

C. K. WETTENGEL, Director,
State Bureau of Personnel; and
BARBARA THOMPSON, State Superintendent,
Department of Public Instruction,

No. 149-326

Petitioners,

NOTICE OF ENTRY
OF JUDGMENT

v.

STATE PERSONNEL BOARD,

Respondent.

To: Lawton & Cates
Attention: John H. Bowers
110 East Main Street
Madison, Wisconsin 53703

Please take notice that on August 30, 1976, judgment, a copy of which is attached, was duly entered in the office of the clerk of said court.

Dated this 7th day of September, 1976.

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STATE PERSONNEL BOARD

C. K. WETTENGEL, Director,
State Bureau of Personnel; and
BARBARA THOMPSON, State
Superintendent, Department of
Public Instruction,

Petitioners,

vs.

JUDGMENT

STATE PERSONNEL BOARD,

149-326

Respondent.

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

The above entitled review proceeding having been heard by the Court on the 23rd day of August, 1976, at the City-County Building in the City of Madison; and the petitioners having appeared by Assistant Attorney General John J. Glinski; and the respondent having appeared by Attorney Robert J. Arnot of the law firm of Lawton & Cates; 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 State Personnel Board denominated "Opinion and Order" dated November 25, 1976, entered in the matter of Walter B. Burkholder, Appellant, v. C. K. Wettengel, Director, State Bureau of Personnel and Barbara Thompson, State Superintendent, Department of Public Instruction, Case No. 74-106, be, and the same hereby is, reversed.

Dated this 30th day of August, 1976.

By the Court:


Reserve Circuit Court Judge

C. K. WETTENGEL, Director,
State Bureau of Personnel; and
BARBARA THOMPSON, State
Superintendent, Department of
Public Instruction,

Petitioners,

vs.

MEMORANDUM DECISION

STATE PERSONNEL BOARD,

149-326

Respondent.

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

This is a proceeding by petitioners Director, State Bureau of Personnel (hereafter the Bureau) and State Superintendent, Department of Public Instruction (hereafter D.P.I.) under ch. 227, Stats., to review a decision of respondent State Personnel Board (hereafter the Board) dated November 25, 1975, denominated "Opinion and Order". The opinion portion of the decision contains findings of fact and conclusions of law. The order rejected the actions of the petitioners Director and State Superintendent in denying the application of Walter B. Burkholder for reclassification to the position of Educational Consultant 2, and remanded the matter for further action in accordance with the Board's decision.

STATEMENT OF FACTS

On December 19, 1970 Burkholder was appointed to the position of Public Instruction Supervisor, Department of Public Instruction, in the area of public pupil transportation, salary range 16, on December 19, 1970. Prior to accepting this appointment, Burkholder had had approximately 22 years experience as a teacher and administrator and immediately prior to this time had been a school district administrator. He had discussed with personnel administrators at D.P.I. two other positions with D.P.I.,

besides transportation specialist, in finance and school organization. He was offered and decided to accept the position in pupil transportation. Mr. Burkholder worked part time for D.P.I. until July 1, 1971, when he began full-time employment.

Prior to the date of Mr. Burkholder's appointment on December 19, 1970, the Bureau had under consideration a revision of the Public Instruction Supervisors and related series. Consequently, in February 1971 Burkholder's position was reallocated to Education Consultant 1 specializing in pupil transportation. The revised series included a new classification of Education Consultant 2, which was in the line of progression from Education Consultant 1. The class specifications for Education Consultant 2, under "Areas of Specialization," excluded pupil transportation by stating the same to be "Similar to those for the Education Consultant 1 with the exception of pupil transportation."

This exclusion effectively precluded Burkholder or anyone else in the classification specializing in pupil transportation from advancing to the 2 level or, for that matter, receiving any promotion in the classified service while remaining an Education Consultant 1 specializing in pupil transportation.

Burkholder was never notified by D.P.I. of this exclusion contained in the class specifications of the position of Education Consultant 2 until long after his application for reclassification had been rejected, and this exclusion is not mentioned in D.P.I. Bulletin No. 53.76 setting forth the procedures covering applications for reclassification to higher positions. Burkholder first became aware of the exclusion at a prehearing conference held by the Board in February, 1975.

Burkholder filed on May 30, 1974, his application for reclassification to the position of Education Consultant 2. Under the procedures for processing such applications set forth in Bulletin 53.76 the applicant's

immediate supervisor or division administrator was required to either approve or disapprove the application and set forth a statement of the rationale for his recommendation. Burkholder's immediate supervisor and division administrator wholly failed to comply with this requirement. After the application has been processed by the immediate supervisor of the applicant it goes to a review board to pass on the same.

