

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

NEAL E. SCHMIDT,

Petitioner,

Case No. 145-169

vs.

STATE OF WISCONSIN
PERSONNEL BOARD,

JUDGMENT

Respondent.

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

The above entitled review proceeding having been heard by the Court on the 21st day of July, 1975, at the City-County Building in the City of Madison; and the petitioner having appeared by Attorney Alice M. Schmidt; and the respondent Board having appeared by Assistant Attorney General Robert J. Vergeront; and the Court having had the benefit of the argument and briefs of counsel, and having filed its Memorandum Decision wherein Judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the Decision of respondent Board denominated "Opinion and Order" entered in Board Cases No. 74-51 and No. 74-52 wherein Neal E. Schmidt was Appellant and David W. Adamany, Secretary, Department of Revenue, was Respondent, and in Board Case No. 74-62 in which Neal E. Schmidt was Appellant and C..K. Wettengel, Director, State Bureau of Personnel, was Respondent, be, and the same hereby is, affirmed.

Dated this 1st day of August, 1975.

By the Court:

George R. Currie
Reserve Circuit Judge

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

NEAL E. SCHMIDT,

Petitioner,

Case No. 145-169

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 the respondent board dated November 22, 1974, denominated "Opinion and Order" which determined that the State had erroneously granted petitioner a pay increase to which he was not entitled, and that the Department of Revenue was entitled to recoup such overpayment from petitioner.

STATEMENT OF FACTS

The facts were stipulated to at the hearing before the board by the parties agreeing that the facts stated in petitioner's complaint in Step No. 1 of the grievance procedure were true. This complaint constitutes part of Board Exhibit No. 2. The facts are succinctly stated in the first three paragraphs of the board's decision under the heading FACTS as follows:

"On December 24, 1972, following application and examination, the Appellant was promoted from Attorney 12 to the position of Inheritance Tax Counsel-Attorney 14, in the Wisconsin Department of Revenue. The notice and description of this position were reviewed and approved by the Bureau of Personnel prior to circulation and provided that 'The person promoted to this position will be required to serve a 12-month probationary period.'

"Upon promotion, the Appellant received a promotional salary increase of \$65 monthly pursuant to Wisconsin Administrative Code Pers 14.04. On June 24, 1973, six months later, Appellant received an additional salary increase of \$65, as

provided by Wisconsin Administrative Code Pers 5.03(1) at the pay period 'closest to the completion date of the first six months of the probationary period, . . .'. Then, on July 8, 1973, under the Agreement between the State and the Wisconsin State Attorneys' Association, the Appellant received a cost-of-living allowance of \$84 and a merit increase of \$60. On December 23, 1973, the Appellant received an additional \$65 salary increase at the termination of his 12-month probationary period.

"On May 29, 1974, the Appellant was notified by the Department of Revenue, and specifically by Larry Tainter, Director of Personnel and Employment Relations for the Department, that the salary increase given to him on December 23, 1973 was erroneous and that his base salary rate would be adjusted to \$1,820 per month beginning with the pay period May 27, 1974 (Payroll Period No. 13). The Department of Revenue intended and does intend to recoup the overpayment from the Appellant."

The Court deems it desirable to elaborate on the foregoing statement of facts by setting forth the exact circumstances under which petitioner received the \$65 per month increase on December 23, 1973. This was the result of a letter from Tainter, Director of Personnel and Employment Relations of the Department of Revenue, dated December 21, 1973, addressed to petitioner reading as follows:

"On December 24, 1972, you were promoted to an Attorney 14. This letter is to advise you that you will complete the twelve month probationary period required by your promotion on December 23, 1973.

"Since your Division has recommended that you be retained in this new classification on a permanent basis, you will receive a \$65.00 monthly salary increase effective beginning December 23, 19[7]3, which is a result of your completing this probationary period."

THE ISSUES

The two issues necessary to be resolved on this review are:

(1) Was the \$65 per month increase in salary granted petitioner effective beginning December 23, 1973, paid to him as a result of a mistake of law?

(2) If it was, is the Department of Revenue as an agency of the State estopped from recouping from petitioner the amount of the payments of such increase?

A further issue has been raised by petitioner of improper procedure followed by the board. The Court finds it unnecessary to pass on this contention because of its conclusion that, even if a remand were ordered, there is no possibility of petitioner prevailing. Therefore, any procedural error was nonprejudicial.

MISTAKE OF LAW ISSUE

Under the undisputed facts it is clear that the sole reason petitioner was granted the \$65 per month increase here at issue was the mistaken belief of Tainter that petitioner was legally entitled to the same upon completing a twelve month probation period.

Counsel for petitioner contends that the board was in error in determining that petitioner's probationary period was twelve months when it actually was six months. Two principal arguments are advanced in support of this contention.

The first argument is that the Classification and Compensation Plan 1972-1973 promulgated by the State Bureau of Personnel, at page 81, specifies that promotional appointments of attorneys shall have a six month probationary period. It is contended that this controls over the provision of sec. 16.22(1)(b), Stats., which provides that the Director of the Bureau of Personnel may authorize a longer probationary period not to exceed two years for any professional position.

The second argument advanced is that the Director did not himself specifically authorize the twelve month probationary period for the position of Inheritance Tax Counsel to which petitioner was appointed.

While both the board's decision and the Attorney General's brief advance convincing reasons why petitioner's probationary period was twelve and not six months, the Court finds it unnecessary to decide that issue. This is because, even if the Court were to decide that petitioner's probationary period was six months, the granting of the \$65 per month

increase because it was deemed the law required it when a twelve month probationary period was completed was made under a mistake of law.

The increase which Wis. Adm. Code Pers 5.03(1) and the Classification and Compensation Plan 1972-1973 required to be paid an Attorney 14 upon completion of a six months probationary period was \$65 per month. Petitioner received a \$65 per month increase on June 24, 1973, upon completing six months probation. Petitioner has been unable to point to any statute which required that he be paid a \$65 per month increase upon completing twelve months of service after entering upon his probationary period. The Classification and Compensation Plan 1972-1973 does not provide for such an increase in case of promotional appointments.

The Court concludes that the board's determination in its decision "that the \$65 pay increase granted on December 23, 1973 was erroneous" was correct and must be upheld. Therefore, under the undisputed facts of this case the \$65 per month paid petitioner as a result of this erroneous increase was made as a result of mistake of law.

THE ESTOPPEL ISSUE

It was held in Gabriel v. Gabriel (1973), 57 Wis. 2d 424, 429, that in order to have equitable estoppel these three factors must be present: "(1) Action or nonaction which induces (2) reliance by another (3) to his detriment."

Here the element of detriment to the petitioner is entirely lacking.

There being no estoppel, the Department of Revenue is entitled to recoup from petitioner the payments made of such erroneous increase under the general rule that an action may be maintained to recover public funds paid without authority, although paid under mistake of law, regardless of the good faith of the payee. City of Milwaukee v. Milwaukee County (1965), 27 Wis. 2d 53, 65; United States F & G Co. v.

Hooper (1935), 219 Wis. 373; St. Croix County v. Webster (1901),
111 Wis. 270.

Let judgment be entered affirming the respondent board's decision
here under review.

Dated this 1st day of August, 1975.

By the Court:

George P. Currie
Reserve Circuit Judge