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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1190**

Elliot Skurich,
Relator,

vs.

Fond du Lac Tribal & Community College,
Respondent,
Department of Employment and Economic Development,
Respondent.

**Filed March 9, 2010
Affirmed
Stauber, Judge**

Department of Employment and Economic Development
File No. 22050023-2

Elliot B. Skurich, Duluth, Minnesota (pro se relator)

Gail M. Olson, Minnesota State Colleges & Universities, St. Paul, Minnesota (for
respondent Fond du Lac)

Lee B. Nelson, Amy R. Lawler, Minnesota Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent DEED)

Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

Relator challenges the decision by the unemployment law judge (ULJ) that he is ineligible for unemployment benefits because he was not employed in a “covered” position that would allow him to earn wage credits and establish a benefit account. We affirm.

FACTS

Relator Elliot Skurich was employed by respondent Fond du Lac Tribal & Community College from December 1996 until January 2009. The college is part of the Minnesota State College and University system (MnSCU). For most of his tenure, including at the time of his discharge, relator served as the chief financial officer (CFO) of the college and reported exclusively to the president of the college. The CFO position is an unclassified position included within the Personnel Plan for Administrators at MnSCU. As CFO, relator’s responsibilities included (1) overseeing the day-to-day financial operations of the college in accordance with state and federal law and tribal regulations; (2) advising the college president and college administration on financial policy-making and budget matters; (3) developing the college’s \$12 million annual budget; and (4) helping to establish policies and procedures for residential housing, financial aid, information technology, food service, child care, vending, and staffing.

After being discharged from his employment, relator applied for unemployment benefits from respondent Department of Employment and Economic Development (DEED). DEED declared relator ineligible for unemployment benefits because he had

not earned sufficient wage credits to establish an unemployment benefit account. *See* Minn. Stat. §§ 268.069, subd. 1(1) (2008) (stating that an applicant must establish a benefit account in order to become eligible for unemployment benefits); .07, subd. 2(a) (2008) (stating that an applicant must have a certain amount of wage credits to establish a benefit account). Wage credits are earned through wages “for covered employment.” Minn. Stat. § 268.035, subd. 27 (2008). “Covered employment” does not include employment with the State of Minnesota “that is a major policy making or advisory position in the unclassified service.” *See* Minn. Stat. § 268.035, subd. 20(15) (2008). DEED determined that relator did not have sufficient wage credits to establish a benefit account because his position was not covered employment.

Relator appealed the decision and a *de novo* hearing was held before an unemployment law judge (ULJ). At the hearing, relator acknowledged that his position was unclassified, but claimed that the wages he earned as CFO constituted “covered employment” under section 268.035 because his employment did not involve major policy making or advising. Relator claimed that he had very little discretion to act on behalf of the college and emphasized that the president had final decision-making authority. But relator did admit that he served in an advisory capacity to the president with respect to all financial matters and was responsible for such “integral” tasks as constructing the annual budget and managing the financial operations of the college.

The ULJ concluded that relator’s position as CFO did not constitute “covered employment” under Minn. Stat. § 268.035, subd. 20(15), because he played an important advisory role to the president and was responsible for developing major fiscal policies on

behalf of the college. Without any time in covered employment, relator was ruled ineligible to receive unemployment benefits because he did not have any wage credits to establish a benefit account. Relator requested reconsideration, and the ULJ affirmed her decision. This certiorari appeal followed.

D E C I S I O N

When reviewing the decision of a ULJ, this court may affirm the decision, remand it for further proceedings, or reverse or modify it if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are “(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (2008).

To become eligible for unemployment benefits, an applicant must establish a benefit account. Minn. Stat. § 268.069, subd. 1(1) (2008). An applicant may establish a benefit account only if he has a certain amount of “wage credits.” Minn. Stat. § 268.07, subd. 2(a) (2008). “Wage credits” are statutorily defined as wages paid within the applicant’s base period for “covered employment.” Minn. Stat. § 268.035, subd. 27 (2008). Covered employment does not include employment with the State of Minnesota “that is a major policy-making or advisory position in the unclassified service, including those positions established under section 43A.08, subdivision 1a.” Minn. Stat. § 268.035, subd. 20(15) (2008). An individual in a policy-making position “determines the direction, emphasis, and scope of action in the development and the administration of

governmental programs.” Minn. R. 3315.0530, subp. 4 (2007). “An individual in an advisory position is one who advises governmental agencies and officers with respect to policy, program, and administration without having authority to implement its recommendations.” *Id.*