Under date of September 4, 1974, the State Superintendent by letter to Burkholder (Applicant's Exhibit 6) advised him that the review board had not selected him for reclassification, but that the reclassification process was an ongoing one, the review board would meet again in the spring and "applications will be solicited".

Burkholder appealed this rejection to the Board and counsel for the Board wrote Burkholder October 4, 1974, (Applicant's Exhibit 9) that certain procedures in processing his application had not been followed and "the agency" (D.P.I.) had been advised of this." The review board thereafter further considered the applications for recalssification of Burkholder and others in an attempt to meet the objections raised by counsel for the Personnel Board and by letter to the State Superintendent dated December 10, 1974,, (Respondent's Exhibit 11) recommended that five named applicants were qualified for reclassification to Education Consultant 2, and stated it was the judgment of the board (The Education Consultant Reclassification Committee) that Burkholder and another named applicant "do not meet the criteria established for reclassification to Education Consultant 2." This amounted to a final rejection of Burkholder's application, and the Personnel Board proceeded to process his appeal.

THE BOARD'S DECISION

The Board determined that these two procedural errors had occurred in the processing of Burkholder's application for reclassification:

(1) The acts of his immediate supervisor and division administrator in forwarding on Burkholder's application without recommendation or comment.

(2) The failure of the review board to have as one of its members a person having the same position classification as Burkholder, viz., an Education Consultant 1, as required by Bulletin 53.76.

On the issue of the "substantive correctness" of that part of the Education Consultant 2 position specifications which excludes pupil transportation as an area of specialization, the opinion portion of the Board's decision stated:

"The Respondents presented a colorable case that there were significant inherent differences between the subject matter connected with pupil transportation and that connected with the other consultant areas to justify the difference in classification. The Appellant did not introduce evidence comparing the duties and responsibilities of his position and those of other consultants, or otherwise come to grips with the question of the general correctness of the exclusion. However, we concluded that Appellant will not be restricted to proof relating to the abstract correctness of the exclusion on its face. Inasmuch as we also conclude that Respondents failed to follow the correct procedure in effectuating the reallocation within this series, we limit our conclusion at this point to the conclusion that the class specifications for Education Consultant 2 insofar as they exclude the area of pupil transportation are on their face substantively correct.

"There is another factor present concerning the procedure utilized in effectuating the reallocation. No one advised the Appellant of the reallocation which occurred in February, 1971, essentially creating the Education Consultant series from the public instruction supervisor and consultant series. S. Pers. 3.04, Wisconsin Administrative Code, provides: 'Whenever a position is reclassified or reallocated, the appointing authority and the incumbent shall be notified in writing.' The Respondents' position is that although the Appellant had been appointed to the position and was employed in the position on a part-time basis pending his availability on a full-time basis, that he should not be considered an 'incumbent' for the purposes of this section of the administrative code because he had not yet started on a full-time basis.

"We conclude that in the context of S. Pers. 3.04, 'incumbent' must be interpreted to include a person in Appellant's circumstances. At least one of the major functions of this requirement of notice to incumbents is to ensure that persons whose positions are affected by

important personnel decisions are made aware of these decisions. Given the Appellant's commitment to the then Public Instruction Supervisor position in February, 1971, his interests in being made aware of the reallocation were as strong as if he were employed full-time. Given the potential flexibility of his position in February when he conceivably might have changed his mind about accepting the position if he had been made aware of the details of the re-allocation, his interests in notice might even have been greater at that point.

"This conclusion is reinforced by the Respondents' evaluation of the importance of notice. The failure of notice was candidly acknowledged as a 'massive error.' T., May 7, 1975, p. 101.

"Although the Respondents erred in failing to notify Appellant of the reclassification, through inadvertence they allowed him to apply for Education Consultant 2 and considered his application on the merits without regard to the exclusion of pupil transportation specialists. We conclude that this has essentially cured the error, at least to the extent that these terms are meaningful within the confines of the Board's jurisdiction, and to the extent that Respondents' consideration of Appellant's application was fair and in accordance with applicable standards. If the consideration of Appellant's application was not fair and in accordance with applicable standards, then the denial of Appellant's application for reclassification must be rejected, and he must be given the opportunity to have his application considered properly. In other words, the failure of notice to Appellant does not void the class specifications, but the Appellant should be given the opportunity to compete for the position regardless of the exclusion."

