

FILED
COURT OF APPEALS
DIVISION II
JAN 27 2005
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No. 37144-8-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DEPARTMENT OF EMPLOYMENT SECURITY, ET AL

Respondent

v.

LINDA AMBLER, CAROL PEDEN,
FRANCES TAGBO and CHERYL WATERS

Appellants

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY

REPLY BRIEF OF APPELLANTS

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I. Reply to Counter-Argument:

A. Summary of Counter-Argument:

The Respondent, Washington State Department of Employment Security, has focused its Responsive brief on two issues. First it contends that the Appellants were properly paid for the period between the date their allocation appeals were received by the Human Resources Unit and the date of the reduction in force that eliminated their positions. Second, they assert that because the issue of due process was not raised before the trial judge, the Court of Appeals should not consider that portion of the appeal made in this cause.

What the Respondent does not substantially address in its Brief is the issue of the “vested right” possessed by the Appellants to the remedy that the existing civil service system afforded to them. Respondents contend that the Reduction in Force (RIF) was a supervening force that cut-off their right to the remedy the Appellants would otherwise have been entitled to receive. The argument of the Appellants is to the contrary.

Appellants reason that once the Personnel Appeals Board (PAB) issued its order affirming the determination made by the designee of the Director of the Department of Personnel, their rights to reallocation were retroactive and complete. Hence, they were entitled to a determination reflecting the upward allocation irrespective of the intervening RIF.

Appellants contend that the agency had the duty and the ability to implement the upward allocation on the date the PAB ruling was effective. The agency had the ability, not to redo the entire RIF, but to either adjust the positions of each of the Appellants or to Y-rate their salaries to the higher level commensurate with the reallocation decision.

B. Basic Civil Service Law:

Each of the Appellants was incumbent in the positions they held with the Department of Employment Security when they sought an upward allocation. The rights they possessed were tied to those positions. WAC 356-10-060 and CP 40-41. When the RIF did take place, the options offered to the Appellants by the agency were based upon their incumbency. CP 40.

The primary issue in this appeal is the application of that law and the extent to which rights declared for incumbents in civil service positions enjoy remedies that have become vested because of a ruling by the PAB.

The controlling administrative regulation, WAC 358-30-180 provides in pertinent part that:

Any employee, when fully reinstated after appeal, shall be guaranteed all employee rights and benefits, including back pay, sick leave, vacation accrual, retirement and OASDI credits as provided for in RCW 41.06.220.

The preceding administrative code provision is included as a part of the regulatory scheme for civil servants entitled “Restoration of Rights and Benefits”. Among the forms of appeal that are also included in the same regulatory scheme in Chapter 358-30 WAC is 358-30-020 – “Hearings on Appeals of Allocation Determinations”. When read together, the two administrative regulations require the award of “...all employee rights and benefits, including back pay...” etc. If this were not true, then the word “guaranteed” would have no meaning in the sentence.

Respondents acknowledge that the Appellants were entitled to an increase in their salary and benefits consistent with the upward allocation to Employment Security Program Coordinator 3 (ESPC 3) and paid the Appellants at that level for the period from 17 March 2003 until 30 June 2004. CP 190.

Respondents have declared and the trial court supported that they had no duty to elevate the Appellants from Employment Security Program Coordinator 2 levels to ESPC 3 level on the date of the decision by the PAB or anytime after 30 June 2004 when the RIF was effective.

C. A Vested Right Requires Remedy Authorized by Law:

Respondent rely upon WAC 356-10-060(8)¹ to support the argument that it was required to maintain the Appellants at the ESPC 2

¹ “Whenever possible, agencies shall continue employee’s duties unchanged, pending an allocation decision.”

level. Appellants agree with that assessment. Where the distinction arises is that the Respondent contends that because the RIF intervened during the period when the reallocation requests of the Appellants were under review by the agency, it was required to impose the RIF procedure to the positions held by each Appellant since each position was identified for reduction.

Respondent's perspective is superficially convenient for the agency. First, it was the agency that delayed the determination from which the appeal was made to the Department of Personnel. The Appellants had no control over that decision making process.²

Second, as was noted in Appellants brief, the agency never adopted a "procedure" pursuant to WAC 356-10-030(5).³ It had a duty to adopt the procedure because it had been delegated the responsibility to make the allocation determination in the first instance. Because there was no procedure adopted by the agency, the requests of the Appellants languished in the Human Resources unit until a decision was made, three months after the RIF, on 30 September 2004. CP 188. This was a total

² Respondent's Brief, page 6; Respondents also assert that there was a RIF in 2005 and 2006 but there is no evidence in the record of such events. The discussion of due process in Appellants Brief was included to provide the court with a contextual basis for the argument of Appellants. Appellants acknowledge that the issue of "due process" was not addressed to the trial court, but the issue of delay and "vested right" was addressed to the trial court. CP 197-203.

³ Appellant's Brief, page 11-12.

elapsed period of about 18 months from the date determined under the applicable administrative code for purposes of beginning the review by the agency. WAC 356-10-050(6).

Third, it was the agency that made the decision to engage in a RIF in June 2004 and eliminate the call centers where each of the positions of the Appellants was situated.⁴ The Appellants had no control over whether a RIF would occur or what positions were identified for purposes of the RIF.

