

No. A13-871

State of Minnesota
In Court of Appeals

HENRY H. RUBIN,

Relator,

vs.

WINONA STATE UNIVERSITY,

Respondent,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUE

Under Minnesota law, an individual engaged in employment for the State of Minnesota that is a major policy-making or advisory position in unclassified service, is engaged in “noncovered” employment and is not entitled to credit for wages earned in that employment. Henry Rubin was appointed to the position of Dean of the College of Education for Winona State University, the highest-level administrator for the College of Education, oversaw a \$7 million budget, and advised the president and provost on matters relating to the College. Was Rubin’s employment with Winona State University noncovered?

Unemployment Law Judge (“ULJ”) Christopher Cimafranca found that Rubin’s employment was noncovered and that he was therefore not entitled to wage credits from his employment with Winona State University.

STATEMENT OF THE CASE

This case involves the questions of whether Rubin was engaged in noncovered employment with Winona State University (WSU) and whether Rubin may use WSU wages to establish an unemployment benefit account.

Rubin applied for unemployment benefits in January 2013. Because WSU had not filed any wage detail reports for Rubin with the Department of Employment and Economic Development (“the Department”), Rubin requested an

audit of his employment.¹ The Department conducted an audit² that resulted in a determination that Rubin's employment with WSU was noncovered and that he could not use wages earned in that employment to establish an unemployment benefit account.³ Rubin appealed the determination,⁴ and ULJ Cimafranca held a de novo hearing. The ULJ issued a decision, concluding that Rubin's employment with WSU was noncovered.⁵ Rubin requested reconsideration,⁶ and the ULJ affirmed.⁷

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Rubin under Minn. Stat. § 268.105, subd. 7(a) (2012) and Minn. R. Civ. App. P. 115.

STATEMENT OF FACTS

On July 6, 2010, Rubin was appointed to the position of Dean of the College of Education at WSU.⁸ Rubin earned \$130,000 annually in this position,⁹ and his position was covered under the Personnel Plan for MNSCU

¹ Return-2, Ex. 5.

² Return-2, Ex. 3.

³ Return-2, Ex. 1.

⁴ Return-2, Ex. 2.

⁵ Appendix, A4-A9; Return-3.

⁶ Return-4.

⁷ Appendix, A1-A3; Return-5.

⁸ T. 15.

⁹ T. 15.

Administrators as an unclassified position.¹⁰ WSU is part of the Minnesota State Colleges and University System (MNSCU).¹¹

Rubin's position description outlined the expectations of the Dean as "provid[ing] administrative and innovative leadership to [WSU][,] . . . provid[ing] overall management to all faculty, staff, and students within the College of Education[,] . . . curricular and instructional quality with the College[,] . . . [and] academic leadership of all the teacher education licensure programs[.]"¹² Rubin had 60-70 faculty members and 15 staff under his authority.¹³ Rubin's duties and responsibilities as dean included planning and monitoring the \$7 million¹⁴ budget of the College of Education, participating in the management of the University, and securing and managing external grants and other sources of funding to support the College's mission.¹⁵ Rubin was on the Dean's Council,¹⁶ where he "advise[d] the provost on matters relating to the college" and "directions that the individual is setting for the college."¹⁷ He was also on the Council of Administration,¹⁸ where he, among other tasks, "participate[d] in events for strategic planning," gave "input to regulations for the university," gave "input [on] policy," and gave "input

¹⁰ T. 19; Return-2, Ex. 6.

¹¹ T. 19.

¹² Return-2, Ex. 6.

¹³ T. 23.

¹⁴ T. 22; Return-2, Ex. 6.

¹⁵ Return-2, Ex. 6.

¹⁶ Return-2, Ex. 6.

¹⁷ T. 23.

¹⁸ T. 23.

[on] regulations for the university.”¹⁹ In his role as dean, he had “some autonomy to develop policies for the . . . college [of education] itself, as well as work with the provost, the president, [and] the cabinet members on policies for the university.”²⁰

On May 28, 2012, Rubin was reassigned to duties of a senior research associate.²¹ While Rubin’s job duties were reassigned and he received a new working title, he remained in the position of Dean of the College of Education.²² Another individual was assigned the responsibility to assist the College of Education as a dean, and that person also retained his original title.²³ Rubin’s pay and benefits did not change, and he remained under the administrator’s plan, meaning his role continued to be unclassified.²⁴

¹⁹ T. 23.

²⁰ T. 24.

