

STATE OF WISCONSIN

CIRCUIT COURT
Branch 10

DANE COUNTY
2016CV2107

Andrew T. Murphy,
Petitioner

vs.

Case No. 16CV2107

Wisconsin Employment Relations Commission,
Respondent

[re: WERC Dec. No. 34176-C]

DECISION AND ORDER

Andrew T. Murphy filed a petition for judicial review of a Wisconsin Employment Relations Commission (WERC) decision affirming the University of Wisconsin-Madison's refusal to restore him to three positions following a layoff and denying him back pay with respect to a fourth position to which he should have been restored. The case is decided on the briefs of the parties. For the reasons stated below the decision and order upon rehearing of the Commission are affirmed and the petition for review is dismissed.

STANDARD OF REVIEW

WERC's factual findings must be affirmed by the court if it is supported by credible and substantial evidence in the record. *Milwaukee Bd. of Sch. Directors v. Wisconsin Employment Relations Comm'n*, 2008 WI App 125, ¶ 7, 313 Wis. 2d 525, 533 Evidence is credible if it is more than speculation or conjecture and it is substantial if a reasonable person relying upon it might make the same decision. *Id.*

WERC asserts that WERC's interpretation of law is entitled to great weight deference. That deference means that its conclusions of law must be affirmed if they are reasonable even if there is another reasonable interpretation, or even if there is a more reasonable interpretation. Petitioner does not disagree in general, but contends that as to questions of WERC's own authority, such as what remedies it may order, the court should give no deference., citing *Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 2011 WI 54, ¶ 23, 335 Wis. 2d 47, 64. In this case, the petitioner argues no deference should be given to WERC's decision that it did not have authority to order back pay as a remedy. The court agrees that under *Lake Beulah Mgmt. Dist.* the court owes no deference to WERC's interpretation of its authority to order back pay as a remedy.

PROCEDURAL FACTS

In 2009 Murphy accepted a demotion to a Financial Specialist 3 in the UW in lieu of a layoff as a Financial Program Supervisor in the UW Department of Medicine. He applied and was rejected for 4 positions in the UW School of Medicine and Public Health. They were: Financial Program

Supervisor, Primate Center; Accountant, Department of Pediatrics; Accountant, Department of Population Health Services and Accountant, Department of Radiology.

He filed four appeals under Wis. Stat. §230.44(1)(d), on grounds that the failure to appoint him to any of the four positions violated his rights to restoration to a position. The appeals were consolidated and on April 19, 2016 WERC issued a decision that the University did not violate his rights in failing to appoint Murphy to the Primate Center, Pediatrics or Population Health Services positions. It also ruled that the University did violate his rights by not appointing him to the Radiology position. It initially ordered back pay as a remedy, but on reconsideration concluded it did not have that authority and vacated the back pay order.

DISCUSSION

The parties agreed that Murphy was entitled to a right of mandatory restoration to a position for which he “is qualified to perform the work after being given the customary orientation provided newly hired workers in such position.” Wis. Adm. Code ER-MRS 22.10(1) & (2), *see also* §ER-MRS 1.02(30) and Wis. Stat. §230.31(1)(b). WERC contends that it reasonably determined that the UW did not act illegally or abuse its discretion by not appointing Murphy to the Primate Center, Pediatrics and Population Health Services positions.

Primate Center Position

The letter denying Murphy the appointment to the Primate Center Position gave as reasons that his “limited knowledge of pre and post award processes, grant proposal and post-award process closeout duties does not rise to the level of knowledge needed to perform this position’s duties after the “customary orientation” is provided. James Butts interviewed Murphy and made the decision not to offer him the position.

At the WERC hearing Butts testified that he did not think Murphy was experienced enough with pre-award work or with state and federal electronic systems used for grant management, that he was unenthusiastic about being a supervisor and would prefer to avoid unpleasant supervisory duties and that it would take a minimum of one year to train him, a normal period, but longer than he had intended for this particular vacancy. Tr. Vol. 1, 25-30.

Murphy cites his experience as a supervisor and before that as a lead worker in the School of Music as qualifying him to be a supervisor and testified that his response to a question about discipline during the interview showed that although he did not enjoy disciplining or terminating employees he was willing and able to do it when necessary. He concedes that he did not have pre-award experience but points out that he received training in pre-award experience and sometimes reviewed grant budgets before submission.

The position announcement and job description (R. Exh. 2) specified that “strong” management and supervisory skills were required and that integrating pre- and post-award processes and training and mentoring other staff in those processes were qualifications for the position. Butts’ conclusion that Murphy did not have enough pre-award experience to qualify for a position that included managing and integrating pre-award processes was supported by credible evidence. His inference that Murphy

was averse to difficult supervisory situations and was unenthusiastic about supervision was also reasonable and supported by the evidence, though that evidence might also have supported an alternative inference and conclusion. WERC's decision with respect to the Primate Center position was supported by substantial evidence.

Pediatrics Position

The letter denying Murphy the appointment to the Pediatrics position gave as reasons that his knowledge and experience with NIH grants, policies and procedures and working directly with researchers on financial analysis was not sufficient. R. Ex. 10. Susan Killips interviewed Murphy and concluded that he did not have experience with specific kinds of complex NIH grants he would be working with. She also felt he did not have experience working regularly and directly with researchers on financial management of the grants. Because of that he would have needed more than the customary training. Tr. Vol. 1 124-125, 127-128.

On cross examination Killips testified that as between Murphy and another applicant, a Ms. Floerke, Ms. Floerke was "the most qualified." Tr. Vol. 1, 133. Murphy testified that he did have experience with NIH grants, but did not testify that he had experience with the specific kinds of complex grants Killips described. Tr. Vol. 1, 108. He also testified that he had contact with researchers about financial analysis of their projects, but it was not part of his normal function to do that. Tr. Vol. 159. There is no evidence that he had experience with the close working relationship with researchers about their financial management that Killips testified would be necessary in the job, nor did his testimony rebut the evidence that he would require extensive training beyond the customary orientation.