Here, the record supports the ULJ’s determination that relator served in both a major policy making and advisory capacity as CFO of a MnSCU institution. Relator acknowledged that he advised the president on financial matters, and the human resources director for the college testified that relator played a role in developing policy at the institution. Further, the job description for the CFO position indicates that relator’s duties included advising the president and administration on financial policies and programs and helping to shape the policies of several departments including residential housing, financial aid, information technology, food service, child care, vending, and staffing. Relator was also responsible for developing the annual budget and managing the financial operations of the college. Thus, relator’s position as CFO clearly falls within the definitions of “policy-making” and “advisory” positions contained in the administrative rules.

Relator further contends that the ULJ erred in concluding that his position was unclassified. Relator relies upon Minn. Stat. § 43A.08, subd. 1(9) (2008), which defines “unclassified positions” as including:

presidents, vice-presidents, deans, other managers and professionals in academic and academic support programs, administrative or service faculty, teachers, research assistants, and student employees eligible under terms of the federal Economic Opportunity Act work study program in the

Perpich Center for Arts Education and the Minnesota State Colleges and Universities, *but not the custodial, clerical, or maintenance employees, or any professional or managerial employee performing duties in connection with the business administration of these institutions.*

(Emphasis added.)

Relator asserts that his position should be deemed “classified” because he is a “professional or managerial employee performing duties in connection with the business administration” of the college. *See id.* At first blush, the language of subdivision 1(9) could appear to support relator’s argument. But we believe that subdivision 1a of the same statute, which was cited by the ULJ in determining that relator’s position was unclassified, is the appropriate provision to apply in this instance. The subdivision provides that the “appointing authorities” for a number of state agencies, including MnSCU, may designate unclassified positions in addition to those enumerated by statute. *See id.*, subd. 1a (2008).

A position designated by an appointing authority according to [subdivision 1a] must meet the following standards and criteria:

- (1) the designation of the position would not be contrary to other law relating specifically to that agency;
- (2) the person occupying the position would report directly to the agency head or deputy agency head and would be designated as part of the agency head’s management team;
- (3) the duties of the position would involve significant discretion and substantial involvement in the development, interpretation, and implementation of agency policy;

(4) the duties of the position would not require primarily personnel, accounting, or other technical expertise where continuity in the position would be important;

(5) there would be a need for the person occupying the position to be accountable to, loyal to, and compatible with, the governor and the agency head, the employing statutory board or commission, or the employing constitutional officer;

(6) the position would be at the level of division or bureau director or assistant to the agency head; and

(7) the commissioner has approved the designation as being consistent with the standards and criteria in this subdivision.

Id.

Despite the slight facial inconsistency between the two subdivisions, the record indicates that relator's position was designated "unclassified" by the college board of trustees and the state legislative committee on employee relations. Relator does not dispute that these governing bodies were the appropriate appointing authorities.

Moreover, the language of this subdivision more closely describes relator's position than the definition contained in subdivision 1(9). Consistent with subdivision 1a, relator reported directly to the agency head (the president of the college) and as chief financial officer, was part of the college's management team. As the architect of the college budget, relator also had significant discretion in developing fiscal policy. Accordingly, we conclude that relator's position was properly deemed unclassified.

We further note that relator was informed that his position was unclassified at the time of his appointment, yet he waited until after he was denied unemployment benefits (a period of almost ten years) to challenge this designation. We presume that a high-

ranking official responsible for overseeing the financial operations of a college would understand the significance of the “unclassified” designation.

Because substantial evidence in the record supports the ULJ’s determination that relator was employed in a policy-making and advisory role as CFO, and because the ULJ did not err in concluding that the CFO position was unclassified, relator’s employment constituted “noncovered employment” for purposes of Minn. Stat. § 268.035, subd. 20(15). Without any service in covered employment, relator could not establish a benefits account, and, therefore, was ineligible to receive unemployment benefits. *See* Minn. Stat. § 268.069, subd. 1(1) (stating that an applicant must establish a benefit account to become eligible for unemployment benefits).

Affirmed.