STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

MILWAUKEE COUNTY,

Plaintiff, MEMORANDUM DECISION

vs.

STATE OF WISCONSIN
LABOR AND INDUSTRY
REVIEW COMMISSION and
JOYCE E. SHERMAN,

Case No. 78-CV-48

Defendants.

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is an action by the plaintiff County to review a decision of the defendant Commission dated July 21, 1978, entered in an unemployment compensation proceeding. This decision reversed a decision of the appeal tribunal in favor of the County and determined that the defendant Sherman (hereafter the employee) was eligible for unemployment benefits, if otherwise qualified.

FINDINGS OF APPEAL TRIBUNAL

The appeal tribunal had made the following findings of fact:

> "The employe worked for about 22 months as a clerk stenographer for the employer, a municipality. Her last day of work was December 30, 1976 (week 1 of 1977).
>
> As a qualification for employment the employe was required to be a resident of Milwaukee County and maintain such residence throughout the period of her employment. At the time of hire, she was a bona fide resident of Milwaukee County. In August of 1976 she moved out of Milwaukee County and signed a certificate of residence to that effect. When she did not move back into Milwaukee County by December 31, 1976 (week 1 of 1977), the end of the grace period, the employer regarded her actions as a quitting.
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> The employe contended that she did not quit her employment, but rather was forced to resign. However, she was aware of the residence requirement at the time she initially qualified for her position. Notice of this rule was posted at various locations throughout her place of work. In addition, she was given sufficient time to move back into the County and reestablish residency. She elected not to return to Milwaukee County. Her actions severed the continuing employer-employe relationship and constituted a voluntary termination of employment.
>
> Although the rule may have been a hardship for

the employe, it was not an unreasonable work rule. While she may have had compelling personal reasons for not living in Milwaukee County, it was purely a personal decision and cannot be attributable to the employer.

Under the circumstances, the employe terminated her employment, but not with good cause attributable to the employer, nor for any other reason that would allow the immediate payment of unemployment benefits.

The appeal tribunal therefore finds that in week 1 of 1977, the employe voluntarily terminated her employment within the meaning of section 108.04(7)(a) of the statutes, and that such termination was not within any of the exceptions to said section."

THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM OF THE COMMISSION

"The employe worked during about 22 months as a clerk-stenographer for the employer, a county. Her last day of work was December 30, 1976 (week 1 of 1977).

Sometime prior to August 1, 1976 (week 32), the employe informed her supervisor that she and her husband were puchasing a home located outside the employer's county and that she would move there on August 1, 1976 (week 32). When so notified, her supervisor gave her no indication that such a move would terminate the employment relationship. On or about August 3, 1976 (week 32), the employer notified all its workers that a residency rule would be enforced effective December 31, 1976 (week 1 of 1977). Shortly thereafter in August of 1976 her supervisor directed her to resign effective December 31, 1976 (week 1 of 1977) because she was in violation of the employer's residency rule. She was afforded no option to move back into the county in order to continue her employment. Furthermore, she believed that the rule would be selectively enforced by the employer.

The employe's resignation was submitted in the good faith belief that the employment relationship would not be continued. Under the circumstances, termination of the employment relationship was clearly initiated and induced by the employer and cannot be considered, for unemployment compensation purposes, as a voluntary quitting.

The Commission therefore finds that in week 1 of 1977, the employe did not voluntarily terminate her employment, within the meaning of section 108.04(7)(a) of the statutes."

The Commission appended this memorandum to its decision immediately below the three signatures of the Commissioner:

"NOTE: The Commission considers that the appeal tribunal failed to consider that although the employer may have had a residency rule for many years, no attempt to enforce this rule was made until immediately after the employe purchased her home and that, although the employer had knowledge

that the employe planned to purchase the home, the employer did not warn the employe that attempts would be made to enforce its rule in the future. Furthermore, the appeal tribunal failed to consider that the employe was afforded no option of moving or resigning."

THE ISSUES

The court deems that the issues to be resolved are:

(1) Whether the Commission made material findings of fact that are not supported by credible evidence.

(2) Whether the Commission made an erroneous determination as a matter of law in determining that the employee's termination of her employment was not a voluntary quitting within the meaning of sec. 108.04(7)(a), Stats., and by reversing the appeal tribunal's determination that such quitting was not within any of the exceptions to such statute.

THE COURT'S DECISION

A. Whether Commission's Findings of Fact Are Not Supported by Credible Evidence.

(1) Finding that Employee had Informed Supervisor Prior to August 1, 1976, of Contemplated Purchase of Home Outside County and Would Move there August 1, 1976.

The employee's supervisor was a Mrs. Boeder. The employee nowhere in her testimony testified that prior to August 1, 1976, she had told Mrs. Boeder or any other representative of the county, that her husband and she were buying a home outside Milwaukee County, or were contemplating moving out of the county.