²¹ Return-2, Ex. 5. On appeal, Rubin makes much about the ULJ’s finding that the assignment was related to a notice of involuntary termination. Rubin testified at the evidentiary hearing that he submitted a letter of resignation because he heard he was going to be fired. T. 40. But the provost asked Rubin to pull the letters and talk to Reed about the possibility of an administrative reassignment. T. 40. Rubin testified that he then requested a reassignment of duties, after speaking with Reed. T. 40. Nevertheless, whether or not the reassignment was immediately preceded by a notice of involuntary termination, or a request for administrative reassignment, the resolution of that factual issue is not required for the noncovered-employment analysis.

²² T. 15, 16, 18.

²³ T. 16, 30.

²⁴ Return-2, Ex. 5; T. 19

STANDARD OF REVIEW

When reviewing an unemployment-benefits decision, the Court of Appeals may affirm the decision, remand for further proceedings, reverse or modify the decision if Rubin's substantial rights were prejudiced because the decision of the ULJ violated the constitution, was based on an unlawful procedure, was affected by error of law, was unsupported by substantial evidence, or was arbitrary or capricious.²⁵

Whether an individual performed services as an employee is a mixed question of law and fact.²⁶ The Minnesota Supreme Court in *Stagg v. Vintage Place* explained that it views the ULJ's "factual findings in the light most favorable to the decision," and that it will not disturb the findings when the evidence substantially sustains them.²⁷ "Substantial evidence" is the relevant evidence that "a reasonable mind might accept as adequate to support a conclusion."²⁸ Appellate courts exercise independent judgment on issues of law.²⁹

²⁵ Minn. Stat. § 268.105, subd. 7(d) (2012).

²⁶ *Bergen v. Sonnie of St. Paul, Inc.*, 799 N.W.2d 234, 236 (Minn. App. 2011).

²⁷ 796 N.W.2d 312, 315 (Minn. 2011) (citing *Jenkins v. Am. Express*, 721 N.W.2d 286, 289 (Minn. 2006)).

²⁸ *Moore Assoc. v. Comm'r of Econ. Sec.*, 545 N.W.2d 389, 392 (Minn. App. 1996).

²⁹ *Ress v. Abbott Nw. Hosp., Inc.*, 448 N.W.2d 519, 523 (Minn. 1989).

ARGUMENT

Rubin's entire tenure with WSU was in noncovered employment and therefore he is not permitted under the law to utilize the wages earned from WSU to establish an unemployment benefit account.

In order to establish an unemployment benefit account, an applicant must have earned wages from covered employment. "Covered employment" is defined as any employment performed in Minnesota unless excluded as "noncovered employment" under the statute.³⁰ Noncovered employment includes "employment for Minnesota that is a major policy-making or advisory position in the unclassified service."³¹

When considering whether a position is "a major policy-making or advisory" position, the court has recognized that "[a]n employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position."³² The court also noted that "consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad policy goals."³³

Rubin did not contend at the hearing, nor does he argue now, that his position as Dean of the College of Education was in covered employment. Rubin concedes that his dean position was noncovered as an advisory or major policy-

³⁰ Minn. Stat. § 268.035, subd. 12 (2012).

³¹ Minn. Stat. § 268.035, subd. 20(15) (2012).

³² *Ginsberg v. Minn. Dep't of Jobs & Training*, 481 N.W.2d 138, 142 (Minn. App. 1992) (quotation omitted).

³³ *Id.* (quotation omitted).

making position, and the evidence fully supports the ULJ's finding that Rubin's position as dean was unclassified.³⁴

Thus, the sole issue in this case is whether Rubin's employment at WSU continued to be noncovered after May 28, 2012. The ULJ found that Rubin's appointment as Dean of the College of Education continued throughout the duration of his employment at WSU and that only his job duties were reassigned after May 28, 2012.³⁵ That finding is plainly supported by the record evidence. Lori Reed, chief human resources officer at WSU, testified that Rubin's position remained Dean of the College of Education after the May 28 reassignment of job responsibilities.³⁶ Reed testified that the position did not change; only Rubin's working title and his job responsibilities were altered.³⁷ Moreover, Reed testified that because Rubin's position continued as dean, he remained covered under the administrator's plan and remained unclassified.³⁸ Additionally, the record evidence shows that Rubin continued to receive the same, \$130,000 annual salary of a dean throughout his employment with WSU, thus retaining many of the benefits of this high-level position. This evidence supports the ULJ's findings that

³⁴ Return-2, Ex. 6. See Minn. Stat. § 43A.08, subd. 1 (2012) (providing that "presidents, vice-presidents, deans, other managers and professionals in academic and academic support programs" are unclassified positions); Minn. Stat. § 43A.08, subd. 2 (2012) (granting MNSCU the authority to designate additional unclassified positions beyond those provided for in subdivision 1). Because WSU is part of the MNSCU system, Rubin's employment was also for the State of Minnesota.