WERC's conclusion with respect to the Pediatrics position was supported by substantial evidence.

Population Studies

Deanna Moore, administrator of the Department of Population Health Sciences interviewed Murphy for the position in that department. She testified that Murphy did not provide enough detail about his experience, his actual use of systems and forms and his actual management of grants to find him qualified for the position. Tr. Vol. 213-221. Moore also contact independent references, who conveyed that he didn't have a good sense of the details of the matters he oversaw, seemed to delegate excessively and showed little independent initiative and would not be qualified for the position because of the size and complexity of Population Studies' funding. Tr. Vol. 2 227-231. She also testified that the customary training would not have remedied his deficiencies. Tr. Vol. 2, 229-233.

Murphy's response to this testimony is that Moore denied him the position not because he was unqualified, but because his responses were not sufficiently detailed. Pet. Am. Br. at 18. This misses the import of Moore's testimony, which was that because of Murphy's lack of specifics and detail to support his qualifications for the position, combined with the negative independent references, she concluded he was not qualified and could not be trained in the customary orientation period.

WERC was entitled to find Moore's un rebutted testimony credible and to give it weight. There was substantial evidence in the record upon which WERC could reasonably rely to reach its decision regarding the Population Studies position.

Radiology Position and Back Pay

WERC did find that Murphy was qualified for the Radiology position and was entitled to restoration. Because the position was already occupied, WERC ordered back pay then reconsidered and concluded it did not have authority to order back pay and vacated the back pay order. As noted above, the court reviews WERC's authority to order back pay in lieu of restoration without deference.

Murphy relies on the language in Wis. Stat. §230.44(4)(c) that says WERC "may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision." He notes that §230.44(4)(d) bars WERC from removing an incumbent as a remedy and argues that since this is the only express limitation on its remedial authority, the statute should be read as permitting all other remedies consistent with its decision, including back pay.

WERC cites the Court of Appeals decision in *Seep v. State Pers. Comm'n*, 140 Wis. 2d 32, 409 N.W.2d 142 (Ct. App. 1987). The court reversed the circuit court's reversal of a Personnel Commission denying back pay to a former employee. *Id.* at 42. The Court of Appeals found reasonable the Commission's interpretation of Section 230.43(4) as not authorizing the award of back pay in reinstatement. The Commission reasoned that since the statute expressly authorized back pay only in cases dealing with improper removal, demotion or reclassification the legislature did not intend to authorize it in reinstatement cases. Murphy seems to argue that this court should disregard *Seep* as wrongly decided. Quoting the holding Murphy states "this is a misstatement of the plain meaning of Wis. Stat. 230.43(4)." Pet. Am. Brief at 22. This court is bound by published decisions of the Court of Appeals.

Murphy also cites to *Watkins v. Labor & Indus. Review Comm'n*, 117 Wis. 2d 753, 345 N.W.2d 482. In that case the Supreme Court held that the Labor and Industry Review Commission could award attorney fees as part of a remedy under the Fair Employment Act, Wis. Stat. 111.36(3)(b), (1975) even though the statute did not expressly authorize it, because to hold otherwise would be contrary to the purpose of the statute. *Id.* at 765. Similarly, Murphy argues, to disallow awards of back pay under the broad authority of §230.44(4)(c) would be contrary to the purpose of the statute. However, in *Watkins* the court relied on a prior holding that one purpose of the Fair Employment Act was to make victims of discrimination economically whole, which could not be done unless their attorney fees were compensated. *Id.* at 763, 764. The court is unaware of either statutory language or case law that supports a comparable interpretation of the purpose of §230.44(4)(c).

Murphy also argues that following WERC's interpretation would create a right without a remedy in violation of Article I, Section 9 of the Wisconsin Constitution. That section does not confer any rights, but only entitles a person to remedies based on the law as it exists. *Messner v. Briggs & Stratton Corp.*, 120 Wis. 2d 127, 133, 353 N.W.2d 363, 366 (Ct. App. 1984). The right here is created by §230.31(3), which creates a right "a position having a comparable or lower pay rate or range for which such person is qualified for a 3-year period from the date of the layoff." The

remedy for violation of that right is provided by §230.44(4)(c) which allows that after an improper denial of reinstatement “the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision.” This remedy is limited by prohibiting displacing an incumbent or delaying an appointment process, except in cases of obstruction or falsification. §230.44(4)(d). This is a reasonable limitation, to avoid disruption both to the incumbent and to the operations of the agency. As discussed above, *Seep* also excludes compensatory back pay as a remedy.

However, if the commission’s power is limited to ordering appointment to the position that was improperly denied the employee, that limitation would essentially render the employee without remedy. It must a rare case that the position in dispute remains vacant and available as a remedy after complaint has wended its way through the appeals process. If the only remedy is appointment to the now-occupied Radiology position Murphy is left without a remedy.

To avoid running afoul of Section 9 and still preserve the statute, it must be read to give the commission authority to direct another equitable remedy. The commission did so by directing tolling the time remaining for restoration from the date of the improper denial to the date of the commission’s order. R. Order on Rehearing, July 13, 2016. The remedy may not be all that Murphy would like, but it is a remedy, it is consistent with the language of the statute and “in accordance with the decision.”

CONCLUSION

For the reasons stated above, the decision and order of the commission are **AFFIRMED**. This is a final order under Wis. Stat. §808.03(1) for purposes of appeal.

Electronically signed by Juan B. Colas

Circuit Court Judge

06/09/2017

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