

appeal of F. St. v. D. Ver
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84-0218-PC, 5/22/85

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

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WISCONSIN DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS, AND
WISCONSIN DEPARTMENT OF EMPLOYMENT
RELATIONS,

AUG 7 1986

Personnel
Commission

Petitioners,

v.

Case No. 85-CV-3206

WISCONSIN PERSONNEL COMMISSION,

Respondents.

NOTICE OF ENTRY OF ORDER

TO: Howard Bernstein
General Counsel
Department of Industry, Labor
and Human Relations
Post Office Box 2946
Madison, Wisconsin 53707

PLEASE TAKE NOTICE that the Memorandum Decision and Order,
a copy of which is attached hereto, was entered in this matter
on the 29th day of July, 1986.

Dated: August 6, 1986

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WISCONSIN DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS, AND
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MEMORANDUM DECISION

Petitioners,

AND

vs.

ORDER

WISCONSIN PERSONNEL COMMISSION,

Case No. 85CV3206

Respondents.

Jean Foust is an adjudicator of unemployment compensation claims for the Department of Industry, Labor and Human Relations (DILHR). In 1984, she requested a reclassification of her position's civil service ranking from UBS-2 to UBS-3. Part of the reclassification process consists of a review of unemployment case files handled by the employee known as the Quality Performance Index (QPI). To pass the QPI and continue the reclassification process, the employee must score at least 75% in 19 of 20 reviewed files. The review is conducted by employees of DILHR's Bureau of Benefits. In Foust's case, the Bureau of Benefits reviewer, John Roche, gave Foust a score of 75% or greater for only 17 of 20 files, a failing score;

Foust filed an appeal with the Personnel Commission. On appeal the Commission found that Foust met her burden of proof by showing that Roche incorrectly scored two of the three contested cases. For the Doe file, the Personnel Commission found that Roche incorrectly concluded that Foust

failed to adequately document her decision to classify a woman who had recently been hospitalized for alcohol abuse as able and available for work. This is a requirement of receiving full unemployment compensation. The Commission decided the file was adequately documented. The Commission found that Roche also incorrectly gave Foust a failing score for the Ebert file. The reviewer found that Foust failed to identify as an issue the possibility that a claimant failed to return to work after being duly recalled by a former employer. Such a failure would make the claimant ineligible for benefits. The Commission found that Foust's interpretation that no duly recalled issue existed was correct, noting a statement from the claimant that the recall notice was received by the claimant, but not until after the week in question. Thus, the Commission found that the grade given to Foust for the file was incorrect. Because the Commission found that Foust had been incorrectly given a failing score for two files, the Commission declared that Foust had passed the QPI and ordered the continuation of the reclassification process.

Petitioners, DILHR and the Department of Employment Relations (DER), appeal the Commission's order to this court, pursuant to secs. 227.15, 227.16, Stats. Petitioners argue that the Commission should have limited its review of Foust's scores on the QPI to connecting inconsistency and arbitrariness in the scoring process. Instead, the Commission exceeded its authority by substituting its interpretation of DILHR's unemployment compensation guidelines and its judgment of

Foust's performance for that of Roche, DILHR's performance review expert. Further, petitioners argue that the Commission's interpretations of DILHR's guidelines were incorrect. Finally petitioners argue that the Personnel Commission's decision was not supported by substantial evidence.

The Personnel Commission did not exceed its authority by reviewing the scoring of Foust's files for correctness rather than arbitrariness.

This court may review and correct incorrect interpretations of law by administrative agencies.

"The court shall set aside or modify the agency actions if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the law." Sec. 227.20(5), Stats.

In this case the Personnel Commission correctly interpreted the law concerning the scope of its authority. The authority to reclassify and regrade civil service positions lies with DER. Though DER may delegate this authority to appointing agencies review of decisions to reclassify and regrade remains the responsibility of the Commission. The Commission may reject delegated reclassification decisions if they are incorrect.

DER has the authority to reclassify civil service positions and regrade incumbents of those positions.

"After consultation with the appointing authorities the secretary (of DER) shall allocate each position in the classified service to an appropriate class on the basis of its duties, authority, responsibilities or other factors recognized in the job evaluation process. The secre-

tary may reclassify or reallocate on the same basis." Sec. 230.09(2)(a), Stats.

Although the statute requires consultation with the appointing authority DILHR in this case, the Statute clearly gives the Secretary of Employment Relations the authority to conduct the actual reclassification.

"If after review of a filled position the secretary reclassifies or reallocates the position, the secretary shall determine whether the incumbent shall be regraded or whether the position shall be opened to other applicants. Sec. 230.09(2)(d), Stats.