³⁵ Appendix, A4-A9.

³⁶ T. 15,

³⁷ T. 16, 18.

³⁸ T. 18-19.

Rubin remained in the dean position after the reassignment of his job duties and that, as a dean, he continued to be unclassified.³⁹

Rubin argues that there is no evidence to show that he retained the dean position after the reassignment. But contrary to Rubin's contentions, testimonial evidence is sufficient to meet substantial-evidence review.⁴⁰ And while Rubin may have considered himself to be in a new position, the substantial evidence in the record shows that Rubin retained the dean position throughout his employment. In fact, Reed testified that there "was no senior research associate position."⁴¹ Rubin continued as dean until his employment ended in December 2012, but simply received new job tasks. Rubin has no specific evidence to refute this testimony, citing only to his perceptions about his position in WSU following the reassignment. But Reed, as chief human resources officer, would be in a unique position to know and understand how a reassignment would work in this situation, and she testified to that knowledge, based on the Rubin's situation as well as prior situations⁴² involving administrative reassignments. The fact is that Rubin continued to receive a dean's salary, continued under the administrator's plan reserved for high-level roles in WSU, but had new job tasks. A change in working title is not the same as a change in position. Thus, the substantial

³⁹ See Minn. Stat. § 43A.08, subd. 1.

⁴⁰ See *Sykes v. Nw. Airlines, Inc.*, 789 N.W.2d 253, 255-56 (Minn. App. 2010) (concluding that even brief testimony was sufficient to sustain the ULJ's findings of fact, even when records "would likely have been more informative").

⁴¹ T. 29.

⁴² T. 22.

evidence in the record demonstrates that Rubin remained in the dean position throughout his employment at WSU.

Rubin argues that because his job tasks after the reassignment were not advisory or related to policy making, he was in covered employment after the reassignment. But in *Ginsberg*, this court rejected an identical, tasks-focused argument.⁴³ This Court, construing the unemployment statute, pointed to the specific statutory reference of “position,” and concluded that the subdivision was concerned only with the position held and corresponding job description, and not with an employee’s actual day-to-day responsibilities.⁴⁴ The Court therefore concluded that it was not error for the ULJ to focus primarily on the position description instead of the applicant’s testimony about his actual job tasks.⁴⁵ In subsequent cases, the Court has affirmed that the focus is on the position and the position description, and not what work an individual is assigned on a daily basis.⁴⁶

Thus, the proper focus is Rubin’s *position* at WSU after the May 28, 2012 reassignment. Here, while Rubin’s job responsibilities may have been reassigned to another employee, the substantial evidence in the record shows that he retained

⁴³ 481 N.W.2d at 143.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See *Brannen v. Metro. State Univ.*, No. A10-136, 2010 WL 4181399, at *4 (Minn. App. Oct. 26, 2010) (examining the job description to determine if a position was in “a major policy-making or advisory position” with Metro State University), Appendix, A10-A13; *Hamilton v. City of St. Paul.*, No. C9-02-1866, 2003 WL 21152212, at *2 (Minn. App. May 30, 2003), Appendix, A14 -A16.

the position of Dean of the College of Education. Reed testified that having a dean position was necessary for certain accreditation requirements, and that it was common to “reassign different job duties to an administrator after he or she had been given notice that the position would end” in the future.⁴⁷ And there is no dispute that this position was a “major policy-making or advisory position in unclassified service.” The fact that Rubin was assigned new tasks as dean after May 28 is inconsequential and not part of the relevant analysis. Therefore, under the statute as interpreted by this court in *Ginsberg*, the fact that Rubin continued to hold the position of Dean of the College of Education is the dispositive fact, and he remained in noncovered employment at WSU after the reassignment.

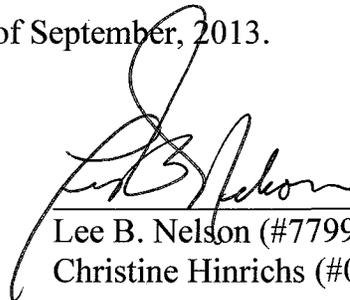
The substantial evidence in the record supports the ULJ’s findings that Rubin remained in the dean position after his duties were reassigned in May 2012. Based on these findings, the ULJ did not err in concluding that Rubin’s employment at WSU was noncovered as an unclassified, advisory or major policy-making position with the State of Minnesota.

CONCLUSION

Henry Rubin’s entire employment with WSU was noncovered, and therefore he is not entitled to use wages from WSU to establish an unemployment benefit account. The Department requests that the Court affirm the decision of the Unemployment Law Judge.

⁴⁷ T. 18, 22.

Dated this 6th day of September, 2013.



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