Essentially, the argument of the agency is that it was not possible for the agency to continue the Appellants duties unchanged past the date of the RIF in June 2004. The agency also contends that any claim of injury by the Appellants is defective because it is speculative and would be a windfall.⁵

Appellants would agree that if they have no right to “...full reinstatement after appeal”, then any additional funds would be a “windfall”. However, it is not speculative to contend that the Appellants should receive payment for “back pay” and benefits since that sum can be calculated from 1 July through the date of the decision by the PAB, 24 March 2006, at an ESPC 3 level.

⁴ Respondents Brief, page 6; CP 42.

⁵ Respondents Brief, pages 6-8.

The problem with the agency argument is that it fails to apply the comprehensive responsibility it possesses under the ruling by the PAB. The PAB confirmed the ruling by Mr. Peterson. CP 29. Mr. Peterson ruled that the positions of the Appellants should be reallocated to ESPC 3 level. CP 23. Neither the PAB nor Mr. Peterson ruled that the reallocation ended on 30 June 2004.

WAC 358-30-180⁶ requires all back pay and benefits to be awarded. It is for the court to determine the purpose and meaning of statutes even when the court's interpretation is contrary to that of the agency charged with carrying out the law. Overton v. Economic Assistance Authority, 96 Wn.2d 552, 637 P.2d 652 (1981). In Adams v. Social and Health Services, 38 Wn.App.13, 16, 683 P.2d 1133 (1984), Division II of the Court of Appeals considered whether the back pay awarded when Ms. Adams was reinstated to her employment would be reduced by the unemployment benefits she had gained during the period after her termination. In that matter, the Personnel Board (predecessor to the PAB) had determined that the "back pay" award should be reduced by the unemployment benefits Ms. Adams received. Judge Reed, writing for a unanimous court held that the statute required full back pay without setoff.

⁶ Previously, WAC 356-34-250.

In a later case, the same Division of the Court of Appeals held that interest on unpaid wages was not authorized by the same statute where the Appellants had been reinstated after a RIF and were ordered to receive back pay under the same statute. Kringle, et al. v. Social and Health Services, 45 Wn.App.462, 726 P.2d 58 (1986).

In each case the individual appellants had lost their jobs; either through a discharge for cause or a reduction-in-force. Yet, each was ordered reinstated with full back pay and benefits because that is what the law required. The situation faced by the Appellants in this cause is analogous. They lost their jobs as ESPC 2s as a result of the RIF that was effective during the pendency of their reallocation request. Both Ms. Adams and Mr. Kringle were entitled to full back pay and reinstatement. In Mr. Kringle's case, because he was the subject of a RIF, his position had been eliminated, much as the Appellants in this cause. However, the Board, in compliance with the same statute in effect in this matter required full reinstatement of back pay and benefits. Kringel, at 463.

The Appellants therefore contend that at the juncture where the PAB ruled, they were entitled to reinstatement and back pay and benefits as required by the law. The situation of the Appellants in this cause is no different from that of a person who is discharged from employment or who loses their position due to a RIF. The remedy imposed by the law,

RCW 41.06.220(2), supervenes the decisions made by the agency. This is because the right to reallocation became vested when the request was made even though it was contrary to the decision made by the agency to deny the reallocation. This is because the agency does not occupy the position as the final decision maker. Where the employee seeks an objective decision by the statutory agency delegated the authority to make the final decision, here—the PAB, it is the determination made by that agency once made that becomes retroactive and subject to compliance by the employing agency.

If this were not valid, then the statute requiring reinstatement and full back pay and benefits would have no meaning. The rights of the Appellants were vested when they established the basis for the upward allocation of their positions. The agency denied the upward allocation, but the designee of the Director of DOP granted the upward allocation and that determination was confirmed by the PAB. The basis for the decision of the PAB was the ruling by the designee who relied upon the materials and reasoning of the employees seeking review.

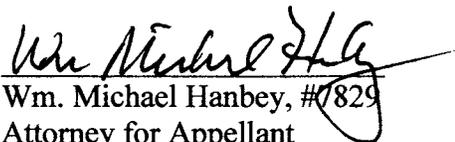
II. Conclusion:

Under law, the Appellants in this cause are entitled to full reinstatement of their back pay and benefits until the date of the ruling by the Personnel Appeals Board on 24 March 2006, because their right to

receive that award was “vested” when they filed their request for review. Their award is not speculative because the level of award can be calculated between the 30th of June 2004 and the 24th of March 2006 at the ESPC 3 level.

The ruling of the PAB takes precedence over the intervening RIF action unilaterally imposed by the agency. The rights of civil service employment are controlled by the civil service statute. Washington Federation of State Employees v. State, 110 Wn.2d 536, 682 P.2d 869 (1984). This Court should grant the appeal and remand this matter for determination of the award of back pay and benefits and award attorney fees and costs sought in this appeal as set forth in Appellant’s Brief and the attached supplemental affidavit in support of additional fees and costs.

RESPECTFULLY SUBMITTED THIS 5th DAY OF AUGUST 2008.



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CERTIFICATE OF SERVICE:

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I certify under the penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

Dated this 5th day of August, 2008

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