

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 22, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2017AP1488

Cir. Ct. No. 2016CV2107

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ANDREW T. MURPHY,

PETITIONER-APPELLANT,

V.

**STATE OF WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
CHANCELLOR REBECCA BLANK AND THE BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
JUAN B. COLAS, Judge. *Affirmed.*

Before Lundsten, P.J., Kloppenburg and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. The Wisconsin Employment Relations Commission (WERC) issued an order refusing to “restore” Andrew Murphy to three positions following a layoff and denying him back pay with respect to a fourth position to which he should have been restored. The circuit court affirmed. On appeal, Murphy argues that: (1) WERC erred in concluding that Murphy was unqualified for the three positions to which he applied and was denied restoration; and (2) Murphy was entitled to back pay as a remedy for being denied restoration to a fourth position to which he applied and for which he was qualified. We conclude that substantial evidence in the record supports WERC’s determination that Murphy was unqualified for the three positions to which he applied and was denied restoration. We also conclude that, under controlling law, Murphy was not entitled to back pay as a remedy for being denied his restoration rights as to the fourth position. Therefore, we affirm.

BACKGROUND

¶2 Murphy has worked for the University of Wisconsin (UW) in several financial services-related positions.¹ In 2009, Murphy was working as a financial program supervisor with the UW-Madison School of Medicine when he accepted a voluntary demotion in lieu of being laid off from his position. Under the civil service laws, Murphy was then entitled to three years of restoration rights in a position classified as equivalent to his position as “financial program supervisor” and for which he was qualified. *See* WIS. STAT. § 230.31(1)(b) (2009-10);

¹ Murphy worked for the UW as a Financial Specialist 1 at the Sea Grant Institute, then as a Financial Specialist 3 at the School of Music, then as an Accountant-Journey within the Department of Medicine, and lastly as a Financial Program Supervisor also within the Department of Medicine.

WIS. ADMIN. CODE § ER-MRS 22.10(1)-(2).² Murphy, in attempting to invoke these restoration rights, applied to the following positions and was denied based on his not being qualified: (1) financial program supervisor within the Primate Research Center; (2) accountant within the Department of Pediatrics; (3) accountant within the Department of Population Health Sciences; and (4) accountant within the Department of Radiology.

¶3 Murphy sought administrative review before WERC. The sole issue was whether Murphy was qualified for each of the four positions. Murphy and the four hiring authorities who denied Murphy the positions testified. WERC determined that Murphy was unqualified for three of the four positions to which he had applied: the financial program supervisor position within the Primate Research Center; the accountant position within the Department of Pediatrics; and the accountant position within the Department of Population Health Sciences. WERC determined that Murphy was qualified for and improperly denied the accountant position within the Department of Radiology.

¶4 Initially, WERC concluded that Murphy should receive back pay “for any difference in the compensation he would have received” had he been restored to the accountant position within the Department of Radiology. However, on rehearing, WERC reversed its ruling as to back pay on the ground that such an

² Employees who voluntarily accept a demotion in lieu of a lay off are entitled to a right of mandatory restoration to a position for which they are “qualified to perform the work after being given the customary orientation provided newly hired workers in such position.” WIS. ADMIN. CODE § ER-MRS 22.10(1) and (2); *see also* § ER-MRS 1.02(30) and WIS. STAT. § 230.31(1)(b).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. All references to the Wisconsin Administrative Code are to the version in effect in 2009-10.

award was prohibited by WIS. STAT. § 230.43(4) and controlling case law. WERC ruled that the sole remedy available to Murphy was an extension of Murphy's restoration rights.

¶5 Murphy sought judicial review of WERC's decision, challenging the findings that he was not qualified for the three positions and the conclusion that he was not entitled to back pay for the fourth position. The circuit court affirmed WERC's decision. Murphy appeals.

DISCUSSION

¶6 On appeal, we review the decision of the agency, not the circuit court. *Jefferson Cty. v. WERC*, 187 Wis. 2d 647, 651, 523 N.W.2d 172 (Ct. App. 1994). The scope of our review depends on whether the decision of the agency challenged on appeal involves a finding of fact or an interpretation of law. *Madison Teachers, Inc. v. WERC*, 218 Wis. 2d 75, 83, 580 N.W.2d 375 (Ct. App. 1998). We uphold the agency's findings of fact if the findings are supported by substantial evidence. *Hutson v. Wisconsin Pers. Comm'n*, 2003 WI 97, ¶29, 263 Wis. 2d 612, 665 N.W.2d 212. The substantial evidence test is "not whether a preponderance of the evidence supports the WERC's determination, but whether reasonable minds could arrive at the same conclusion reached by the WERC." *Madison Teachers*, 218 Wis. 2d at 85. A factual finding is set aside only if "a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences." *Id.* at 86 (quoted source omitted).