Under the heading DISPOSITION OF THIS CASE the Board's decision further stated:

"We conclude we must reject the actions of the Respondents denying Appellant's reclassification, inasmuch as they failed to observe the procedures set forth in Bulletin No. 53.76. This does not entitle Appellant to be reclassified to Education Consultant 2; he is entitled, however, to have an application for such reclassification processed in accordance with the procedures set forth in the bulletin. If he then satisfies the criteria for reclassification other than the pupil transportation exclusion, he is entitled to be reclassified."

THE COURT'S DECISION

Inasmuch as the Board advanced as a reason for its rejection of the actions of the Director and State Superintendent in denying Burkholder's application for reclassification the occurrence of the two procedural errors, the Board determined these procedural errors materially prejudiced Burkholder's rights and were not harmless.

While the Board decided the specifications for the position of Education Consultant 2 containing the pupil transportation exclusion were "on their face" substantially correct, it determined that such exclusion was not applicable to Burkholder's application for reclassification because of D.P.I.'s failure to notify him of such exclusion prior to the final rejection of his application. The reason advanced for this conclusion was that the error in failing to give such notice "essentially cured" the same by D.P.I. considering his application on the merits. However, the Board also expressly determined that the failure to give Burkholder notice of the transportation exclusion in the specifications "does not void the class specifications, but the Appellant [Burkholder] should be given the opportunity to compete for the position regardless of the exclusion."

The petitioners advance these contentions:

(1) The two procedural errors were harmless errors which did not affect the ultimate substantive issue of whether Burkholder was barred from being reclassified an Education Consultant 2 so long as his position was that of Education Consultant 1 specializing in pupil transportation.

(2) The respondent Board's rejection of petitioner's denial of Burkholder's application for reclassification as an Education Consultant 2 for the reasons stated in the Board's decision was arbitrary and capricious within the meaning of sec. 227.20 (1) (e), Stats.

If the exclusion of pupil transportation in the specifications for the position of Education Consultant 2 barred petitioners from granting Burkholder's application to be reclassified Education Consultant 2, then it necessarily follows that the two found procedural errors were harmless errors.

The respondent Board's decision rejecting the petitioners' denial of Burkholder's application for reclassification could not constitute capricious action on its part within the meaning of sec. 227.20 (1) (e), Stats., because there was no showing that petitioners in denying such application subjected Burkholder to different treatment than had been accorded any other applicant for reclassification. This leaves as the only substantive issue to be decided whether the Board's decision in rejecting petitioners' denial of Burkholder's application and remanding the matter back for consideration of the application without regard to the pupil transportation exclusion, constituted arbitrary conduct on its part. If there existed no legal basis for the Board's decision, then in the opinion of the Court the action of the Board constituted arbitrary conduct on its part within the meaning of sec. 227.20 (1) (e), Stats.

The Court has experienced no difficulty in concluding that the Board's action in rejecting petitioners' denial of Burkholder's application and remanding the matter back for petitioners to reconsider the application because of the two procedural errors would constitute arbitrary action on its part if the pupil transportation exclusion were applicable to Burkholder.

The Court, however, has had difficulty with respect to the other basis on which the Board grounded its decision to reject the denial and remand the matter for further consideration of Burkholder's application without regard to the pupil transportation exclusion, viz., that D.P.I. had failed to give any notice to Burkholder of this exclusion at the time he was reclassified Education Consultant 1 specializing in pupil transportation or at any time thereafter until after petitioners had finally rejected Burkholder's application for reclassification. The reason for the Court's difficulty is that it considers the end result a highly equitable one which appeals to the Court's sense of justice.

The only statute or administrative agency rule bearing on the issue of notice which has been cited in the briefs of counsel is sec.

Pers. 3.04, Wis. Adm. Code referred to in the Board's decision which provides:

"Whenever a position is reclassified or reallocated, the appointing authority and the incumbent shall be notified in writing."

The only reclassification which was made of Burkholder occurred in February 1971 when he was still employed by D.P.I. on a part-time basis when he was reclassified from Public Instruction Supervisor to Education Consultant 1 specializing in pupil transportation, the classification of Public Instruction Supervisor having been abolished when the positions of Education 1, Consultant 1, and Education 2 were created. There is little doubt but what the purpose of sec. Pers. 3.04, Wis. Adm. Code was to fix the commencement of the time of the running of the period available to the reclassified employee within which he could appeal the reclassification. There is no question but what Burkholder knew long before he filed his application for reclassification on May 30, 1974, that his position was classified as Education Consultant 1 specializing in pupil transportation. What he did not know, and had never been notified of, was the pupil transportation exclusion in the specifications for the Education Consultant 2 position.

