.S. armed forces for at least one day during a war period, as defined in s. 45.01(13) or under section 1 of executive order 10957 dated August 10, 1961.

(d) A person who served on active duty under honorable conditions in the U.S. armed forces for 2 continuous years or more or the full period of the person's initial service obligation, whichever is less. A person discharged from the U.S. armed forces for reasons of hardship or a service-connected disability or a person released due to a reduction in the U.S. armed forces prior to the completion of the required period of service

³ Petitioner also asks me to remand this case under Wis. Stat. § 227.27 (8), because WERC's decision is contrary to a prior Personnel Board case, *Dement v. Wettengel*, Decision by Personnel Board, Case No. 73-1 (Nov. 22, 1974), and was not distinguished in WERC's decision. In *Dement*, an applicant was found to be a non-veteran because he had a "bad conduct" discharge from the military. There are no facts in the *Dement* decision or before me that suggest that *Dement* applies when an applicant has a period of service that was honorable and a period of service that was not honorable. As a result, a finding in *Dement* that applicant's one period of service was non-honorable is not contrary to the finding here where an honorable period of service can confer veteran status even if applicant had a second non-honorable period of service. Under WERC's interpretation, the two decisions are not in conflict and therefore do not necessitate a remand for explanation.

shall also be considered a "veteran", regardless of the actual time served.

The subsection applied in this case is (d), specifically the sentence "A person who served on active duty under honorable conditions in the U.S. armed forces for 2 continuous years or more or the full period of the person's initial service obligation, whichever is less". WERC's interpretation of that language held:

[T]he commission concludes that the phrase "served on active duty under honorable conditions" refers to a defined period of service, with a specific beginning point and an end point (i.e. release or separation), for which the character, either honorable or otherwise, has been determined in an official manner.

We conclude, therefore, that duration of service must satisfy one of two requirements 1) a delineated period of service, with an objectively verifiable beginning and end, covering two consecutive years or more, 2) if the service was for less than two consecutive years the service period was the person's entire initial service obligation.

In applying that interpretation to the findings of fact, WERC concluded that because M.S. had completed his a four year period of service honorably that he satisfies the definition of "veteran" under the statute even if he served another period of service under non-honorable conditions.

The exact issue of this review is subject of some confusion. Petitioners start off their brief by identifying the issue as one of a faulty interpretation of the statute by WERC. They then go on to identify the deference standards the court uses on reviews of an agency's interpretations of law. Page twelve of that brief outlines the legal interpretations with which petitioners and WERC agree. In short, petitioners agree with WERC that the standard in § 230.03 (14) requires a finding that the applicant served a period of service under honorable conditions. Petitioners then state:

"The parties diverge, however, when the specific facts of M.S.'s service are applied to the statute." Petitioner's Brief of November 4, 2011, page 13.

From this statement, it is apparent that I am not being asked to review WERC's interpretation of the statute but am instead being asked to review how WERC applied that standard to the findings of facts. After a careful review of the briefs, I

understand that petitioners specifically dispute the factual findings that M.S.'s first four years of service constituted a period of service under honorable conditions distinguishable from the final two and a half years served under non-honorable conditions.

Judicial review of factual findings is limited to evaluating the substantial evidence. Wis. Stat. § 227.57 (6). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Hacker v. DHSS*, 197 Wis.2d 441, 467, 541 N.W.2d 766 (1995). "An agency conclusion of fact will not be set aside unless it is found that such a conclusion could not have been reached by a reasonable person acting reasonably". *Knight v. Labor & Indus. Review Comm'n of Dept. of Indus.*, 220 Wis. 2d 137, 149-50, 582 N.W.2d 448 (Wis. Ct. App. 1998). Under such deference, I cannot evaluate the credibility or weight given to evidence in reaching a finding of fact. *Id.*

Petitioner argues that the DD214⁴ in this case is determinative of the issue because it identifies one period of service, the full six and a half years, and that period of service ended under other than honorable conditions. In fact, petitioners seem to argue that the DD214 is determinative in almost every circumstance because it carries this information. However, the DD214 is not created solely to determine a veterans' entitlement to veterans' benefits rights. It may be helpful, and routinely relied upon, but no authority cites it as determinative of the issue.

WERC concluded that M.S. had two periods of service, the first constituting four years; the second, two and a half years. They reached this conclusion based upon a finding by the U.S. Department of Veterans Affairs (VA) that M.S. was a veteran because he served the first four years and then was extended for two and a half years. It was this first four years of service that entitled M.S. to veterans' benefits through the VA. WERC concluded that while the finding by the VA was not determinative it was instructive because the goals and policies behind veterans' benefits under the VA and preference points in employment are similar. However, the DD214 document is not created for the purpose of determining veterans' benefits. Given this, a reasonable mind could reach the same conclusion as WERC that M.S. had two periods of service, the first four years and the second two and a half.

The second determination challenged is that this four year period of service was served under honorable conditions. In reaching this conclusion WERC relied upon M.S.'s receipt of a Navy Good Conduct Award and took evidence that this award honors (1) four years of continuous active service, within which the


⁴ This is a discharge document created by the U.S. Armed Forces which identifies service time and the status of discharge (honorable, dishonorable, etc.).

individual had (2) a clear record (no convictions by courts-martial, no non-judicial punishments (NJP), no lost time by reason of sickness-misconduct, no civil convictions for offenses involving moral turpitude) and (3) certain performance marks. WERC noted that this medal was awarded for the period of M.S.'s first four years of service. WERC noted that any bad conduct committed by M.S. occurred after this four year period of service ended. From this WERC concluded that M.S.'s first four year period of service was served under honorable conditions. This conclusion is reasonable. There is no evidence that M.S.'s service was anything other than honorable during this four year period of service.

WERC's findings of fact and decision were reached with substantial evidentiary support. Therefore, WERC's decision is AFFIRMED. Petitioner's claims for relief under Wis. Stat. ch. § 227 are DENIED.

Dated this 7 of Feb., 2012 in Madison, Wisconsin.

BY THE COURT:


John W. Markson
Circuit Court Judge, Branch 1