¶7 We review the agency's legal conclusions under one of three levels of deference: great weight, due weight, or no weight. *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996). Neither party disputes that WERC's conclusion as to its own authority to order back pay is a question of law and is

entitled to no deference. See *Torres v. Morales*, 2008 WI App 113, ¶4, 313 Wis. 2d 371, 756 N.W.2d 662.

¶8 Murphy argues that: (1) WERC erred in concluding that Murphy was unqualified for the three positions to which he applied and was denied restoration, and (2) Murphy was entitled to back pay as a remedy for being denied restoration to a fourth position to which he applied and for which he was qualified. We address each of these arguments in turn. We conclude that substantial evidence in the record supports WERC’s determination that Murphy was unqualified for the three positions to which he applied and was denied restoration. We also conclude that, under controlling law, Murphy was not entitled to back pay as a remedy for being denied his restoration rights as to the fourth position.

I. Unqualified

¶9 The parties agree that Murphy was entitled to a right of mandatory restoration to a position for which he “is qualified to perform the work after being given the customary orientation provided to newly hired workers in such position.” WIS. ADMIN. CODE § ER-MRS 22.10(1) and (2); *see also* § ER-MRS 1.02(30) and WIS. STAT. § 230.31(1)(b). Murphy argues that “[t]he Commission’s findings that Murphy would have been unqualified for each of the three positions are unsupported by substantial evidence and based on an unreasonable application of law.” We first address and reject Murphy’s challenge concerning the “unreasonable application of law,” a challenge common to each of the three positions under review. We then address and reject Murphy’s factual challenges as to his qualifications for each of the three positions.

A. *No Unreasonable Application of Law*

¶10 Murphy argues that “rather than determining if Murphy met the basic qualifications for each position, the University decision-makers instead denied his restoration rights by claiming he was not the most qualified applicant.” Murphy directs our attention to testimony from the three hiring authorities that, according to Murphy, evinces a subjective misunderstanding of the civil service restoration rights which Murphy enjoyed. As a result, Murphy argues, WERC’s reliance on such testimony in reaching its decision was based on an unreasonable application of the law.

¶11 We reject Murphy’s argument because he does not show that WERC relied on any testimony as to the hiring authorities’ purported misunderstanding of Murphy’s restoration rights. Rather, the record shows that WERC relied on testimony as to the requirements of the positions and whether Murphy was qualified to meet those requirements. What Murphy is actually arguing is that WERC improperly *credited* testimony, as to the position requirements and Murphy’s qualifications to meet those requirements, of hiring authorities who may have misunderstood the civil service restoration requirements. However, any subjective misunderstanding of the civil service restoration requirements by an individual hiring authority is irrelevant when separate substantial evidence supports the view that a candidate, such as Murphy, is unqualified for a position.

¶12 The proper inquiry before us focuses on whether substantial evidence in the record supports WERC’s factual findings as to Murphy’s qualifications. See ***Madison Teachers***, 218 Wis. 2d at 85 (“we must defer if it is supported by substantial evidence in the record” and “[w]e may not substitute our judgment for that of the WERC ‘as to the weight of the evidence on any disputed

finding of fact” (quoted source omitted)). As we explain below, substantial evidence in the record supports WERC’s factual findings that Murphy was unqualified for each of the three positions.

B. Supported by Substantial Evidence

¶13 Murphy argues that WERC’s findings as to his qualifications for each of the three positions is unsupported by substantial evidence in the record. We disagree, and address and reject Murphy’s challenges with respect to each of the three positions.

1. Primate Research Center Financial Program Supervisor

¶14 The position of Primate Research Center Financial Program Supervisor required a candidate with the following skills and experience, among others: “[s]trong management and supervisory skills,” grant management, including pre-grant award administration and post-grant award administration, and purchasing. WERC found that “Murphy has not proven by preponderance of the evidence that he was qualified to perform the duties of a Financial [Program] Supervisor at the [Primate Research Center].” WERC’s finding rested on the testimony of hiring authority James Butts showing that Murphy was unqualified in two respects: pre-grant award management and supervisory skills.

