

appeal of Smith v. DMRS, 90-0032-PC,
8/3/95 and 1/5/96

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STATE OF WISCONSIN

CIRCUIT COURT BRANCH 6

DANE COUNTY

DOUGLAS J. SMITH, **PERSONNEL COMMISSION**

Plaintiff,

DECISION AND ORDER

VS

Case No. 90 CV 5059
96 CV 283

KENNETH SHAW, et al.,

Defendants.

STATEMENT OF FACTS

In June of 1990 the position of Administrative Officer 2 - Supervisor for the University of Wisconsin-Madison Safety Department was vacated, and the Department of Merit, Recruitment and Selection (DMRS) was responsible for filling the position pursuant to Sec. 230.05(2), Wis. Stats. Sec. 230.05(2) limits the rights of non-Wisconsin residents to compete for classified positions in the state civil service. On December 26, 1990, plaintiff Douglas Smith commenced a quo warranto action against officials of the University of Wisconsin (UW) and Department of Employment Relations (DER) alleging that the DMRS had violated Sec. 230.05(2) by permitting David Drummond, a non-Wisconsin resident, to compete for the position. Plaintiff also alleged that the DMRS had improperly administered the placement exams. On October 22, 1992, the court stayed the quo warranto action pending the resolution of Smith's appeal before the Personnel Commission. On August 3, 1995, the Personnel Commission issued an interim decision and order stating that the DMRS had violated the residency requirement when it appointed Drummond to the Administrative Officer-2 position, but had administered the examinations

objectively and accordance with the state civil service laws. The interim decision awarded plaintiff attorneys fees and costs. However, before the Personnel Commission issued a final order the DMRS requested the Personnel Commission to consider a 1995 appellate decision, Wis. Retired Teachers Assoc. v. Employes Trust Fund BD (ETF), 195 Wis. 2d 1001, 1043, 537 N.W.2d 400 (Ct. Appl. 1995) The Commission treated the DMRS addendum as a request for reconsideration and reversed its October 27, 1995 interim decision awarding plaintiff attorneys fees and costs.

ISSUES PRESENTED

(1) Does Smith's complaint state a claim upon which relief can be granted where the Administrative Officer 2 position at issue in this case is not a "public office" and where the defendants are not "parties offending" within the meaning of ch. 784, Stats.?

(2) Is Smith entitled to the Administrative Officer 2 position or to damages where the findings of the Personnel Commission clearly and conclusively demonstrate that he would not have been appointed to the Administrative Officer 2 position but for the unlawful appointment of a nonresident?

CONCLUSIONS OF LAW

I.

The court first reviews whether the Personnel Commission's decision that Smith is only entitled to a cease and desist order is correct. It has already been established that defendants violated Sec. 230.16(2) Wis. Stats. when they considered a non-Wisconsin resident for a civil service positions. Plaintiff alleges,

however, that the DMRS's consideration and appointment of a nonresident obstructed his statutory protection in violation of Sec. 230.43(1). To satisfy Sec. 230.43(1), a complainant must show that "defendants willfully defeated, deceived or obstructed the appellant in respect of the rights of examination or registration." The statute covers only *intentional acts against a particular individual or individuals*. The court is not convinced that the DMRS obstructed plaintiff's application process within the plain meaning of the statute. Plaintiff's request fails because there is no showing that the Personnel Commission willfully obstructed plaintiff's application process and there were no intentional acts directed against him individually.

II.

Plaintiff states that under Sec. 230.44(4)(d) Wis. Stats., the Personnel Commission may remove an incumbent if there is a showing of obstruction. Again, this request fails for a lack of showing of any obstruction directed at the plaintiff. The Personnel Commission determined that the examination for safety director was properly administered, objectively graded and job related. (Proposed Decision and Order, page 13). The top five candidates were certified for interviews. Smith scored tenth on the exam, seven spots lower than Drummond. Even if Drummond had not been permitted to take the exam, plaintiff would still not have been considered for the position in light of his low score. Plaintiff's argument that if Drummond had not been certified, other candidates might have dropped out and Smith would have been ultimately certified and selected is tenuous at best. The

plaintiff's rank from ninth to tenth is meaningless. It is pure speculation that eight people would have been offered the position and not accepted it. The Personnel Commission has previously rejected this argument and refused to base its decision on "mere speculation." There was no specific, intentional obstruction directed at the petitioner, and without such the Personnel Commission does not have the authority to remove the incumbent. (Proposed Decision and Order, p. 9).

III.

Defendants argue that the only remedy available to Smith is the cease and desist order against the DMRS because Smith would not have been certified for the Safety Director position even if the violation had not occurred. Furthermore, defendants argue that the plaintiff suffered no injury as a result of the breach of Sec. 230.16(2)(a). The Commission could not conclude that Smith would have been "either appointed or certified for the position of safety director in the absence for the violation of 230.16(2)." (Interim Decision Order, p. 4). Moreover, the Commission found that nothing in the record indicated that the DMRS had taken any willful action against Smith individually; therefore, the Commission could not remove the incumbent Safety Director from the position, pursuant to 230.44(4)(d) and 230.43(1), Wis. Stats., and appoint Smith to the position. In a final decision dated January 15, 1996, the Personnel Commission stated that although the DMRS had violated Sec. 230.16(2), Wis. Stats., it had acted in accordance with WRTA and stated the DMRS had acted in good faith reliance on a March 1996 Attorney General's opinion. The Commission relied on

Wisconsin Retired Teacher's Association (WRTA) v. Employes Trust Fund BD. (ETF), 195 Wis. 2d 1001, 1043 537 N.W.2d 400 (Ct. Appl. 1995). In WRTA the Court determined that members of the ETF did not breach their fiduciary duties to investors by relying upon the advice of the Attorney General that a statute was constitutional when the ETF decided to implement the statute. WRTA, 195 Wis. 2d at 1043. The court stated that it would be unfair to penalize public officials for relying on the advice of governmental counsel. Id.

