
NO. 22568

IN THE SUPREME COURT OF THE STATE OF HAWAII

KENNETH A. MOSKOW, Appellant-Appellant,

vs.

CIVIL SERVICE COMMISSION FOR THE COUNTY OF MAUI; HOWARD T. TAGOMORI, in his capacity as Chief of Police; and MAUI POLICE DEPARTMENT, Appellees-Appellees.

APPEAL FROM THE SECOND CIRCUIT COURT
(CIV. NO. 98-0158(2))
(Agency Appeal)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Acoba, JJ.,
and Circuit Judge Pollack, assigned by reason of vacancy)

Appellant-appellant Kenneth A. Moskow appeals from the May 13, 1999 final judgment of the Circuit Court of the Second Circuit, the Honorable Shackley F. Raffetto presiding, dismissing his appeal from the February 4, 1998 amended decision and order of the Civil Service Commission (CSC) for the County of Maui [hereinafter, amended decision and order]. On appeal, Moskow argues that: (1) the relief given by the CSC -- placing Moskow on a reemployment list of eligibles for Police Officer II (P.O. II) positions in the Maui Police Department (MPD) for eighteen months -- does not adequately remedy the violation of law committed by Howard T. Tagomori, in his capacity as MPD Chief of

Police, and the MPD [hereinafter, collectively, Appellees]¹;
(2) Appellees should be estopped from denying him immediate
rehire, back pay, benefits, and costs; and (3) the CSC's
conclusion of law (COL) No. 8² was erroneous because there was
sufficient evidence to support a finding that perceptions of his
attitude were the basis for his not being rehired, and that,
therefore, he was "constructively" removed from the reemployment
list without the opportunity to be heard, in violation of HRS
§ 76-25(c) (1993).³

Upon carefully reviewing the record and the briefs
submitted by the parties and having given due consideration to
the arguments advanced and the issues raised by the parties, we
resolve Moskow's contentions as follows. First, Moskow has not
made a convincing showing that the CSC's amended decision and
order was: (1) unjust and unreasonable in its consequences;
(2) arbitrary, capricious, or characterized by an abuse of
discretion; or (3) a clearly unwarranted exercise of discretion.

¹ The circuit court determined that Appellees' method of filling vacant P.O. II positions internally (through the promotion of officers in P.O. I positions) violated Hawaii Revised Statutes (HRS) § 75-23 (1993), which required that, "[w]henver there is a position to be filled, the appointing authority shall request the director of human resources development to submit a list of eligibles." Id.

² COL No. 8 states, "Although [Moskow's] appeal included allegations that perceptions of his work attitude and possibly other improper motives were the primary basis for his not being rehired, [Moskow] did not present sufficient evidence to support such a finding."

³ HRS § 76-25(c) states that "[t]he director of personnel services may remove the name of a person on any reemployment or recall list or refuse to certify the person's name on any list of eligibles, if the director finds, after giving the person notice and an opportunity to be heard, that the person is no longer able to perform the necessary duties satisfactory." HRS § 76-25 was repealed in 2000. 2000 Haw. Sess. L. Act 253, § 51 at 877.

We, therefore, hold that the remedy granted by the CSC was reasonable under the circumstances. See HRS § 91-14 (1993).⁴

Second, a reviewing court has power to grant relief only in accordance with HRS § 91-14; therefore, the relief Moskow requested -- to be automatically re-hired with back pay and back benefits -- was not a remedy that the circuit court could have granted. See Citizens for Protection of North Kohala Coastline v. County of Hawai'i, 91 Hawai'i 94, 103, 979 P.2d 1120, 1128 (1999) (holding that the relief requested in that case, i.e. declaratory and injunctive relief, was not a remedy that the circuit court could have afforded the appellants in its prior agency appeal); see also Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 70 n.13, 881 P.2d 1210, 1216 n.13 (1994) (stating that in an agency appeal, although a party may seek declaratory and injunctive remedies, "the court only has power to grant relief in accordance with HRS [§] 91-14(g)").

⁴ HRS § 91-14 states in relevant part:

Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Finally, a review of the record indicates that Moskow failed to produce sufficient evidence to demonstrate that the MPD's refusal to rehire him was arbitrary, discriminatory, or based on improper motives. The record indicates that the MPD did consider Moskow's record of prior disciplinary actions, as well as his performance evaluations, and that the decision not to rehire Moskow was largely based on his prior employment record. Consequently, COL No. 8 was not erroneous, and Moskow was not "constructively removed" from the reemployment list. Therefore,

IT IS HEREBY ORDERED that the May 13, 1999 final judgment from which this appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, May 2, 2003.

On the briefs:

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