STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

CLAYTON LANDAAL,

Petitioner, Case No. 138-392

vs.

STATE OF WISCONSIN (PERSONNEL BOARD), MEMORANDUM DECISION

Respondent.

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

This is a proceeding under ch. 227, Stats., to review a decision of theState Personnel Board (hereafter the Board) entitled "Order" dated January 12, 1973, which dismissed the petitioner Landaal's grievance protesting the reduction of petitioner's salary from $657 to $627 per month "effective on the grievant's return to the Officer 2 classification", which effective date was May 31, 1970.

Statement of Facts

The Assistant Attorney General Vergeront, who represented respondent at the hearing before this Court, conceded that the statement of facts in petitioner's brief is accurate and the facts herein stated are taken from petitioner's brief. The Court might add that such facts are substantially the same as those set forth by Attorney D. J. Sterlinske, counsel for the Department of Administration, in his brief to the Board, which brief is included in the Board's return to this Court.

Petitioner commenced his employment in the state classified service on August 1, 1960, as an Officer I, Trainee. On February 2, 1961, he completed his probationary period and acquired permanent status in the Officer 1 classification. On December 12, 1965, the petitioner attained status as an Officer 2 by reclassification. On August 28, 1968, he transferred from the Central State Hospital, Waupun, Wisconsin, to the Wisconsin State Prison, Waupun, Wisconsin. He retained his Officer 2 classification.

On February 8, 1970, petitioner was selected from a promotional roster for the position of Industries Technician 1 in salary range 9, based on a promotional examination. Prior to acceptance of the promotion, petitioner had been in salary range 8 as an Officer 2 and had permanent status in this classification. Upon accepting his promotion petitioner's salary was adjusted one step upward ($30) from $627 per month to $657 per month. He was required to serve a six month probationary period in his new classification.

Petitioner performed satisfactorily in his new position. However, he did not enjoy his new work. Consequently, on May 8, 1970, for purely personal reasons petitioner requested permission to reassume his previous position. This request was made by letter addressed to E. O. Cady, Warden, Wisconsin State Prison, and reads as follows:

> "Dear Warden Cady:
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> "I, Clayton Landall, hereby request voluntary demotion from my position as Industries Technician 1 - Laundry to the position of Correctional Officer 2 at the Wisconsin State Prison.

"In requesting this transfer I understand that I will be able to retain my present salary of $657 per month, since it is within the maximum of the range for Correctional Officer 2.

"I would like to transfer as soon as suitable arrangements can be made."

Warden Cady granted petitioner's request by letter signed by him to petitioner dated May 28, 1970, reading as follows:

"Dear Mr. Landaal:

"This is to notify you that your request for voluntary demotion and transfer back to the officer staff has been approved.

"According to Civil Service regulations, you will retain your present salary of $657 per month, since it is within the maximum of the Correctional Officer 2 range. No probationary period will be required.

"This transfer will be effective on May 31, 1970. Please contact the security office for your schedule after this date."

Petitioner thereupon, on May 31, 1970, resumed his officer 2 position, at the salary designated by Warden Cady. He performed in his position in a satisfactory manner. Petitioner continued to receive a salary of $657 per month. Petitioner never received any notice or indication of any kind from the state during this period that anything in his situation was amiss.

Then, sixteen months after Petitioner reassumed his Officer 2 position, on September 17, 1971, Petitioner was informed that the state alleged there had been a payroll error and misinterpretations of the law and the Personnel Board Rules. The Board suddenly asserted that Petitioner should not have been permitted to retain the $30 per month increase he received

upon his promotion after he requested a demotion and reassumed his former position.

Petitioner was also informed that his salary was to be adjusted downward some $30, and that the state would seek recoupment of alleged excess salary payments, which were calculated at $30 per month for 16 months for a total of approximately $480.

Petitioner thereupon filed a grievance under the state-wide grievance procedure to protest the state's announced intended actions. On or about November 16, 1971, petitioner was notified by letter signed by Wilbur Schmidt, Secretary of the Department of Health and Social Services, pursuant to Step Three (3) of the grievance procedure that petitioner's grievance, protesting the reduction of his salary and recapture of alleged excess payments from his future salary, was denied.

