

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

MAY 20 1987

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62 (1).

NOTICE

This opinion is subject to further editing. If published the final version will appear in the next volume of The Official Reports.

No. 86-1950

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

DAVID M. KUTER,

Petitioner-Respondent,

v.

STATE PERSONNEL
COMMISSION,

Respondent-Appellant.

RECEIVED

MAY 21 1987

**Personnel
Commission**

APPEAL from a judgment of the circuit court for
Fond du Lac county: STEVEN W. WEINKE, Judge. Reversed.

Before Scott, C.J., Brown, P.J., and
Nettesheim, J.

SCOTT, C.J. The State Personnel Commission (commission) appeals a circuit court judgment reversing an order of the commission. In an order dated July 15, 1985, the commission had affirmed a hearing examiner's order stating that the layoff of David M. Kuter (Kuter), an employee of the Department of Industry, Labor and Human Relations (DILHR), was for just cause under sec. 230.44(1)(c), Stats., and Wis. Adm. Code § ER-Pers 22.06(2).

The trial court concluded that Kuter's layoff was arbitrary and capricious because a letter from the Administrator of Job Services, Robert Polston (Polston), which stated that Kuter could remain in his position in the Fond du Lac office for as long as he chose and satisfactorily performed his duties could have been used to exempt Kuter from the layoffs but was not. We conclude that the record supports the commission's conclusion that: (1) the Polston letter was meant to provide Kuter with only limited job security in his Fond du Lac position and not to immunize him from future DILHR layoffs, and (2) his layoff was for just cause, and therefore we reverse.

The basic facts are undisputed. Kuter was an employee of DILHR for nearly 42 years, working in its Job Service office in Fond du Lac. Prior to 1979, Kuter was classified as a Job Service Supervisor 4 (JSS 4), with duties that included supervision of the Special Applicant Services (SAS) and Employment Assistance Units.

In 1979, the District Director, Al Tollefson (Tollefson), proposed a reorganization of the Fond du Lac office which would have resulted in: (1) the SAS reporting to him instead of Kuter, and (2) Kuter's being moved to a different position with a different title.

Kuter objected to changes in his position and title and appealed to a legislator, his department secretary and division administrator. In response to these appeals, an agreement was reached whereby Kuter would retain his classification and job description but Tollefson could reassign the supervisory responsibilities. This agreement was reflected in a letter dated December 12, 1979 (the Polston letter),¹ in which Polston agreed that the organizational structure would not be changed but that Tollefson could determine direct supervisory and reporting responsibilities of the SAS. During this time, all JSS 4 positions, including that held by Kuter, were reallocated at a higher JSS 5 level.

In 1981, federal funding for DILHR's Work Incentive program and Employment Service program was reduced, necessitating a statewide reorganization of Job Service and subsequent layoff of a large number of Job Service personnel.

Changes from this statewide reorganization and subsequent layoffs impacted directly upon Kuter. He was notified on April 2, 1982 of a pending layoff from his JSS 5 position, effective April 18, 1982. His former JSS 5 position having been abolished through the

reorganization of the district, Kuter exercised his bumping rights on April 5, 1982 and moved into the reorganized JSS 4 position, a reclassification of the same position he had been in for the previous two years. Once in the JSS 4 position, he retained the higher JSS 5 pay and benefits; however, he did not receive a subsequent cumulative pay adjustment on May 1, 1982 as a result of the budget repair bill because his salary exceeded the maximum of the pay range for a JSS 4 position.

On November 11, 1982, based upon recall rights, Kuter interviewed for a JSS 5 position in the Madison Central Operations office. Kuter states that he elected not to pursue the position because of his reliance on the Polston letter, which he believed provided him with job security in his JSS 4 position. Kuter then remained in his JSS 4 position until his retirement in June 1983. Kuter appealed to the commission to receive the budget repair bill across-the-board 3% increase which he was denied from October 3, 1982 through June 24, 1983 and to retain his JSS 5 title.

At a contested case hearing, the examiner took testimony as to the intent of the letter. Kuter actively sought such testimony. The commission issued a decision

which found that: (1) the DILHR reorganization which resulted in Kuter's layoff, as well as the layoffs of 200 other employees, was part of the statewide reorganization of Job Service occasioned by loss of federal funding; (2) the Polston letter was limited to a particular reorganization in 1979 and had been designed to avoid Kuter's layoff at that time but was not intended to protect Kuter from departmental layoffs or economic cutbacks beyond that time period; and (3) Kuter's layoff was for just cause.