Therefore, if there is support for such finding, it consists in testimony given by Mrs. Boeder. Mrs. Boeder near the beginning of her testimony was asked this question and gave this answer (Tr. 31-32):

"Q Briefly in your own words, can you tell the examiner about when you had your first conversation with her and what the substance of that conversation was?

A Well, ah, Mrs. Sherman gave me her change of address on August 3rd. So currently from that date it was either a mandate or before that, we discussed her moving out of the County."

Later in her testimony she was asked these questions and gave these answers (Tr. 35):

"Q Had you had a chance to talk to Mrs. Sherman prior to her telling you she had moved to Menomonee Falls about her looking for homes other than the one she found?

A We talked about it informally.

Q So, you were aware of the fact that she was looking for homes other than the one she found?

A We talked about it informally.

Q So, you were aware of the fact that she was looking for a new home, is that correct?

A Yes. Yes, it is.

Q And, ah, then she did have occasion to talk to you about this home in Menomonee Falls, did she not?

A Yes. She talked about it.

Q And, ah, she said that she knew, did she not, that her desire to own a (inaudible), is that correct?

A Yes. She said, well, she should go where her husband went.

Q And, even though she realized that, ah, the rule of residency required she stay in Milwaukee County, she wanted to continue on her job?

A Yes. That's correct."

The court concludes there was support in Mrs. Boeder's testimony for this finding, but there is nothing in that finding to suggest that the employee did not know she was required to maintain her residence in Milwaukee County as a condition of her employment, or that the County through Mrs. Boeder condoned her contemplated move out of the county.

(2) Finding that Employee Was Afforded No Option to Move Back Into the County.

A letter dated July 30, 1976, was sent to all County employees by order of the Milwaukee County Civil Service Commission signed by Anthony P. Romano, its Chief Examiner (Exhibits 1 and 3). This letter informed the employees of a judgment entered in the United

keep her job by moving back into the county at any time prior to December 31, 1976, or that she had any desire to do that. On the contrary she did not dispute this testimony by Mrs. Boeder (Tr. 33):

> "Q Ah, do you recall what Mrs. Sherman told you about no longer being employed by Milwaukee County?
>
> A She did not seem to be too unhappy about it because she figured she would be able to secure some place of employment in Menomonee Falls. Ah, they were happy about the new home. This is what her husband wanted and that's why they were moving."

On this state of the record the court determines that the finding made that the employee was afforded no opportunity to move back into the County is not supported by any credible evidence. In fact the evidence clearly established by Exhibits 1 and 3 that she was accorded such an opportunity.

(3) Finding that the Termination of the Employment Relationship Was Clearly Initiated and Induced by the Employer.

If this finding had stated that the signing of the resignation by the employee had been initiated and induced by the County, the court would have no difficulty in finding that it was supported by credible evidence, but this is not what was found.

Whether the finding that the termination of the employment of the employee was initiated by the County, if meant to embrace the promulgation of the residency rule and the sending out of the notice of intention to enforce it of July 30, 1976 (Exhibit 1), that also is supported by credible evidence.

The legal effect of these acts of the County will hereinafter be dealt with in the court's consideration of whether the Commission made an erroneous determination as a matter of law on the quit issue.

B. Whether the Commission Made an Erroneous Determination of Suit Issue as a Matter of Law.

This court within the past year has dealt with the effect of the violation by employees of residency rule ordinances in Swessel v. Labor and Industry Review Commission and City of Milwaukee, Case No. 161-462, Dane County Circuit Court (November

6, 1978), and City of Madison v. ILHR Department and Gerald J. Eastman, Case No. 164-053 (March 20, 1979).

In both of these cases the court quoted this extract from the decision of the Supreme Court in Dentici v. Industrial Comm., 264 Wis. 181, 186, 58 N.W. 2d 717 (1953):

> ". . . Here it must be held that there was a voluntary termination of employment by the employee, because the evidence shows that by his acts he intended to leave his employment rather than accept a transfer. When an employee shows that he intends to leave his employment and indicates such intention by word or manner of action, or by conduct inconsistent with the continuation of the employee-employer relationship, it must be held, as the industrial commission determined here, that the employee intended and did leave his employment voluntarily and by refusing to accept the transfer left without good cause attributable to the employer . . ." (Emphasis added.)

These cases held that the quoted rule of the Dentici case was applicable to stiuations of employee violation of residency rule ordinances that made residency within the employer municipality a condition of continued employment. The decision therein pointed out that the situation was factually parallel to that in unemployment compensation cases where the employee as a condition of his employment is required to maintain his membership in a labor union and fails to do so. Two of such cases are Nottelson v. DILHR and A.O. Smith Corporation, Case No. 151-485, Dane County Circuit Court (~~December 9, 1953~~) the Honorable Alvin C. Reis, presiding.