IV.

On February 2, 1996, Smith petitioned for judicial review of the Personnel Commission's Decision and Order. On February 29, 1996, the Court consolidated the quo warranto action and request for judicial review for purposes of argument. The Court will now address plaintiff's request for judicial review of the January 15, 1996, Cease and Desist Order pursuant to Sec. 227.53, Wis. Stats., for removal of the incumbent, for plaintiff's appointment to the position and for attorneys fees and costs granted in the Personnel Commission's October 27, 1996, interim order.

In denying plaintiff's request for attorneys fees and costs, the Final Order reversed the Personnel Commission's earlier award because the Personnel Commission believed that the DMRS had acted in good faith reliance on a March, 1996, Attorney General opinion. The Personnel Commission determined that attorneys fees and costs could not be awarded because the DMRS had a reasonable basis to rely on the opinion. Sec. 227.485(3), Wis. Stats. provides in pertinent part that:

"In any contested case in which an individual, a small nonprofit corporation or a small business is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust."

The Personnel Commission's interim order stated that the DMRS should not have examined or interviewed a nonresident for the position of safety director. The Final Order stated that even though Drummond should not have been considered, the DMRS was "substantially justified" in relying on an Attorney General opinion. While the Court is not bound by the agency's interpretation of law, it will give the Personnel Commission due deference to an agency's application of the law and as to their determination of what qualifies substantial justification. The Court agrees with the Personnel Commission's determination that the reliance on the Attorney General's opinion did not excuse DMRS's unlawful placing of a nonresident in a civil service position, but that the DMRS did act in good faith reliance on the Attorney General's opinion. Plaintiff argues that WRTA is distinguishable from his situation, and the Personnel Commission made "improper leaps of faith" by extending the principles of WRTA to the present case. The Commission did, however, distinguish WRTA from the present case, but yet concluded that even though the DMRS violated Sec. 230.16(2) Wis. Stats., it was substantially justified in its reliance on the Attorney General's opinion.

DECISION

For the aforementioned reasons, the Personnel Commission's decision is affirmed. The Court agrees that even though the DMRS should not have considered a non-Wisconsin resident for the civil service position, a cease and desist order against DMRS is the appropriate remedy for Smith. Their decision should be affirmed because the examination for safety director was properly administered, there was no willful obstruction in the application process directed at Smith, and the DMRS justifiably relied on the Attorney General's Opinion when it decided to consider Drummond for the position.

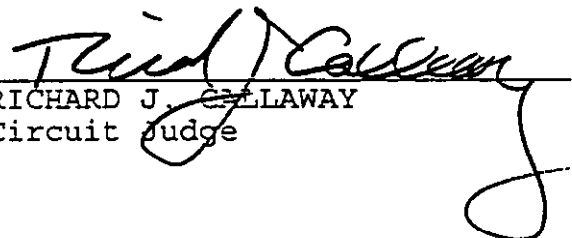
In defendant's Motion for Summary Judgment, defendants state that plaintiff's complaint fails to state a claim for which relief can be granted because plaintiff seeks redress under inapplicable law. Plaintiff brought an action in quo warranto seeking damages, removal of the incumbent and his appointment to the Administrative Officer-2 position. Plaintiff's complaint does not state a claim upon which relief can be granted because the position at issue is not a "public office," and the defendants are not "parties offending" within the meaning of Chap. 784, Stats. Plaintiff properly litigated this claim before the Personnel Commission pursuant to the Wisconsin Civil Service laws. A Quo warranto action is the appropriate method to try title to a "public office." State ex rel. v. Lochschmidt v. Raisler, 133 Wis. 672, 674-75; Secs. 784.04(1) and 784.08 Stats. Not every position of public employment constitutes a public office. Martin v. Smith, 239 Wis. 314, 332 (1941). In Martin the president of University of Wisconsin is not a public office, so his subordinate is not a

public officer. In addition, a quo warranto action may only be brought against the "offending parties." Sec. 784.04(1)(a), Stats. In this case the "offending party" would be Drummond because Drummond is the person whom plaintiff alleges "unlawfully hold the public office." The named defendants, UW, DER or DMRS do not hold the position, and Smith does not request their removal. The Court agrees that the position at issue is not a public office and that the defendants are not the "offending parties." Therefore, the quo warranto action states a claim for which relief cannot be granted. and that action is dismissed.

IT IS SO ORDERED. *TH*

Dated this 10 day of December, 1996.

BY THE COURT


RICHARD J. CALLAWAY
Circuit Judge

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