

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STEVEN KRIESER, Appellant,

vs.

DEPARTMENT OF TRANSPORTATION, Respondent.

Case 41
No. 72528
PA(adv)-353

DECISION NO. 34696

DECISION ON DISCOVERY MOTIONS

This matter is before us on the Respondent Department of Transportation's motion for a protective order and Complainant Steven Krieser's motion for leave to take the deposition of Eric Schutt.

Krieser was removed from his unclassified position as a result of remarks he made on a social media site regarding illegal immigrants. At the time, Krieser was the third ranking official in the Wisconsin Department of Transportation. Krieser then sought to exercise his restoration rights to return to a position in the classified service. Mark Gottlieb, the head of the Department, made the decision under § 230.33(1m), Stats., to deny Krieser the opportunity to exercise his restoration rights and reinstatement privileges.

Under § 230.33(1m), Stats., restoration rights and reinstatement privileges "shall be forfeited if the reason for termination of the unclassified appointment would also be reason for discharge from the former position in the classified service."

The issue before the Commission is whether the conduct Krieser engaged in would constitute just cause for dismissal from the position he otherwise would have been reinstated to.

Krieser has taken the deposition of Secretary Gottlieb and the Department of Transportation Human Resources Manager. During the course of those depositions, Gottlieb disclosed that he consulted with Eric Schutt who was (and is) Governor Scott Walker's Chief

of Staff. Krieser seeks leave to depose Schutt, and the Department seeks a protective order blocking the proposed deposition.¹

From my review of the complete deposition transcript of Secretary Gottlieb, it would appear that there are very few if any factual disputes underlying this matter. I would note also that, unlike the typical statutory employment claims, e.g. Title VII employment discrimination, 42 U.S.C. § 1983 retaliatory discharge claims and the like, in these proceedings the employer has the burden of proof and motive is not an issue. In that respect I believe that the deposition testimony of Chief of Staff Schutt would add nothing of evidentiary value to this proceeding.

Clearly there was a political component with this decision. Krieser, as a high ranking employee of the Department, apparently made comments which became public that were embarrassing to the administration. There is no dispute that Schutt expressed his view that Krieser be removed from his unclassified position and that he not be placed in a high level position in the classified service. I do not believe that that fact or Schutt's rationale which Krieser presumably wants to explore in discovery would add anything to Krieser's claim.

Gottlieb has conceded that it was the social media comments alone that formed the basis for his decision to refuse restoration. Deposition Transcript of Secretary Mark Gottlieb (hereinafter "Gottlieb Tr.") at p.37. In my judgment, that concession clearly frames the issue. Certainly Secretary Gottlieb sought input from others in the process of making his decision, and it will be his decision to defend.

I conclude that *State v. Beloit Concrete Stone Co.*, 103 Wis.2d 506, 309 N.W.2d 28 (Ct. App. 1981) is applicable and that Krieser must make a "clear showing" that the deposition of Schutt is "necessary to prevent prejudice or injustice." *Id.* at 512-513. Essentially, Krieser argues that Schutt, not Gottlieb, was the final decision maker and therefore he should be permitted to depose Schutt. In my judgment, the question of who made the call is far less important than the call itself. Krieser does not argue that there was some other reason for the refusal to reinstate him. It appears that all agree that the social medial "controversy" led to his demise. Furthermore, Secretary Gottlieb testified that he "did ot concern himself with the political element" of the incident. Gottlieb Tr.40.

My analysis at this point is based upon the evidence the parties have submitted. If, in the course of the hearing, the Department's evidence demonstrates that the Schutt testimony may have some relevance, I have no qualms about permitting Krieser to renew his request. As the record stands now, I conclude that the deposition of Chief of Staff Schutt should not be permitted in light of the lack of evidence of "prejudice or injustice" to Krieser.

¹ In the prehearing order in this case, I directed that there would be no depositions of an employee or official of the Governor's office without prior approval.

ORDER

The motion of the Respondent Department of Transportation for a protective order is granted, and the Complainant Steven Krieser's request to depose Chief of Staff Eric Schutt is denied.

Dated at Madison, Wisconsin, this 14th day of February 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman