

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH IV

DANE COUNTY

RONALD L. PAUL,

Petitioner,

v.

Case No. 95-CV-0478

STATE OF WISCONSIN
PERSONNEL COMMISSION,

Respondent,

RECEIVED

OCT 17 1995

PERSONNEL COMMISSION

Petition for review of the Final Decision and Order of the Personnel Commission dated January 1, 1995. The Commission held that the Petitioner's right to reinstatement to an ISD-1 position and back pay terminated upon his discharge with cause from the Department of Corrections. The Petitioner, Ronald L. Paul, contends that the Commission erred in its order and he is entitled to a continued unconditional offer of employment and back pay. Back pay is defined as the difference between what Paul would have earned had he continued in the position he was denied with Mendota Mental Health Institute (MMHI) in 1982, and what he earns today.

The relevant facts are undisputed. Petitioner was denied employment with MMHI in 1982, even though he was the most qualified applicant because the Department of Health and Social Services (DHSS) filled the position under a minority "quota" policy, which was subsequently determined to be erroneous. In 1986 the Personnel Commission entered an interim order that petitioner had been discriminated against and that he was entitled to "back pay" and reinstatement to an ISD-1 position as long as he was qualified. An ISD-1 position was not available at that time and has not been available since that time.

In 1985 the petitioner was terminated with cause from his CO-6 position at the Kettle Moraine Correctional Institute (KMCI). His discharge, however, became effective

with the Department of Corrections (a division of DHSS) in 1987. He gained employment thereafter with the Department of Agriculture.

In January 1995 the Personnel Commission issued its final order, stating that the petitioner was discriminated against in 1982, but that his remedy expired in 1987 as a result of his termination of employment with the Department of Corrections. The petitioner instituted this action, seeking review of the January 25, 1995 order, alleging that the Personnel Commission erred in terminating his remedy with his 1987 discharge.

I. WHETHER MR. PAUL IS ENTITLED TO AN UNCONDITIONAL OFFER OF (RE)INSTATEMENT TO AN ISD-1 POSITION OR ITS EQUIVALENT WITH BACK PAY AND BENEFITS?

The Commission's Interim Decision and Order determined that but for respondent's discrimination Mr. Paul would have been appointed to the ISD-1 position at MMHI. "With respect to remedy, . . . , he is entitled to appointment to this or a similar appropriate position upon the next vacancy, if qualified at that time, plus back pay and benefits. . . ." The petitioner cites to Reinke v. Personnel Board, 53 Wis. 2d 123, 191 N.W.2d 833 (1971), to support his position that he is entitled to an unconditional offer of reinstatement. However, this case does not effectively establish Mr. Paul's right to an unconditional offer of (re)instatement. Reinke establishes that the Personnel Board has the burden of proof as to whether an employee has been discharged with just cause. Id. In addition Reinke arises under Civil Service Laws, chapter 16 of the Wis. Stats. (1969), which requires reinstatement as a remedy. Id. Section 16.24 Wis. Stats. was repealed by chapter 271 sec. 62 Wis. Stats. in 1971. It was subsequently replaced by subchapter II of sec. 111, Wis. Stats., Wisconsin Fair Employment Act, which does not specifically mention this remedy. Petitioner also cites to Anderson v. Labor and Indus. Rev. Comm'n., 111 Wis. 2d 245, 330 N.W.2d 594 (1983), to support his position that only an unconditional offer of employment will terminate an employer's back pay liability. However, Anderson, holds that a valid employment offer will end back pay liability, not that it is the only way to

end back pay liability. Id. Anderson primarily examines what constitutes a valid offer. Id.

The respondent cites Marten Transport, Ltd. v. DILHR, 176 Wis. 2d 1012, 501 N.W.2d 391 (1992), to support their position that a victim of discrimination is not entitled to back pay until an offer of employment is made. However, Marten is a case where the employee voluntarily quit her position. Id. It does not necessarily establish that a discharged employee is not entitled to remedy. Marten interprets sec. 111.39(4)(c), Wis. Stats. to say that should the examiner find that the respondent has engaged in discrimination, the examiner shall "order such action by the respondent as will effectuate the purpose of this subchapter, with or without back pay." Id. Therefore, Marten specifically addresses when an employee voluntarily quits and the necessity of establishing constructive discharge in order to recover back pay and reinstatement under the WFEA and holds whether back pay should be ordered within the discretion of the examiner. Id.

It appears that case law does not fully establish the extent of the remedy to which Mr. Paul is entitled as a victim of discrimination and the WFEA does not specifically set forth an unconditional offer of employment as a remedy. It is valid, then, to reject the petitioner's contention that he is entitled to an unconditional offer of (re)instatement. The language of the Commission's Interim decision clearly limits an offer of (re)instatement to Mr. Paul necessarily being qualified at the time that a position becomes available. The issue now becomes whether discharge with cause no longer qualifies Mr. Paul from acting in an ISD-1 position.

II. DID MR. PAUL'S DISCHARGE FROM THE CO-6 POSITION AT KMCI NO LONGER QUALIFY HIM FOR (RE)INSTATEMENT TO AN ISD-1 POSITION IN ACCORDANCE WITH THE COMMISSION'S INTERIM ORDER FROM JUNE 20, 1986?