Here there is a reasonable inference that the County was not actively enforcing its residency rule pending the decision of the Miller v. Kraczyk case in United District Court. However, the judgment in that case was entered on May 14, 1976, upholding the constitutionality of the residency rule, and all County employees were notified by the notice of July 30, 1976 (Exhibit 1) that the residency rule would be enforced and that any employee, except those specifically exempted from the rule, who were in non-compliance by December 31, 1976, would be discharged.

Therefore, when the employee was asked by Mrs. Boeder, her supervisor, to sign the resignation effective December 31, 1976, she knew she would be subject to discharge on that date if then

not residing in the county. There is no evidence that Mrs. Boeder made any statement of any impending result other than that if the employee did not sign the resignation form. The court holds that under these circumstances the signing by the employee of the resignation form was a voluntary, and not an involuntary, act within the meaning of sec. 108.04(7)(a), Stats. She merely agreed to accept the same result that would have occurred if she continued in violation of the residency rule until December 31, 1976.

There remains to be considered this finding made by the Commission:

> "Furthermore she [the employee] believed that the rule would be selectively enforced by the employer."

In the context in which this finding appears the time of such found belief of the employee was that when she signed the resignation form.

The court deems significant this statement made by the hearing examiner who sat as the appeal tribunal in her credibility memorandum furnished to the Commissioners:

> "I found that the only exception to the County Civil Service rule stated by Mrs. Sherman was one where the employe was in the process of moving back to Milwaukee County. All other exceptions were adequately explained by the employer and the employer's witnesses."

The only individual employee to whom the employee had alluded in her testimony, who she believed was being more favorably treated than herself, was Dolores Riling. Riling was a probation officer residing in Sussex in Waukesha County (Tr. 11). The only testimony the employee gave of any conversation she had with Riling was one that occurred in "possibly" late November, 1976, in which Riling told the employee she was going to comply with the residency rule, but by the end of December she had not (Tr. 47). In cross examining Mrs. Boeder the employee asked, ". . . if they requested me to resign as soon as they knew I did not live in the County, why was she not asked to resign at the same time?" Mrs. Boeder's answer was (Tr. 42):

> "Ah, Mrs. Riling is moving into Milwaukee County becuase of the residency rule. She has purchased

a condominium on 92nd and Lisbon called, ah, Ability Court (ph). She did not tell me this personally, but I have discussed her moving to Milwaukee County with her. Ah, she said that she is selling her home in Sussex and moving to Milwaukee because of the residency rule."

The date of the hearing before the appeal tribunal was February 24, 1977, or nearly two months after December 31, 1976. However, there is nothing in the record to disclose when Riling bought the condominium in Milwaukee County in which she planned to move. When she had told the employee about it in November, 1976, she then planned to comply with the residency rule. There is nothing in the record to suggest that, if the employee had told her supervisor she intended to comply with the residency rule and that she and her husband were planning to buy or rent property in the County into which to move, she would not have been relieved of her resignation and given the same kind of extension Riling apparently was given.

The words "all other exceptions were adequately explained by the employer and the employer's witnesses" in the examiner's credibility memorandum refers to job positions specifically exempted from the residency rule by the Civil Service Commission. Romano, after testifying there were some exceptions to the residency rule, was asked these questions and gave these answers (Tr. 22-23):

"Q Now, ah, can you tell us if there are such exceptions to this rule of residency?

A Yes, sir.

Q And, briefly, can you tell us what those exceptions are?

A Most of the positions that are exempted pertain to the medical, nursing areas.

Q Now, is this an exemption, an official exemption to the rule of the Civil Service Commission?

A That is correct."

Later on Romano was asked these questions and gave these answers (Tr. 25-26):

"Q Now, just going into that for a few moments, Mr. Romano, ah, can you explain the reasoning behind the exceptions?

A The reasoning behind the exceptions was that

were areas, or are areas where it is very difficult to recruit sufficient number of candidates to fill all of the authorized positions.

Q And these positions are positions that concern health and well-being of patients in Milwaukee County?

A That is correct.

Q So, it is extremely - in your opinion, it is extremely urgent and necessary that those positions be filled if at all possible?

A If at all possible.

Q That was one of the reasons why this exception was made?

A That's correct."

The Commission's brief does not raise any issue that the portion of the residency rule which authorized the County Civil Service Commission to grant such exemptions was unconstitutional as denying equal protection of the laws. The court believes it would be unproductive to make such an attack because there appears to be a rational basis for such exemptions.

It is the court's conclusion on the basis of the evidence analyzed above not to attach any legal significance to the finding, "Furthermore, she believed that the rule would be selectively enforced by the employer."

Let judgment be entered reversing the Commission's decision which is the subject of this review, and remanding the matter for further proceedings consistent with this decision.

Dated this 13th day of August, 1979.

BY THE COURT:

Reserve Circuit Judge

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