A timely appeal from that denial was then taken to the Board which resulted in the entry of the order here under review. The order was accompanied by findings of fact and conclusions of law. Many of the findings of fact are in reality conclusions of law which set forth the Board's interpretations of its own rules.

The Issues

Petitioner's brief makes these two contentions which constitute the issues to be resolved on this review:

(1) Under the Board's rules petitioner's appointing officer, Warden Cady, properly set petitioner's salary at $657 per month when transferred back from the classification of Industries Technician to that of Officer 2.

(2) If the Court should determine that the Board's rules properly interpreted required a reduction in salary of $30 per month when such transfer was made, is the state equitably estopped from carrying out such reduction?

Interpretation of Applicable Board Rules

All of the Board's rules on which both parties rely are to be found in the Wisconsin Administrative Code under the chapter prefix of "Pers". However, for purposes of simplification, the Court will refer to them by rule number, such, for example, as Rule 16.01.

It is conceded that Warden Cady was petitioner's appointing officer at the time of the transfer made effective May 31, 1970. As such, Appointing Authority Cady had discretion to set petitioner's salary for the period beginning with that date within limits set by the Board's rules.

Rule 16.01 reads in pertinent part:

> "DEFINITION. Reinstatement is the restoration without competition of an employe or former employe to a position in the same or a closely related class in which he was previously employed."

Petitioner returned to a former position in the same class. He was not required to take an examination in order to return; i.e., he returned without competition.

Rule 16.02 lists four types of reinstatement, viz., (1) acceptance of a voluntary demotion in lieu of impending lay-off; (2) permissive reinstatement; (3) reinstatement by Board or court action; and (4) non-completion of probationary period upon promotion. Petitioner contends his reinstatement

to the Officer 2 classification was a permissive reinstatement and is covered by sub. (2) of Rule 16.02. The respondent contends that it was a non-completion of probationary period upon promotion reinstatement which is covered by sub. (4) of Rule 16.02

Sub. (2) provides in part:

> "PERMISSIVE REINSTATEMENTS. An employe who has been separated from state service without misconduct or delinquency, or who has accepted a voluntary demotion for personal reasons, may establish reinstatement eligibility. . ." (Emphasis added).

Sub. (4) provides:

> "NON-COMPLETION OF PROBATIONARY PERIOD UPON PROMOTION. See Subsections 16.22(1), Wis. Stats. and Wis. Adm. Code subsection Pers. 14.03(1)."

Sec. 16.22(1), Stats., referred to in Sub. (4) of Rule 16.02, provides for a six month probationary period for all state employees in classified service during which they are subject to dismissal. Rule 14.03(1) requires that any employee promoted within the same department is required to serve this probationary period in the promoted classification and in addition provides:

> "At any time during this period the appointing officer may remove and restore the employee to his former position or a similar position and salary without right of appeal." (Emphasis added).

Petitioner was not required to undergo a new six month probationary period when he was transferred back to Officer 2 classification. Rule 16.03(3). The salary to be received by a reinstated employee is governed by Rule 16.05. Sub. (1)(b) of that rule provides:

"SALARY ON REINSTATEMENT. (1) Subject to the maximum of the salary range to which the class is assigned, the appointing officer shall determine the salary rate of an employee who is reinstated as follows:

"An employe not placed on probation may be paid at any rate between the PSICM of the range for the class reinstated to and the last rate received . . ." (Emphasis added).

"PSICM" is in effect defined in Rule 1.01(7) as being the minimum of the rate range applicable to an employee with permanent status. It is petitioner's contention that "last rate received" in sub. (1)(b) of Rule 16.05 means, in the case of petitioner his salary he had been receiving as Industries Technician 1, which salary was within the maximum of the rate range for Officer 2, and thus Warden Cady was authorized to fix his salary upon his reinstatement as Officer 2 at $657 per month. The respondent's brief contends that Rule 16.05(1)(b) is entirely irrelevant, because petitioner's salary is governed by Rule 14.03(1) which required that he be paid his former salary as Officer 2 before his promotion to Industries Technician 1.

