

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

MAY 13, 1997

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. 96-2749-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

GERALD WITKOWSKI AND RANDY SCOTT,

PLAINTIFFS-APPELLANTS,

v.

**BARRY WEBER, CHIEF OF POLICE, CITY OF WAUWATOSA
AND CITY OF WAUWATOSA,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM D. GARDNER, Judge. *Reversed and cause remanded with directions.*

Before Fine, Schudson and Curley, JJ

PER CURIAM. Gerald Witkowski and Randy Scott sued Barry Weber, Chief of Police of the City of Wauwatosa, and the City of Wauwatosa for declaratory and equitable relief regarding Chief Weber's failure to promote Witkowski and Scott pursuant to a personnel policy developed and implemented by Chief Weber. The trial court granted summary judgment to Chief

Weber and the City. Witkowski and Scott appeal, contending that Chief Weber violated a ministerial duty to follow his own promotional policy. We agree with Witkowski and Scott and therefore reverse the trial court's order.

I. BACKGROUND

The relevant facts are undisputed. On December 15, 1993, Chief Weber initiated a new promotional policy for promotions within the police department. The policy identified certain qualifications required for promotion to Lieutenant: (1) the candidate had to complete five years of service within the department; (2) the candidate had to show knowledge and ability for the position as demonstrated by both written and oral examination; and (3) the candidate had to complete an interview with the chief. The policy stated that at the conclusion of the process, Chief Weber would "select candidates in rank order from this list to fill vacancies. This list shall be valid for two (2) years from the date it is finalized."

On March 10, 1994, Chief Weber posted the promotions list for Lieutenant. The list included both Witkowski and Scott:

WAUWATOSA POLICE DEPARTMENT

March 10, 1994

TO: ALL PERSONNEL

FROM: CHIEF BARRY WEBER

RE: LIEUTENANT ELIGIBILITY LIST

The following personnel, listed in the correct order, comprise the Lieutenant eligibility list which expires on March 10, 1996, or sooner if exhausted.

1. Greg Jochem
2. Jon Cindric

3. Dan Andersen
4. Jerry Witkowski
5. Randy Scott
6. Mark Presper

Barry Weber
CHIEF OF POLICE

The list indicated that Witkowski and Scott were in line for promotion ranked as the fourth and fifth candidates, respectively. By May 19, 1995, Chief Weber had promoted the first three candidates on the March 10, 1994 list. On that date, however, Chief Weber rescinded the list and announced that the hiring criteria were being amended to require supervisory experience. Between May 19, 1995 and March 10, 1996, the original date for the expiration of the promotion list, two lieutenant positions came open in the department. Chief Weber promoted two persons who were not on the March 10, 1994 list.

Chief Weber and the City argued to the trial court that Chief Weber's action of amending the promotion policy was a discretionary function entitled to immunity from suit pursuant to § 893.80(4), STATS. The trial court agreed with Chief Weber and the City and granted their motion for summary judgment.

The appellants raise two issues: (1) whether Chief Weber violated a ministerial duty imposed by his own promotion policy and, therefore, was not immune from suit; and (2) whether the appellants were entitled to summary judgment on their amended complaint's claim that Chief Weber was estopped from changing the promotion criteria and policy. Because our disposition of the first issue resolves the appeal, we decline to address the second issue. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W.2d 663, 665 (1938) (if decision on one point disposes of appeal, appellate court will not decide other issues raised).

II. DISCUSSION

Our review of a trial court's grant of summary judgment is *de novo*. See *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315-16, 401 N.W.2d 816, 820 (1987). We use the same summary judgment methodology as the trial court. *Id.* That methodology has been described in many cases, see e.g. *Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980), and need not be repeated here. If the summary judgment submissions demonstrate that genuine issues of material fact exist, summary judgment must be denied. *Berna-Mork v. Jones*, 173 Wis.2d 733, 741, 496 N.W.2d 637, 641 (Ct. App. 1992). In determining whether a genuine issue of material fact exists, all reasonable doubts must be resolved in favor of the nonmoving party. *Preloznik v. City of Madison*, 113 Wis.2d 112, 116, 334 N.W.2d 580, 583 (Ct. App. 1983). Summary judgment must be entered if the evidentiary material demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." RULE 802.08(2), STATS.

The general rule of public officer immunity is "that a public officer is not personally liable to one injured as a result of an act performed within the scope of his official duty." *Lister v. Board of Regents*, 72 Wis.2d 282, 300, 240 N.W.2d 610, 621 (1976). Exceptions to the rule of immunity include the "general exception ... that an officer is liable for the negligent performance of a ministerial act." *Pavlik v. Knisey*, 81 Wis.2d 42, 50, 259 N.W.2d 709, 712 (1977). "A public officer's duty is ministerial only when it is absolute, certain, and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." *Lister*, 72 Wis.2d at 301, 240 N.W.2d at 622. The supreme court has also recognized that "once a

legislative or quasi-legislative type of decision is made, which decision in itself would be immune from the imposition of liability, the very officer who made the immune decision may nevertheless be subject to liability as a public officer for the breach of the ministerial duty imposed by that decision.” *Pavlik*, 81 Wis.2d at 50-51, 259 N.W.2d at 712.

Applying these legal principles to the undisputed facts submitted to the trial court, we conclude that Chief Weber violated a ministerial duty when he amended the department’s promotion policy prior to its two-year expiration date. When Chief Weber created the new promotional policy in December 1993, his action was discretionary and immune from suit. The policy, however, established a two-year period during which Chief Weber was obligated to comply with the criteria he established for the duration he established. Once Chief Weber established the eligibility list and decreed that it would remain in force until March 10, 1996, he lacked the authority to amend the criteria, change the duration, or appoint persons not on the list to vacancies occurring prior to March 10, 1996, unless the list were exhausted. Accordingly, Chief Weber’s decision to change the promotion criteria prior to the expiration of the promotion policy was a violation of ministerial duty imposed by the policy.

Therefore, the trial court erred in granting Chief Weber’s and the City’s motion for summary judgment. Witkowski and Scott were entitled to summary judgment as a matter of law. Accordingly, we reverse the trial court’s order and remand this matter for the trial court to enter summary judgment on this legal issue in favor of the appellants. The trial court shall order Chief Weber to appoint Witkowski and Scott to the lieutenant positions, “subject to approval by the board” pursuant § 62.13(4)(a), STATS., and shall conduct those proceedings

necessary to determine the back pay and other benefits to which the appellants may be entitled.

By the Court.—Order reversed and cause remanded with directions.

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

