STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

State of Minnesota ex. rel. Association of Freeborn County Landowners,

Plaintiff,

v.

Minnesota Public Utilities Commission,

Defendant,

and

Buffalo Ridge Wind, LLC, Three Waters Wind, LLC, Northern States Power Company, and Plum Creek Wind Farm, LLC,

Defendants-Intervenors.

Case Type: Other Civil
Court File No. 62-CV-20-3674
Judge: Hon. Sara R. Grewing

DECLARATION OF ANDREW W. DAVIS

I, Andrew W. Davis, hereby state and declare as follows:

1. I am an attorney at Stinson LLP. I am licensed to practice law in the State of Minnesota.

2. I am one of the attorneys representing Defendants-Intervenors Buffalo Ridge Wind, LLC ("Buffalo Ridge") and Three Waters Wind, LLC ("Three Waters") (collectively, "Intervenors").

3. Intervenors have cited the following unpublished cases in their Reply in Support of their Motion to Dismiss:

- *Bolar v. Hennepin Home Health Care, Inc.*, 1998 WL 88228 (Minn. Ct. App. Mar. 3, 1998)

- *Minnesota Center for Environmental Advocacy v. Minnesota Public Utilities Commission*, 2010 WL 5071389 (Minn. Ct. App. Dec. 14, 2010)

- *State ex rel. Friends of the Boundary Waters Wilderness v. AT&T Mobility, LLC*, 2012 WL 2202984 (Minn. Ct. App. June 18, 2012)

- *Water in Motion, Inc. v. Minn. Dept. of Labor and Industry*, 2016 WL 7041978 (Minn. Ct. App. Dec. 5, 2016)

4. A true and correct copy of *Bolar v. Hennepin Home Health Care, Inc.* is attached as **Exhibit A** to this Declaration. Copies of the remaining cases were included in Exhibit A to my August 19, 2020 Declaration, which was filed contemporaneously with Intervenors' Joint Memorandum in Opposition to Plaintiff's Motion for Temporary Injunction.

5. I declare under penalty of perjury that everything I have stated in this document is true and correct.

Signed at Minneapolis, Minnesota, this 26th day of August, 2020.

/s/ Andrew W. Davis
Andrew W. Davis

EXHIBIT A

1998 WL 88228
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

Michael A. BOLAR, Relator,

v.

HENNEPIN HOME HEALTH CARE, Inc., Respondent,

C.H.B. Enterprises, Inc., Respondent,

Commissioner of Economic Security, Respondent.

No. C9-97-1477.

|

March 3, 1998.

File No. 662-UC-97

Attorneys and Law Firms

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William D. Hull, Marcia B. Haffmans, Coleman, Hull & Van Vliet, P.L.L.P., 8500 Normandale Lake Blvd., Suite 2110, Minneapolis, MN 55437 (for respondents Hennepin Home Health Care, Inc., and C.H.B. Enterprises, Inc.)

Kent E. Todd, Department of Economic Security, 390 North Robert St., St. Paul, MN 55101 (for respondent Commissioner of Economic Security)

Considered and decided by KALITOWSKI, Presiding Judge, DAVIES, Judge, and FOLEY,* Judge.

UNPUBLISHED OPINION

DAVIES, Judge

***2** Relator Michael A. Bolar appeals by writ of certiorari from respondent Commissioner of Economic Security's decision disqualifying him from reemployment insurance benefits. We reverse.

FACTS

Respondent Hennepin Home Health Care, Inc. (HHH), hired relator Michael A. Bolar to work as a home health aide at $8.50 per hour. During his tenure with HHH, relator accepted from respondent C.H.B. Enterprises, Inc. (CHB), one short-term assignment as a personal care assistant at $7.60 per hour. (CHB shares offices with and has the same management as HHH.) Near the end of a later home health aide assignment, relator visited the HHH/CHB office seeking another assignment. He was offered a personal care assistant position with CHB, which he rejected because it required less skill and paid less than a home health aide position.