Crucial to respondent's position is its contention previously mentioned that petitioner's type of reinstatement to his former classification as Officer 2 is that described in sub. (4) of Rule 16.02 and not that described in sub.(2) of this rule. The reason advanced by respondent as to why sub.(2) is inapplicable is that sub. (2) speaks in terms of an employee who has accepted "a voluntary demotion for personal reasons" (emphasis added), and sub. (4) of Rule 17.02 provides:

> "The action by which a promoted employe is restored to his previous position and salary as provided in Wis. Adm. Code subsection Pers 14.03(1) is not considered a demotion. See Wis. Adm. Code chapter Pers 16." (Emphasis added).

Rule 16.05(1)(b) applies to all reinstatements generally except for the two exceptions spelled out in subs. (2) and (3) of Rule 16.05, neither of which is applicable to petitioner. Sub. (2) covers reinstatements where the reinstated employee is required to serve a new probationary period in his new classification. Sub. (3) is applicable only where the promotion was to a position outside the department which was not the petitioner's case. However, the transfer back of a promoted employee to his former position during the probationary period being undergone in the position to which promoted is classified as a "reinstatement" by Rule 16.02(4), and Rule 14.03(1) expressly provides that in such a situation the transfer back is to be at the same salary as the former position to which restored.

There is therefore a conflict between the provisions of Rule 16.05(1)(b) and Rule 14.03(1) with respect to the salary to be paid petitioner after his transfer back to his Officer 2 position if Rule 14.03(1) is applicable. However, Rule 16.05(1)(b) is general in nature and applies to all reinstatements except those excepted by subs. (2) and (3) of Rule 16.05. Rule 14.03(1) is special in nature because limited only to the special type of reinstatement taking place while the employee is serving a probationary period in the promoted position. It is a cardinal rule of statutory construction that a specific statute controls over a general statute. Moran v. Quality Aluminum Casting Co. (1967), 34 Wis. 2d 542, 553.

This brings the Court face to face with having to decide the difficult and perplexing question of whether Rule 14.03 (1) is applicable to the voluntary transfer of petitioner back to his position of Officer 2 from the position of Industries Technician 2. If this question were to be resolved by reading Rule 14.03(1) in isolation from the other Board rules, the Court would be inclined to hold that Rule 14.03(1) only applies to involuntary transfers made by the appointing officer and not to the instant transfer where petitioner voluntarily requested the transfer.

However, Rule 14.03(1) is not to be construed in isolation and at least Rule 16.02 must be considered in interpreting Rule 14.03(1). Rule 16.02 is entitled "Types and Condition of Reinstatement." One inference to be reasonably drawn from this is that Rule 16.02 purports by its four subdivisions to list all possible types of reinstatements. As previously noted herein, the parties contend petitioner's reinstatement falls either under sub.(2)(a) or sub. (4) of that rule. Respondent contends that it does not fall under sub.(2)(a) because of the words in that portion of sub.(2) preceding par. (a), "who has accepted a voluntary <u>demotion</u> for personal reasons" (emphasis added), inasmuch as the provisions of Rule 17.02(4) previously set forth herein have the effect of providing that the action of the appointing officer in removing a promoted employee during his probationary period in the new position and restoring him to his former position is not considered to be a demotion.

If sub. (2)(a) of Rule 16.02 is not applicable to petitioner's reinstatement to his former position, this leaves as the only possible applicable subdivision of that rule sub. (4), which covers the restoration of a promoted employee to his former position by his appointing officer during the probationary period as provided in Rule 14.03(1). While petitioner here requested such reinstatement it was the warden as appointing officer who by his approval carried it out.