The trial court, in reversing the commission's order, rejected the commission's interpretation of the Polston letter, stating that "the terms of that letter has a common and ordinary meaning which does not support the opposing view of limited intent."²

In reviewing the commission's findings, the trial court was bound by the substantial evidence test; i.e., whether there is credible and substantial evidence in the record to support the findings made by the commission. Sec. 227.57(6), Stats.; Yunker v. LIRC, 115 Wis.2d 525, 529, 341 N.W.2d 703, 705 (Ct. App. 1983). Likewise, this court's role is to review the record for credible and substantial evidence which supports the

commission's determination, rather than weigh opposing evidence. Graebel Moving & Storage v. LIRC, 131 Wis.2d 353, 356, 389 N.W.2d 37, 39 (Ct. App. 1986). Finally, the commission's construction of the Polston letter based on extrinsic facts to determine the intent of the parties is a question of fact to which we defer. Cf. Patti v. Western Mach. Co., 72 Wis.2d 348, 353, 241 N.W.2d 158, 161 (1976). Contra Boynton Cab Co. v. DILHR, 96 Wis.2d 396, 407, 291 N.W.2d 850, 855 (1980).

The only function of the commission in the determination of "just cause" in a layoff situation is to determine whether there has been compliance with the statutes and the rules. Weaver v. Wisconsin Personnel Bd., 71 Wis.2d 46, 53, 237 N.W.2d 183, 186 (1976). Kuter was allowed to present evidence on "[w]hether or not in light of the [Polston] letter the lay-off was arbitrary and capricious" and thus, "in reality a pretext as opposed to being a necessity ... under the lay-off provisions."

Polston testified that the letter was in response to a planned reorganization of the Fond du Lac office in 1979 which would have altered Kuter's title and duties. Polston testified that because he recognized Kuter's years of state service, he wrote the letter to

ensure that Kuter would not lose his title. Under cross-examination, Polston stated that the letter was never intended to immunize Kuter from a layoff in the future and that, in fact, layoffs were not even contemplated at the time of the 1979 letter. A memorandum from Kuter's supervisor confirms the limited intent behind the Polston letter of Kuter's retaining his job title even though he would no longer supervise the SAS.

Kuter also contended that the layoff was a pretext to camouflage DILHR's alleged retaliatory motives because of the 1978 personnel case (Kuter-North case) in which he had prevailed; proof of this retaliation, Kuter contends, was DILHR's nonconformity with its own model for reorganization, a variance which affected only the Fond du Lac office and restricted his bumping rights to the Fond du Lac-Oshkosh revised employing unit area where JSS 5 positions were no longer available due to the reduced staff levels.

Only one witness, Edwin Kehl (Kehl), Administrator of the Job Service Division in DILHR, testified on the issue of the Kuter-North case, and he said there was no connection between Kuter's earlier complaint against DILHR and his layoff. Furthermore, the

record, instead of revealing personal retaliation toward Kuter, demonstrates that the statewide reorganization and reduction in work force were justified and that the reorganization process contemplated exceptions to the model in appropriate cases, the Fond du Lac office being one such exception.

The commission's findings that the intent of the Polston letter was limited to the specific issue of the 1979 reorganization in the Fond du Lac office, that the 1981-82 reorganization and subsequent layoffs, including Kuter's, were justified by economic necessity, and that Kuter's 1982 layoff in particular was not a pretext camouflaging retaliatory motives on the part of DILHR are reasonable and therefore must be sustained by this court.

By the Court.--Judgment reversed.

Not recommended for publication in the official reports.

APPENDIX

¹In the Polston letter, Polston, the Division Administrator, made the following commitments to Kuter:

1. The organizational structure will remain as it is now. This means that you will remain in the position of a Supervisor 14.
2. The organizational structure will not change as long as you wish to remain in the Fond du Lac office or, you fail to perform your duties as directed and evaluated by the Local District Director.
3. The Local District Director will determine reporting and supervisory responsibilities of the office with the concurrence of the Assistant Administrator for Field Operations.
4. Your personal Management by Objectives plan will be done in accordance with DILHR directives.

We have reservations about Polston's authority as a representative of the state of Wisconsin to enter into this type of agreement and to commit the state to guaranteeing Kuter his position for as long as he wishes. While the assistant attorney general raised this "defense" to the agreement at the hearing, the commission disposed of the issue in its interim decision and order. The issue apparently was not raised at the circuit court level and has not been raised at the appellate level. Therefore, we consider the issue waived and limit our ruling on the letter to a construction of the agreement as it was presented to the commission.

²We note that the trial court sua sponte reframed the issue from one of whether the layoff was arbitrary and capricious to one of equal protection. Since the reorganization of the Fond du Lac office differed from the reorganizational model, the court found that Kuter was not treated in the same fashion as others similarly situated. The equal protection issue was not raised before the commission nor addressed in the commission's findings.

The trial court should have limited its role to the commission's findings to determine whether there is credible and substantial evidence in the record to support the commission's findings. Yunker v. LIRC, 115 Wis.2d 525, 529, 341 N.W.2d 703, 705 (Ct. App. 1983).