Because the power to reclassify positions and regrade incumbents within them lies with DER, that department necessarily has the authority to evaluate the substance of the position and the substantive quality of the incumbent's performance. This authority is contemplated in the DER regulation which defines "reclassification" as including "the attainment of specified education or experience by the incumbent." Sec. ER-Pers. 3.01, Wis. Adm. Code.

DER's authority to evaluate substantive work performance is consistent with the legislature's statement of policy for the State employment relations statutes.

"It is the policy of the state and the responsibility of the secretary and the administrator to maintain a system of personnel management which fills positions in the classified service through methods which apply the merit principle." Sec. 230.01(2), Stats. (Emphasis added).

This policy statement, combined with sec. 230.02, Stats.,

requirement of liberal construction of the State employment relations statutes gives DER considerable authority to see that appointing agencies maintain the merit system.

Recognizing that DER cannot manage all of the employment relations functions given to it by Chap. 230, Stats. sec. 230.04 (1m), Stats., allows the Secretary of Employment Relations to delegate functions to the appointing authorities. In this case DILHR has been delegated the function of reclassifying and regrading positions within its own department. However, sec. 230.04(1m), Stats., is clear that

"[i]f the secretary determines that an agency is not performing such delegated function within prescribed standards, the secretary shall forthwith withdraw such delegated function.

Thus the ultimate responsibility for any authority delegated under sec. 230.04(1m), Stats., remains with DER.

The Personnel Commission hears appeals of decisions made under secs. 230.09(2)(a), 230.09(2)(d), Stats., under the same standard whether the decision was made by DER or by the appointing authority. Sec. 230.44(1), Stats., States

"[a]ppealable actions and steps. Except as provided in par.(e), the following are actions appealable to the commission under §. 230.45(1)(a): . . .

(b)Decision made or delegated by secretary.
Appeal of a personnel decision under §.230.09(2)(a) or (d) or 230.13 made by the secretary or by an appointing authority under authority delegated by the secretary under §.230.04(1m).

The exception of sec. 230.44(1)(e) does not apply here. The statute clearly does not distinguish between decisions

made by DER and those made by the appointing authority.

Administrative agencies only have such authority as may be expressly granted or necessarily implied by statute.

"[A] power which is not expressed must be reasonably implied from the express terms of the statute; or as otherwise stated, it must be such as is by fair implication and intendment incident to and included in the authority expressly conferred? Consistent with this rule is the proposition that any reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority. State ex rel. Tarrell v. Schubert, 52 Wis. 2d 351, 358, 190 N.W.2d 529, 532-533 (1971). (Footnotes and cites omitted).

By necessary implication, the commission may review appeals under sec. 230.44(1)(a), Stats., for correctness.

"After conducting a hearing on an appeal under this section, the commission shall either affirm, modify or reject the action which is subject to appeal . . ." Sec. 230.44(4)(c), Stats.

The statute offers no restraints to the standard of review. However, some subsections of sec. 230.44(1), Stats., do contain the requirement of pleading more than an incorrect decision.

". . . If an employe has permanent status in class, the employe may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause." Sec. 230.44(1)(c), Stats., (Emphasis added).

". . . A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission." Sec. 230.44(1)(d), Stats. (Emphasis added).

Given the closely related nature of the subsections of sec. 230.44(1), Stats., because sec. 230.44(1)(b), Stats., has no such pleading requirements the legislature must have intended that the commission could reject decisions appealed to it under sec. 230.44(1)(b) Stats., without a showing of lack of just cause, abuse of discretion or illegality.

By granting the Personnel Commission the authority to review recalssification decisions for correctness, the legislature gives the commission no more authority over DILHR than the legislature has given to the Department of Employment Relations. Any reclassification decision by DILHR is made solely under authority delegated by DER. The Personnel Commission has the authority to review for correctness reclassification decisions were made by DER itself or by the appointing agency under authority delegated by DER.

The Personnel Commission's reasonable interpretation of DILHR's ambiguous policies will be upheld.

Although the Personnel Commission may interpret DILHR's policies in applying them to evaluate employe merit, the Commission may not make those policies. However, the Commission may supply its own reasonable interpretation of an ambiguous rule or policy. In this case DILHR's policies were ambiguous and the Commission could reasonably conclude that Foust's interpretation was correct.

An administrative agency's interpretation of its own rules are entitled to great weight unless inconsistently applied or clearly erroneous. State ex rel. Durando v. State Athletic Commission, 272 Wis. 191, 195, 75 N.W.2d 451, 453 (1956).