The Court has concluded that the Board's interpretation of Rule 14.03(1) as applying to petitioner's reinstatement in his former Officer 2 position is at least one of two permissible reasonable constructions. Therefore, the Court deems it is incumbent on it to adopt this construction, and chooses so to do. The Wisconsin Supreme Court has repeatedly declared that it accords great weight to the interpretation placed upon a statute by the administrative agency charged with the duty of applying such statute. Chevrolet Division, G.M.C. v. Industrial Comm. (1966), 3 Wis. 2d 481, 488, and cases cited in footnote 7. If several interpretations of a statute are equally consistent with the purpose of the statute the Court will accept the agency's interpretation. Libby, McNeill & Libby v. Wisconsin E. R. Comm. (1970), 40 Wis. 2d 272, 280.

Because Rule 14.03(1) was applicable to petitioner's reinstatement to the position of Officer 2 his legal salary rate was $627 and not $657 per month, absent any application of the doctrine of equitable estoppel.

Estoppel Issue

Petitioner contends that the state is equitably estopped from reducing petitioner's salary from $657 to $627 per month.

The three factors essential for equitable estoppel to lie are stated in Gabriel v. Gabriel (1972), 57 Wis. 2d 424, 429, as follows:

> "The tests for applicability of equitable estoppel as a defense derive from the definition by this court of such estoppel to be: '. . . action or nonaction on the part of the one against whom the estoppel is asserted which induces reliance thereon by another, either in the form of action, or nonaction, to his detriment . . .' Three facts or factors must be present: (1) Action or inaction which induces (2) reliance by another (3) to his detriment."

The action by the state here was Warden Cady's letter of May 28, 1970, in reply to petitioner's letter request to him of May 8, 1970, wherein the warden approved the request for "voluntary demotion and transfer back to the officer staff" and stated, "According to Civil Service regulations, you will retain your present salary of $657 per month, since it is within the maximum of the Correctional Officer 2 range." Warden Cady was petitioner's appointing officer under Board Rule 1.01 and under Rule 16.05(1)(a) had apparent authority to determine the salary rate of petitioner as he did.

There also has been inaction by the state in paying petitioner the $657 per month salary for approximately 16 months after his reinstatement and not raising the claim that such salary was illegal until September, 1971,

There is no question but what petitioner relied on this action of the state through its appointing officer by his acceptance of the transfer back to the position of Officer 2 and relied upon the state's inaction by continuing in the Officer 2 position and conforming his style of living to the salary being paid him.

In so acting, the petitioner acted to his detriment as that term is understood in the law. A person suffers a detriment in law where he foregoes an alternative course of action upon the inducement of another. Here at the time petitioner accepted the reinstatement as Officer 2 on condition he retain his $657 per month salary he had two other alternative options open to him. One was to quit and seek employment elsewhere. The other was to remain in his position as Industries Technician 1 at the salary of $657 per month until such time, if ever, the warden should elect of his own volition to transfer petitioner back to Officer 2 status prior to the expiration of the probationary period. Clearly, he was induced by the state's action to forego exercising either of these two alternative courses of action and thus acted to his detriment if required to repay the approximate sum of $430 of salary which respondent contends was illegally paid him. Whether this detriment continued beyond the time in September, 1971, when he was notified that he had been overpaid $30 per month through error of law and the state started paying him at the rate of $627 per month, is a question which will be discussed later herein.

The crucial question is whether equitable estoppel will lie against the state under the circumstances of this case.

In Park Bldg. Corp. v. Industrial Comm. (1959), 9 Wis. 2d 78, 87, the Supreme Court quoted with approval the statement made by Prof. Kenneth Culp Davis in his Administrative Law Treatise as follows (Vol. 2, p. 541, sec. 17.09):

> "Even though the courts commonly assert without qualification that equitable estoppel does not apply to governmental units, and even though numerous holdings are based upon such assertions, still the number of holdings in which governmental units are estopped is substantial and growing, both in the federal courts and in the state courts.
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> "Since the doctrine of equitable estoppel is founded upon ideas of what is a fair adjustment when one party has relied to his detriment upon what the other party has held out, it is hard to see why the ideas of fairness should differ when one of the parties happens to be a governmental unit, especially when the subject matter relates to property or business dealings and not to the processes of carrying out governmental policies."

And the movement toward allowing estoppel of governmental units continues. Davis, Administrative Law Treatise, 1970 Supplement, p. 607, Sec. 17.09.