After relator applied for reemployment insurance benefits, a claims adjudicator determined that he was disqualified from benefits because he refused an offer of suitable reemployment. A reemployment insurance judge affirmed the adjudicator's decision, but a second reemployment insurance judge disagreed, finding that the personal care assistant job offer was not suitable because it involved work of a different nature and paid substantially less than a home health aide assignment. HHH and CHB appealed to respondent Commissioner of Economic Security.

***3** The commissioner, through her representative, reversed the decision of the second reemployment insurance judge, ruling that the personal care assistant assignment constituted an offer of suitable reemployment.

DECISION

Minnesota's reemployment insurance statute, Minn.Stat. §§ 268.03-.23 (1996), should be interpreted liberally in favor of awarding benefits. *Riley v. Transport Corp. of Am., Inc.,* 462 N.W.2d 604, 607 (Minn.App.1990). The statute's disqualification provisions, Minn.Stat. § 268.09, are to be construed narrowly. *Valenty v. Medical Concepts Dev., Inc.,* 503 N.W.2d 131, 135 (Minn.1993). A claimant is disqualified from receiving reemployment insurance benefits if the claimant fails without good cause "to accept suitable employment, or suitable reemployment with a former employer, when offered." Minn.Stat. § 268.09, subd. 2 (1996).

This court will not disturb the commissioner's findings of fact "if there is evidence reasonably tending to sustain those findings," but we remain free to exercise our independent judgment regarding the commissioner's conclusions of law. *Ress v. Abbott Northwestern Hosp., Inc.,* 448 N.W.2d 519, 523 (Minn.1989); *Smith v. Employers' Overload Co.,* 314 N.W.2d 220, 221 (Minn.1981).

We have, on occasion, stated that suitability of offered reemployment is a question of fact to be determined by the commissioner. *Hogenson v. Brian Knox Builders,* 340 N.W.2d 360, 363 (Minn.App.1983). More accurately stated, however, the standard of review is that in certain cases an agency performs *in its area of expertise* a combination of fact-finding and policy interpretation to which this court will generally defer. *Compare Richview Nursing Home v. Minnesota Dept. of Pub. Welfare,* 354 N.W.2d 445, 450 (Minn.App.1984) (deferring to agency interpretation of rules when language subject to construction is so technical or ambiguous that agency alone has experience and expertise to understand it), *review denied* (Minn. Oct. 31, 1984); *with Klatte v. Elm Creek Golf Course, Inc.,* 372 N.W.2d 54, 56 (Minn.App.1985) (no deference to administrative interpretation of statutory language "phrased in common terms"). Further, when an agency's decision ultimately involves interpretation of a statute, it cannot disguise its decision-making process as one of fact-finding.

> [This] approach, if followed, would mean that in nearly every case of statutory interpretation the administrative ruling would effectively be insulated from judicial review unless manifestly arbitrary and capricious. Instead, it is clear that [this issue of statutory interpretation] is a question of law to be determined on the basis of the operative facts determined by the commission.

Minnesota Microwave, Inc. v. Public Serv. Comm'n, 291 Minn. 241, 245, 190 N.W.2d 661, 664 (1971).

***4** In this case, the commissioner applied the term "suitable" to disqualify appellant from receiving reemployment insurance benefits. This process involves more than mere fact-finding; ultimately, it is the interpretation of a rule. Thus, we review the commissioner's decision as a matter of law that is not entitled to deference.

The personal care assistant position offered to relator did not constitute an offer of suitable reemployment because it paid substantially less than relator's prior home health aide assignments.

> [S]uitable work is permanent work in [claimant's] usual or substantially equivalent employment which provides wages and conditions of employment approximating those of [claimant's] past employment * * *.

