

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DANIEL L. FINK, M.D.,  
Petitioner-Appellee,

UNPUBLISHED  
November 29, 2011

v

CIVIL SERVICE COMMISSION,  
Respondent -Appellant,

No. 299124  
Ingham Circuit Court  
LC No. 09-001459-AA

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Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Respondent appeals by leave granted from the decision of the circuit court reversing respondent's revocation of petitioner's appointment to a position within the Michigan Department of Correction's (MDOC) Huron Valley Complex. Following a hearing, the court found that the revocation was arbitrary and capricious because petitioner was clearly qualified for the position and was not given notice of any other potential grounds for revocation. We reverse.

Petitioner was appointed to a Physician Manager-3 position within the MDOC in January 2008. In March 2008, respondent notified petitioner that his appointment had been revoked. In a letter addressed to the MDOC's human resources director, the state personnel director (SPD) stated that following a routine credential audit, respondent's Office of Compliance had determined that petitioner was not qualified for the position. Petitioner filed a technical appointment complaint on March 24, 2008, arguing that the revocation was contrary to Civil Service Commission (CSC) rules, and that he currently met the requirements for the position and that he had upon his appointment.

On November 14, 2008, a technical review officer (TRO) affirmed the revocation. That decision was based on petitioner's lack of qualifications as well as multiple violations of CSC rules by the MDOC, making the appointment invalid. The TRO also noted that petitioner had a criminal record, which would make him ineligible to work for the MDOC.<sup>1</sup> Petitioner appealed

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<sup>1</sup> This conviction was expunged from petitioner's record, and respondent concedes on appeal that it no longer constitutes a hindrance to petitioner's employment by MDOC.

to the Employment Relations Board. The ERB stated that it upheld the TRO's decision insofar as he had determined that "[r]evocation of the appointment is the only remedy available to comply with the Constitutional obligation to select appointees on the basis of merit, efficiency, and fitness according to CSC Rules." On August 27, 2009, respondent approved the decision of the ERB and adopted its findings as its final decision.

Petitioner appealed respondent's decision to the circuit court. The circuit court agreed that CSC rules and regulations had been violated in making the appointment, but held that to the extent that respondent's revocation was not based on petitioner's qualifications, it was invalid because petitioner had no opportunity to present evidence on any other issues. The trial court further held that the CSC's determination that petitioner was unqualified was arbitrary, capricious, and an abuse of discretion because the record clearly established petitioner's qualifications for the position.

Our standard of review was summed up in *Boyd v Civil Service Comm*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996) as follows:

[W]hen reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. This latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence. As defined in numerous other contexts, a finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made.

Under Mich Const 1963, art XI, section 5, "[n]o person shall be appointed . . . in the classified civil service who has not been certified by the [Civil Service Commission] as qualified" for the position. CSC Rule 3-3.1 provides that all appointments in the classified service must be made in accordance with civil service rules and regulations. There is no evidence that the TRO erred by concluding that the DOC violated rules in the process of hiring petitioner. Therefore, respondent had the authority to revoke petitioner's appointment.

Petitioner argues that his due process rights were violated because he was denied notice and the opportunity to provide evidence about whether his appointment could be revoked because the DOC did not follow the hiring rules.<sup>2</sup> However, this assertion is factually incorrect. Petitioner received notice in the form of the TRO's opinion. Thereafter, the ERB allowed petitioner to supplement the factual record with a substantial amount of materials including a revised resume, letters, and job descriptions on the issue of his qualifications. Petitioner did not provide any evidence on the issue of the DOC's rules violations. Had there been any evidentiary basis to rebut the conclusion that the DOC committed serious breaches of the hiring rules, Dr. Fink could have asked the ERB to accept that evidence as well or to allow him an extension to

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<sup>2</sup> Petitioner does not challenge the constitutionality of CSC Rule 3-3.1, only the application of it to his case without notice or an opportunity to respond.

obtain it. The reality is, however, that there was not and likely would never be any materials with which he could rebut the conclusion that the DOC violated the hiring rules. While we are sympathetic to the apparent unfairness to petitioner of losing his job because of the failures of other people to properly do theirs, respondent has authority to revoke an appointment where the appointing authority acts in violation of the rules.

We further note that the trial court erred in considering Dr. Fink's affidavit filed with his motion for reconsideration to the ERB. The ERB refused to allow this second supplementation of the record and so the circuit court should not have considered it. Although the documents properly considered would certainly have supported the conclusion that petitioner was qualified for the position, we do not find the issue to be so clear as to support the trial court's determination that respondent acted arbitrarily and capriciously by finding petitioner unqualified.

Reversed and remanded for entry of an order reinstating respondent's decision to revoke petitioner's appointment. We do not retain jurisdiction.

/s/ Douglas B. Shapiro  
/s/ Henry William Saad  
/s/ Jane M. Beckering