If the appointing agency offers a clear and consistent interpretation of its own rules, policies and guidelines, the Personnel Commission should give that interpretation controlling weight. However, if the appointing agency does not offer a clear interpretation of its own guidelines, the court will uphold reasonable applications of those guidelines to the employee's performance made by the Commission in deference to the Commission's expertise in evaluating employee merit. See sec. 227.20(10), Stats.

In the Doe case, DILHR's guidelines were ambiguous and the Personnel Commission's interpretation was reasonable. Roche interpreted DILHR's policy on documenting alcoholism as its concerns "able and available" status by stating that adequate documentation would be achieved either by a doctor's statement of the claimant's ability to work or the claim's adjudicator's reasoning as to why a doctor's statement was not necessary. Transcript at 66. However, DILHR's instructions on the use of doctor's statements appeared to give the claims adjudicator more discretion.

"Form UC-474 [for doctor's statements] should not be given out like candy. . . . When it appears that based on observation of the claimant that he is considered 'able and available' on the general labor market, no UC-474 is necessary." Joint exhibit 1 at A-9.

Foust offered testimonial evidence that use of the form was indeed discretionary. Transcript at 87. Thus, this court concludes that DILHR's guidelines were ambiguous and that the Commission's interpretation was reasonable.

In the Ebert case, neither party adequately addressed the issue of whether or not an attempted offer of work is bonafide only upon receipt by the claimant. However, the Commission apparently operated under the assumption that an offer is made upon receipt by the claimant. The court concludes that this assumption is reasonable.

The court emphasizes that DILHR makes and interprets its own rules, policies and guidelines. However, DILHR is obliged to convey its guidelines clearly to its own employees.

Those employees should not be downgraded because of DILHR's failure to clarify its guidelines.

The Personnel Commission's findings of fact are supported by substantial evidence.

An agency's findings of fact will be upheld if the record presents substantial evidence to support them. All evidence is to be considered by the reviewing court, whether favorable or unfavorable to the decision. However, the weight and credibility of the evidence, as well as reasonable inferences drawn from the evidence, is to be determined by the agency. In this case, the Personnel Commission's findings of fact were supported by substantial evidence.

The court's power to review findings of fact by an agency is limited.

"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 if it finds that the agency's action depends on any

finding of fact that is not supported by substantial evidence in the record." Sec. 227.20(6), Stats.

"[T]he term 'substantial evidence' should be construed to confer finality upon an administrative decision when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision, but on the other hand, if a reasonable man, acting reasonably, could not have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and should be set aside." Reinke v. Personnel Board, 53 Wis. 2d 123, 138-139, 191N.W.2d 833, 840(1971). Emphasis in Original).

Substantial evidence supported the Commission's findings of fact that the Doe file was incorrectly graded. Having determined that use of doctor's statements in investigating the effects of alcohol on ability to work was discretionary, substantial evidence supported the Commission's finding that Foust did not abuse her discretion. Evidence was offered showing that the claimant made statements voluntarily revealing her hospitalization and asserting that she was able and available for work at the time benefits were claimed. Joint exhibit 1 at A-4, A-5. Foust testified that she concurred with the statements and saw no reason to go into the matter further. Transcript at 11-12, DILHR made no rebuttal on the question of abuse of discretion, it simply asserted that discretion was limited. Based on this evidence, the Commission could have reasonably concluded that Foust was acting within her discretion and that her handling of the claim was incorrectly given a failing grade, as a result.

Substantial evidence also supported the Commission's finding that no "duly recalled" issue existed in the Ebert case. Evidence included a signed statement from the claimant stating that she received no notice of available work until after the week at issue. Joint exhibit 2 at B-3. Further evidence raised doubts about whether the notice would have been sufficient to raise a duly recalled issue even if it has been received during the week at issue. Joint exhibit 2 at B-5, Transcript at 19-20, 69-70. The Commission could reasonably find that Foust acted correctly and that the failing grade given to her was incorrect.

CONCLUSION

The Personnel Commission has the authority to reject incorrect decisions appealed to it under Sec. 730.44(1)(b), Stats. The Commission must apply the appointing agency's policies when evaluating employee performance. If the appointing agency's interpretations of its own rules, policies and guidelines are clear, the Commission should accept those interpretations. If the appointing agency's interpretations are ambiguous, the Commission may apply reasonable interpretations based on the record before it. In this case, the Commission's interpretation of DILHR's ambiguous guidelines were reasonable. Substantial evidence supported its findings that Foust's files were incorrectly graded. The decision of the Personnel Commission is AFFIRMED.

Dated this 29th day of July, 1986.

BY THE COURT:

A handwritten signature in cursive script, reading "William D. Byrne", written over a horizontal line.

William D. Byrne, Judge

cc:

AAG Paul Lundsten
AAG Robert J. Vergeront