¶15 Butts testified that Murphy demonstrated limited knowledge of the pre-grant award process, and that it would take a minimum of one year to train Murphy. Butts also testified that, based upon Murphy’s interview responses and attitude, Murphy did not demonstrate the supervisory skills required for the position, and it was unlikely that Murphy would possess those skills after the customary orientation. Specifically, Butts testified that Murphy’s interview

responses indicated that Murphy did not have the proper attitude or capacity for supervising and disciplining others.

¶16 Murphy disputed both bases for WERC’s finding. Murphy acknowledges that he lacked experience in pre-grant award management, but argues that his “less extensive experience in pre-award management did not make him unqualified to perform the duties of the position after customary orientation” because of “his considerable experience in purchasing, supervising, and post-award management.” However, it was reasonable for WERC to conclude that Murphy’s lack of pre-grant award management experience rendered him unqualified for the position of financial program supervisor, which required experience in pre-grant award management. See *Madison Teachers*, 218 Wis. 2d at 86 (we will set aside an agency’s factual finding only “if our review of the record convinces us that ‘a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences.’” (quoted source omitted)).

¶17 Murphy also disputes Butts’ opinion that Murphy lacked the requisite supervisory skills, citing his previous supervisory experience and training with the Department of Medicine and Department of Music. However, it was reasonable for WERC to conclude that Butts’ evaluation of Murphy’s attitude toward and capacity for supervision “was relevant to Murphy’s qualification for the position.” WERC stated that “[i]n light of the position’s emphasis on leadership skills, Butts’ evaluation of Murphy’s attitude toward supervision was relevant to Murphy’s qualification for the position. Such evaluation, by necessity, may be more subjective, but it is not out of place.” We will not disturb WERC’s evaluation of the weight and credibility of the record evidence. See *Madison Teachers*, 218 Wis. 2d at 88. While Murphy urges us to reach different

conclusions from the evidence in the record, he does not demonstrate that no reasonable person could have arrived at the same finding reached by WERC.

¶18 We conclude that WERC’s finding that Murphy was unqualified for the position of financial program supervisor with the Primate Research Center is supported by substantial evidence.

2. *Department of Pediatrics Accountant*

¶19 WERC found that “Murphy has not proven by a preponderance of the evidence that he was qualified to perform the duties of an Accountant in the Department of Pediatrics.” This position required experience working with complex NIH research grants, a deep understanding of NIH grant policies and procedures, and experience working directly with researchers in the financial analysis of projects, among other qualifications. Murphy argued to WERC that he possessed the “basic knowledge” required for the position but, as WERC noted, “[i]n his argument, Murphy does not describe what ‘basic knowledge’ he possessed that rendered him qualified for the Department of Pediatrics’ Accountant position.” On appeal, Murphy attempts to describe to us the “basic knowledge” that he failed to describe to WERC. However, “[b]ecause our review of an administrative agency’s decision contemplates review of the record developed before the agency, a party’s failure to properly raise an issue before the administrative agency generally forfeits the right to raise that issue before a reviewing court.” *State of Wisconsin Dep’t of Justice v. State of Wisconsin Dep’t of Workforce Dev.*, 2015 WI App 22, ¶18, 361 Wis. 2d 196, 861 N.W.2d 789. Because Murphy failed to properly develop his “basic knowledge” argument before WERC, we decline to consider it further.

3. *Department of Population Health Sciences Accountant*

¶20 WERC found that Murphy was not qualified for the Accountant position within the Department of Population Health Sciences. This position required the ability to manage all aspects of large-scale federal and private grants, including both pre- and post-grant award administration. WERC found Murphy unqualified based on hiring authority Deanna Moore’s testimony, which WERC summarized as follows: “[Moore] testified that in his interview Murphy provided broad responses that did not contain sufficient detail to demonstrate that he was qualified for the position. He also did not provide detail when asked questions calling for specific information about grant accounting. Based upon Murphy’s responses Moore also determined that he did not have sufficient experience setting up accounts as required for the position or handling errors common within the UW-Madison’s systems.”

¶21 Murphy argues that substantial evidence does not support WERC’s finding that he was unqualified for this position because Moore’s testimony indicates that she “did not deny Murphy the position at the Department of Population Health Services based on a belief that Murphy was unqualified, but rather that he did not interview as well as other candidates.” We disagree.