Pursuant to the above quotation from Davis's Administrative Law Treatise, the subject matter of the instant action relates to the business dealings of the governmental unit. Russel Dairy Stores v. City of Chippewa Falls (1956), 272 Wis. 138; Libby McNeill & Libby v. Department of Taxation (1951), 260 Wis. 551; Superior v. Northwestern Fuel Co. (1917), 164 Wis. 631. In such case the position of the Wisconsin Supreme Court is clear:

> "Quoting from 48 Harvard Law Review 1299, the court says: 'If we say with Mr. Justice Holmes, "Men must turn square corners when they deal with the government," it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens.'" Libby, McNeill & Libby, supra, p. 560.

In sum, in its business dealings with corporate entities and individuals, appellant asserts that the above cited cases sustain the proposition that "the state itself is bound by principles of equitable estoppel and must not expect more favorable treatment than is fair between men." State v. Carlyon (1932), 7 P. (2d) 573.

The Court is not impressed with respondent's argument that estoppel should not lie here because "One who accepts a position in civil service submits to the provisions of the law." It is wholly unrealistic that petitioner should have been required to know that under the Board's rules he was not entitled to be paid at $657 per month when told by his superior appointing officer that under such rules he was so entitled. This is especially true here where even the Court had considerable difficulty in threading its way through the maze of Board rules in arriving at its conclusion that petitioner was not, according to the Board's rules, entitled to retain his $657 monthly salary after his reinstatement to Officer 2 status. One of the critical factors in arriving at this conclusion was the application of the statutory rule of construction that a specific rule controls over a general rule. It would be most unfair to require a layman to know sufficient law to come to this conclusion.

The Court concludes that equitable estoppel does lie against the state in this instance.

There remains for resolution the question of for how long a period does this estoppel extend. This again has caused the Court considerable difficulty in arriving at a determination. The Court first after much reflection reached the conclusion that this period must be for one of these two alternatives: (1) until petitioner was notified in September, 1971, that he had been paid at the rate of $657 per month through error of law and the state commenced paying him at the reduced rate of $627 per month; or (2) until the state offers him the right of promotion to the position of Industries Technician 1, or some other position within the Department of Health and Social Services paying at least $657 per month.

The Court determines that the first of these two alternatives is the proper one to apply. This is because at the time petitioner was restored to Officer 2 status he had not completed his six month probationary period as Industries Technician 1. Thus it would be a meaningless gesture to require the state to offer petitioner a promotion to another position requiring the serving of a probationary period because the state would have the right under Rule 14.03(1) to immediately restore him to Officer 2 status at the same salary he was being paid at time of promotion. Therefore, the only detriment remaining to be considered is the right petitioner had to quit rather than accept a reduction in salary. This right was restored to petitioner as soon as his salary was reduced in

September, 1971, by $30 per month, and thus no estoppel would continue after that date.

Judgment to be Entered

Paragraphs 2 and 3 of the Board's order of January 12, 1973, here under review read as follows:

> "2. Effective on the voluntary return of the grievant to his former position as Officer 2, the proper salary which he was to receive while performing in this classification, was the sum of $627 per month, which was the highest salary attained by him in permanent status within this classification when performing these duties as such Officer 2.
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> "3. The adjustment and reduction of the grievant's salary by his appointing authority from the sum of $657 per month to $627 per month effective on the grievant's return to the Officer 2 classification is proper and hereby ratified and affirmed."

Because the Board's order thus provides for the $30 reduction in salary effective with the return of petitioner to the status of Officer 2, which was May 31, 1970, the order must be reversed and the matter remanded to the Board for further proceeding. On such remand it will be the duty of the Board to enter a new or amended order which makes the effective date of the reduction in salary to $627 per month the date as of which his employing unit actually ceased paying him at the rate of $657 per month, which was sometime in September, 1971.

Let judgment be entered reversing the Board's order here under review and remanding the matter to the Board for further proceedings consistent with this decision.

Dated this 26th day of November, 1973.

By the Court:

Reserve Circuit Judge