

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 12, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3308

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

RONALD L. PAUL,

Petitioner-Respondent,

v.

WISCONSIN PERSONNEL COMMISSION,

Respondent-Co-Appellant,

DEPARTMENT OF HEALTH & SOCIAL SERVICES,

Respondent-Appellant.

APPEAL from an order of the circuit court for Dane County:
JACK F. AULIK, Judge. *Reversed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. The Wisconsin Personnel Commission (commission) and the Department of Health and Social Services (department) appeal from a circuit court order in favor of Ronald R. Paul. Because we

conclude that the circuit court erred in reversing the decision of the commission, we reverse.

BACKGROUND

In 1982, Paul was passed over for promotion to Institution Security Director-1 (ISD-1) at Mendota Mental Health Facility. In 1993, the commission found that the department had contravened the Wisconsin Fair Employment Act (WFEA), §§ 111.31-.395, STATS., by promoting a minority applicant instead of Paul. The commission therefore ordered the department to hire Paul for the next available ISD-1 position "if he was then qualified" and to give him back pay. The commission ordered Paul and the department to reach an agreement within thirty days. Failing agreement, the commission retained jurisdiction to fashion a remedy.

Paul and the department could not agree within the thirty days, and each agreed to submit the issue to the commission with a stipulation as to facts.

The parties stipulated in relevant portion as follows:

1. Paul was entitled to back pay from 1983 until 1987. The 1987 date reflects the date Paul was discharged for cause from Kettle Moraine Correctional Institute for firing dummy bullets at other officers.

2. If an ISD-1 position became available, a new certification list would be necessary to fill the vacancy, and the department would request that Paul's name be removed from the list per WIS. ADM. CODE § ER-Pers. 6.10(4) (now renamed § ER-MRS 6.10(4)) because Paul had been removed from the state civil service for cause.

The commission's 1995 decision on remedy provided that the department was to provide Paul with back pay from 1982 to 1987. The commission also held that Paul was not entitled to an offer of employment after

1987 because his name would have been removed from the list of candidates per WIS. ADM. CODE § ER-Pers. 6.10(4) (now renamed § ER-MRS 6.10(4)).

Paul appealed to the circuit court. That court held that Paul was entitled to back pay until Paul was offered employment as an ISD-1 or equivalent. In reversing the commission, the circuit court relied on evidence from Paul that he had recently been interviewing for various state positions. Despite the fact that this evidence was outside the agency record, the court took judicial notice of it and construed this evidence as proof that Paul had not, in fact, been removed from the list of eligible candidates. Holding that WIS. ADM. CODE § ER-Pers. 6.10(4) (now renamed § ER-MRS 6.10(4)) is not self-executing, the court held that the department's failure to request Paul's name be removed meant that Paul remained eligible for back pay and promotion.

APPLICABLE REGULATION

WISCONSIN ADM. CODE § ER-Pers. 6.10(4) (now renamed § ER-MRS 6.10(4)) reads in relevant portion:

Disqualification of applicants. In addition to provisions stated elsewhere in the law or rules, the administrator may refuse to examine or certify an applicant, or may remove an applicant from a certification:

....

(4) Who has been dismissed from the state service for cause, and the action is requested by the appointing authority.

ANALYSIS

The parties in this appeal made a stipulation before the commission. Construction of a stipulation is a question of law. *Duhame v.*

Duhamer, 154 Wis.2d 258, 262, 453 N.W.2d 149, 150 (Ct. App. 1989). We decide questions of law without deference to the circuit court. *Ball v. District No. 4 Area Bd.*, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984).

The parties stipulated that Paul would have been removed from the list of eligible candidates at DHSS's request. In the guise of construing an agreement between the parties, the court cannot insert what has been omitted or rewrite what has been agreed by the parties. *Batavian Nat'l Bank v. S & H, Inc.*, 3 Wis.2d 565, 569, 89 N.W.2d 309, 312 (1958). The fact that Paul was later able to prove to the circuit court's satisfaction that the department had not taken the necessary steps to remove him from the list of eligible candidates does not alter the binding force of the stipulation to the contrary. Having invited the error (if error it is), Paul was estopped from coming to the reviewing circuit court and complaining that the error occurred. *See Soo Line R.R. Co. v. Office of the Comm'r of Transp.*, 170 Wis.2d 543, 557, 489 N.W.2d 672, 678 (Ct. App. 1992).

Further, on administrative review, the circuit court was not permitted to consider matters not of record before the agency. *See* § 227.56(1), STATS.; *State Pub. Intervenor v. DNR*, 171 Wis.2d 243, 249, 490 N.W.2d 770, 773 (Ct. App. 1992) (a reviewing court may receive evidence in order to determine whether to remand a case to the administrative agency, but may not receive the evidence to decide the case on review). Thus, the circuit court erred in reviewing matters outside the agency record in order to overturn the parties' stipulation.

Finally, we are persuaded that the parties' stipulation was not contrary to public policy. The WFEA does not require an offer of back pay and reinstatement. Rather, the WFEA is silent on reinstatement, and the commission may refuse to order back pay even when discrimination is found. *See* § 111.39(4)(c), STATS.; *Marten Transp., Ltd. v. DILHR*, 176 Wis.2d 1012, 1019-20, 501 N.W.2d 391, 394 (1993).

By the Court.—Order reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.