¶22 First, as Murphy acknowledges, he does not have extensive experience in pre-grant award management, which was required for this position. A reasonable person could find that an employee who lacks pre-grant award experience is unqualified for a position requiring experience in pre-grant award management. See *Madison Teachers*, 218 Wis.2d at 86. Moreover, Moore testified that she did not believe Murphy would be able to reach this required level

of qualification after a customary orientation, and it is not our place to second-guess WERC's determination as to her credibility. *See id.* at 88.

¶23 Second, even taking Murphy's assertion about his qualification at face value, a reasonable person could conclude that Murphy, who failed to give specific answers when asked about his past experience with post-grant award management, did not possess the qualifications required for the position. *See id.* Indeed, employers conduct interviews for the express purpose of verifying the qualifications that candidates assert they have in their resumes and applications. We conclude that substantial evidence in the record exists to support WERC's conclusion that Murphy was unqualified for the Accountant position in the Department of Population Health Sciences.

¶24 In sum, Murphy fails to demonstrate that WERC's factual findings as to his qualifications for the three positions are not supported by substantial evidence in the record.

II. Back Pay

¶25 Murphy also challenges WERC's order denying Murphy back pay for UW's refusal to restore him to the fourth position for which he was qualified. Murphy argues that WERC's conclusion that Murphy was not entitled to back pay contradicts the language and purpose of the statute. The State argues that "precedent forecloses Murphy's request for back pay." We agree with the State.

¶26 WISCONSIN STAT. § 230.43(4) provides in pertinent part:

RIGHTS OF EMPLOYEE. If an employee has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been restored to such position or employment by order of the commission or any court upon

review, the employee shall be entitled to compensation therefor from the date of such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled by law but for such unlawful removal, demotion or reclassification.

¶27 The State argues that our decision in *Seep v. State Pers. Comm'n*, 140 Wis. 2d 32, 409 N.W.2d 142 (Ct. App. 1987), controls here. In *Seep*, a recently retired employee had a right to be reinstated to her position if she applied within three years of her retirement; she timely applied and was denied reinstatement on the ground that she had abused the sick leave policy prior to her retirement. *Id.* at 36. WERC found that her employer abused its discretion in denying Seep reinstatement on the sole ground that Seep had previously abused the sick leave policy, ordered her reinstatement, but did not award Seep back pay. *Id.* at 37 & n.3 The circuit court reversed WERC’s denial of back pay. *Id.* at 37. We affirmed WERC’s decisions as to the issues of abuse of discretion and reinstatement, and reversed the circuit court’s award of back pay. *Id.* at 38-42. We concluded that, under the plain meaning of WIS. STAT. § 230.43(4), WERC was permitted to award back pay only in cases involving unlawful removal, demotion or reclassification. *Seep*, 140 Wis. 2d at 41-42. We reasoned that “[s]ince the legislature expressly allowed the commission to use the remedy of back pay in civil service cases *only* when dealing with removal, demotion or reclassification, it implicitly chose not to make the remedy available in reinstatement cases.” *Id.* at 42 (emphasis in original).

¶28 While *Seep* involved the denial of reinstatement rights, we conclude that the plain meaning interpretation of WIS. STAT. § 230.43(4) articulated in *Seep* also forecloses Murphy’s argument as to back pay for the denial of his restoration rights. Because Murphy was not unlawfully removed, demoted or reclassified, WERC properly denied Murphy back pay for UW’s failure to restore him to a

position for which he was qualified. WIS. STAT. § 230.43(4); **Seep**, 140 Wis. 2d at 42.

¶29 Beyond stating in his initial appellant’s brief that we “misstate[d] ... the plain meaning of WIS. STAT. § 230.43(4)” in **Seep**, Murphy develops no argument distinguishing this case from **Seep** and does not address the State’s argument as to its binding application in his reply brief. Accordingly, we take Murphy to admit that **Seep** forecloses an award of back pay for the denial of his restoration rights, and therefore forecloses any consideration of Murphy’s other arguments as to back pay. See **United Coop. v. Frontier FS Coop.**, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant’s failure to respond in reply brief to an argument made in response brief may be taken as a concession).

CONCLUSION

¶30 For the foregoing reasons, we affirm the decision of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