Minn. R. 3305.0700, subp. 5(D) (1995). CHB's base personal care assistant wage of $7.40 per hour is 13% less than relator's home health aide wage of $8.50 per hour. Relator negotiated a personal care assistant wage rate of $7.60 per hour, still 10.6% less than his wage as a home health aide. A 10.6% disparity in potential maximum salary between claimant's former and offered positions together with a decrease in job grade has been held to constitute good cause to refuse the offered position. *Marty v. Digital Equip. Corp.,* 345 N.W.2d 773, 775 (Minn.1984). Relator cannot be disqualified from receiving reemployment insurance benefits when he refused to accept a position that paid significantly less than his prior employment.[1]

Relator was also entitled, without sacrificing qualification for reemployment insurance benefits, to reject an offer of reemployment that was not reasonably related to his qualifications. Minn. R. 3305.0700, subp. 3; *Hendrickson v. Northfield Cleaners,* 295 N.W.2d 384, 386 (1980). We have held that reemployment claimants have good cause to reject offers of reemployment for which they are overqualified, even if the total compensation for the new position is higher than that for the prior position. *Holbrook v. Minnesota Museum of Art,* 405 N.W.2d 537, 539 (Minn.App.1987), *review denied* (Minn. July 15, 1987).

Respondents argue that the home health aide and personal care assistant positions are identical, with a pay disparity due entirely to differences in the reimbursement structure of the government agencies that pay for services to HHH and CHB clients. But job descriptions from respondents themselves show several differences between the responsibilities of home health aides and personal care assistants. Respondents expected home health aides to perform tasks not required of personal care assistants. By virtue of his training and years of experience as a home health aide, relator was overqualified for the personal care assistant assignment offered by CHB. The commissioner's legal conclusion to the contrary is not supported by the record.

Relator had good cause to refuse the proffered personal care assistant assignment without jeopardizing his qualification for reemployment insurance benefits. The commissioner's representative erred by deciding otherwise.

***5** Reversed. KALITOWSKI, Judge (dissenting)

I respectfully dissent. The record supports the determination of the commissioner's representative that relator was disqualified from receiving benefits because he refused, without good cause, an offer of suitable reemployment from C.H.B. Enterprises (CHB).

The commissioner's representative specifically found the testimony of respondent to be more credible than the testimony of relator. Further, the evidence supports the findings of the commissioner's representative that: (1) during the base period relator worked for CHB as a personal care assistant at a wage rate of $7.60 per hour; (2) CHB offered relator a personal care assistant position substantially similar to the assignment relator performed for CHB during the base period; (3) relator declined the offer because the job required weekend work and paid less than the $8.50 per hour he had earned working as a home health aide for Hennepin Home Health Care; and (4) the evidence presented indicated the only difference between the responsibilities of a personal care assistant and a home health aide is that a home health aide can take a client's temperature, pulse, and respiration rates. These findings support the conclusion of the commissioner's representative that the personal care assistant position was not unsuitable work for relator.

Because substantial evidence in the record supports the conclusion of the commissioner's representative that relator refused, without good cause, an offer of suitable reemployment, I would affirm the determination that relator is disqualified from receiving reemployment insurance benefits.

All Citations

Not Reported in N.W.2d, 1998 WL 88228

Footnotes

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

1 We also note, as a point of interest, that the personal care assistant assignment offered by respondent CHB was unsuitable because the wage offered was "substantially less favorable" than the prevailing wage for similar work in the area. *See* Minn. R. 3305.0700, subp. 4(B) (work is not suitable if wages offered are substantially less favorable than prevailing wage for similar work); Minn. R. 3305.0800, subp. 12 (1995) (wages "must approximate the prevailing wage for the work to be suitable"). Wages more than 10% below the prevailing wage for the type of work being considered are substantially less favorable *as a matter of law. Id.* at subp. 15. In 1996, the prevailing wage for a personal care assistant in the Twin Cities metropolitan area was $8.26 per hour. Research and Statistics Office, Minn. Dept. of Econ. Sec., *Minnesota Salary Survey by Area* 1996 45 (1997). While relator was able to negotiate a rate of $7.60 per hour, 8% below the prevailing wage, CHB's usual wage of $7.40 made the job substantially less favorable to relator as a matter of law.