STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

THOMAS EISENHUT,

Petitioner,

v.

STATE OF WISCONSIN
(Personnel Board),

Respondent.

JUDGMENT

Case No. 144-383
A.G. No. D74110706

The above Chapter 227 review proceeding having been heard before the Court, on the 10th day of March, 1975, at 10:00 a.m., Hon. William C. Sachtjen, Circuit Judge, presiding, and the petitioner having appeared by Richard V. Graylow of the law firm Lawton & Cates; and the respondent Board having appeared by Assistant Attorney General Robert J. Vergeront; and the Court, having heard arguments of counsel, read the briefs submitted and being advised in the premises, having filed its memorandum decision and directions for judgment dated April 4, 1975;

NOW, ON MOTION of the Attorney General, by Robert J. Vergeront, Assistant Attorney General, attorneys for the respondent;

IT IS HEREBY ORDERED AND ADJUDGED that the decision of the State Personnel Board dated October 10, 1974, which upheld the action of the appointing authority in the layoff of petitioner, from his position as Teacher 6 (Music) in the classified service at Kettle Moraine School for Boys, be and hereby is affirmed.

Dated this 9TH day of April, 1975.

BY THE COURT:

s/William C. Sachtjen

Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

THOMAS EISENHUT,

Petitioner,

vs

STATE OF WISCONSIN (Personnel Board),

Defendant.

#144-383

MEMORANDUM DECISION

During 1971 and 1972 declining enrollment at the Kettle Moraine School for Boys reduced the institution's personnel requirements. On August 23, 1972, the personnel manager for the Division of Corrections advised the school that layoffs were necessary. On September 6, the school submitted a plan to the Division, calling for the termination of petitioner. The Department of Health and Social Services and irector of the Bureau of Personnel approved the plan by October 5. The layoff plan was scheduled to go into effect October 28; however, at the suggestion of the Department of Health and Social Services, implementation of the plan was delayed until November 11. On November 14, the school notified petitioner that he would be laid off on January 6, 1973.

Wis. Adm. Code Pers 22.04(1), in effect through the end of October, 1972, provided that employees must be laid off "by classes in accordance with seniority and effectiveness...." Under this rule, all persons in petitioner's civil service grade of "Teacher 6" would have to be considered for layoff. Persons like petitioner with several years of seniority in the classification would stand a good chance of avoiding a layoff. Wis. Adm. Code Pers 22.03(1), which took effect November 1, 1972, amended this rule to permit layoffs "by classes or options within the class." An "option within a class" is a specialized position requiring qualifications different from those pertaining to the class generally and non-transferable to other positions within the class. Petitioner's option or "approved subtitle" (T. 84-85) was "music teacher." Under Pers 22.03(1),

petitioner could be considered the sole member of the category "Teacher 6 (Music)" and laid off without reference to his seniority relative to other "Teachers 6."

The problem facing the Personnel Board was to decide which of the two regulations applies to petitioner's situation. The old rule was in force during the period when the appointing authority made up its mind that a music teacher was expendable and should be laid off. The new rule was in effect by the time that determination was announced and became effective. The Personnel Board decided that the new rule applied, and upheld the layoff. From this decision petitioner seeks Ch. 227 review.

The Board has power to review "decisions" of appointing authorities with respect to layoffs. Sec. 16.05(1)(e), Stats. In exercising this power, the Board should apply the administrative rules in force at the time a reviewable decision is made by an appointing authority. Such a reviewable decision is made when the appointing authority takes direct, official action to terminate an employee's job by naming an effective date of termination and notifying the employee of the unhappy event. It is only after an effective date of termination has been set or the employee notified of his layoff that the employee's right of review accrues. Sec. 16.05(2). Prior to this time, all that exists is an incohate plan in the mind of an administrator or in the administrator's inter-agency memoranda. Such an incohate plan, until implemented by setting of an effective date and notice to the employee, is not yet a fully-formed, reviewable "decision." It makes little sense to say that the Board in evaluating a decision should use a rule which had become ineffective before the decision acquired any corporeal existence. c.f. McCann v. Personnel Board, 255 Wis. 321 (1949).

The decision of the Personnel Board is correct, and is affirmed. Judgment may be drafted in accordance with this memorandum.

Dated: April 4, 1975.

BY THE COURT:

/s/ William C. Sachtjen
William C. Sachtjen, Judge

cc: Attys. Graylow, Vergeront