The petitioner contends that discharge from a CO-6 position within the Division of Corrections does not prevent him from employment within the Division of Care and Treatment Facilities, which is where MMHI is located. The respondent cites to Wis. Adm. Code §ER-Pers 6.10(4) (renamed §ER-Mrs), which allows an administrator to refuse to

certify an applicant or may remove an applicant from certification who has been discharged from state service with cause. In response the petitioner argues that KMCI and MMHI are located within two distinct employing units, contending Mr. Paul's suspension of privileges occurred only within the one unit, the Division of Corrections. This argument must be rejected because Wis. Adm. Code §ER-Pers 1.02(7) provides that an employing unit is either an agency, which in the present case is the Department of Health and Social Service, "or a functional, organizational or geographic unit within the agency which has been approved under §230.30, Stats. for the agency to use for any one or a combination of the following. . . personnel transactions." There is no evidence that the Division of Care and Treatment Facilities was ever approved under sec. 230.30, Wis. Stats. as a separate employing unit. Therefore discharge within one unit can effectively bar employment within another unit of the same agency.

The Petitioner argues that Mr. Paul's termination from KMCI was due in part to his discrimination at MMHI . Although Mr. Paul would not have been employed at KMCI, but for the respondent's discrimination, Mr. Paul is responsible for his own actions. Mr. Paul was discharged for his inappropriately firing dummy rounds at fellow officers at KMCI, no causal relationship exists between that act and his losing the ISD-1 position. It is pure speculation to suggest Mr. Paul would not have been terminated with cause from the ISD-1 position had there been no discrimination.

III. IS MR. PAUL STILL CONSIDERED QUALIFIED TO HOLD AN ISD-1 POSITION OR ITS EQUIVALENT, SINCE HIS NAME HAS NOT BEEN REMOVED FROM THE CERTIFICATION LIST?

The respondents contend that DHSS, as the appointing authority, would ask DMRS to remove Mr. Paul's name from the list of certified eligible candidates pursuant to Wis. Adm. Code §ER-Pers 6.10(4). The Petitioner contends that the state is engaging in speculation as Mr. Paul's name has yet to be removed from certification. It appears that the

Petitioner is correct. As of September 7, 1995, Mr. Paul had a final interview for a position with the Department of Corrections. Although not part of the official record, the court is taking judicial notice of a letter dated August 17, 1995 and received by Mr. Paul from Douglas Milsap of the Department of Corrections. The letter indicated that Mr. Paul is presently being considered for an Administrative Assistant 4-Supervisor Position with the Department of Corrections. It is impossible for the court to ignore the implications of Mr. Paul currently engaging in final interviews with the Department of Corrections: DHSS has not asked DMRS to remove Mr. Paul's name from the certification list, as would be necessary under Wis. Adm. Code §ER-Pers 6.10(4) to disqualify Mr. Paul from subsequent state agency employment.

CONCLUSION

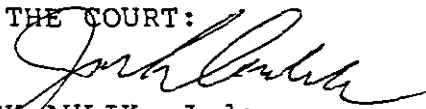
The Final Decision and Order of the Commission is reversed. Upon discharge from the CO-6 position at KMCI, Mr. Paul potentially lost his qualification to hold an ISD-1 position within the DHSS. Had an ISD-1 position or its equivalent become available, Mr. Paul's (re)instatement was expressly contingent upon his maintaining his qualified status. However, it was necessary for DHSS to request that Mr. Paul's certification be removed in order to disqualify Mr. Paul from subsequent state service and cease the accrual of back pay. Although there is no requirement of unconditional employment once Mr. Paul is unable to fulfill the requirements of that employment, Wis. Adm. Code §ER-Pers 6.10(4) is not self executing and it remains the appointing authority's obligation to remove Mr. Paul from the certification list. Therefore Mr. Paul is entitled to back pay and benefits from July 25, 1982 until such time as he receives an offer of an ISD-1 position or its equivalent.

The court initially was prepared to find for the Personnel Commission in this action. It is clear that when Mr. Paul was terminated from the Department of Corrections for firing dummy rounds at fellow officers, while an acting supervisor, he was no longer

qualified to occupy an ISD-I position per the Interim Order. However, it was necessary for DHSS to actively remove Mr. Paul's name from the certification list in order to disqualify him from subsequent state agency employment. DHSS failed to follow Wisconsin's Administrative Code and as a result, a man who's negligent behavior in 1987 should have terminated any further state obligations of reparations for discrimination, is eligible under the law for reinstatement. A sum of \$18,927.89 was rightfully owed to the Petitioner for the wrong he had endured. But now it is the lack of DHSS action in following the administrative code that has caused the amount of back pay owed to be in excess of \$67,000 and still accumulating at the present time. The Court was prepared to affirm the Commissioner's final order, but since DHSS did not fulfill the disqualification process pursuant to Wis. Adm. Code §ER-Pers 6.10(4) and allowed Mr. Paul to engage in final interviews with The Department of Corrections as little as one month ago, there is no other choice but for the Court to find for the Petitioner. DHSS had the necessary law and the means to sever all obligations to Mr. Paul, it was the Court, however, that lacked the legal basis to find for DHSS.

Dated at Madison, Wisconsin this 11 day of October, 1995.

BY THE COURT:


JACK AULIK, Judge
Circuit Court Br. 4

cc: Atty. Steven Schooler
Atty. David C. Rice, AAG