In its decision the Board stated (p. 7):

"The Respondents presented a colorable case that there were significant inherent differences between the subject matter connected with pupil transportation and that connected with the other consultant areas to justify the difference in classification. . . . [W]e limit our conclusion at this point to the conclusion that the class specifications for Education Consultant 2 insofar as they exclude the area of pupil transportation are on their face substantively correct."

The testimony presented by petitioners explaining the basis for including the pupil transportation exclusion in drafting the specifications for the Education Consultant 2 position was given by Marian Walluks of D.P.I. who served on a committee that drafted the specifications for the Education Consultant 1 and 2 positions. Her testimony justifying this

exclusion (pages 155-157 of transcript) has been set forth verbatim in petitioners' brief. This testimony fully justified the inclusion of the pupil transportation exclusion in the specifications of the Education Consultant 2 position and Burkholder adduced no evidence to rebut it. The Board in the portion of its decision last quoted supra assumed the validity of the exclusion, and there is no basis afforded by this record for the Court to determine otherwise.

Section Pers. 3.04, Wis. Adm. Code, is not subject to the strained interpretation which the Board placed upon it as having required D.P.I. to have notified him of the pupil transportation exclusion in the specification of the Education 2 position when he was reclassified in February 1971. The Court is unaware of any other agency regulation or statute requiring the giving of such notice and none has been cited in the briefs of counsel. The Court has concluded that, in the absence of any legal requirement that Burkholder have been given such notice, it was arbitrary within the meaning of sec. 227.20 (1) (e), Stats., for the Board to have taken the action it did, viz., rejecting the denial of Burkholder's petition for reclassification and remanding the matter for the purpose of having his application processed without regard to the pupil transportation exclusion.

So long as the pupil transportation exclusion remains in the specifications for the Education Consultant 2 position, the only avenue open to Burkholder to advance to the position of Education 2 position is first to seek a lateral transfer to a position in his present classification in the field of academic work instead of specializing in pupil transportation.

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

C. K. WETTENGEL, Director,
State Bureau of Personnel; and
BARBARA THOMPSON, State
Superintendent, Department
of Public Instruction,

Petitioners, Case No. 149-326

vs.

STATE PERSONNEL BOARD,

DECISION ON MOTION
FOR RECONSIDERATION

Respondent.

BEFORE HON. GEORGE R. CURRIE, Reserve Circuit Judge

Counsel for the respondent State Personnel Board has moved the Court for reconsideration on the ground that the Court misinterpreted the Board's decision in the Court's memorandum decision filed in this case.

Respondent attacks this portion of the Court's memorandum decision:

"The Court, however, has had difficulty with respect to the other basis on which the Board grounded its decision to reject the denial and remand the matter for further consideration of Burkholder's application without regard to the pupil transportation exclusion, viz., that D.P.I. had failed to give any notice to Burkholder of this exclusion at the time he was reclassified Education Consultant 1 specializing in pupil transportation or at any time thereafter until after petitioners had finally rejected Burkholder's application for reclassification. The reason for the Court's difficulty is that it considers the end result a highly equitable one which appeals to the Court's sense of justice.

"The only statute or administrative agency rule bearing on the issue of notice which has been cited in the briefs of counsel is Sec. Pers. 3.04, Wis. Adm. Code. . . .

* * *

"Section Pers. 3.04, Wis. Adm. Code, is not subject to the strained interpretation which the Board placed upon it as having required D.P.I. to have notified him of the pupil transportation exclusion in the specifications of the Education 2 position when he was reclassified in February 1971. The Court is unaware of any other agency regulation or

statute requiring the giving of such notice and none has been cited in the briefs of counsel. The Court has concluded that, in the absence of any legal requirement that Burkholder have been given such notice, it was arbitrary within the meaning of Sec. 227.20(1)(e), Stats., for the Board to have taken the action it did, viz., rejecting the denial of Burkholder's petition for reclassification and remanding the matter for the purpose of having his application processed without regard to the pupil transportation exclusion." (Emphasis added.)

The Court acknowledges that it misinterpreted the Board's decision in stating in the underlined portions of the above quoted extract that the Board grounded its result on the failure to give notice to Burkholder of the transportation exclusion when he was reclassified in February, 1971. Rather, the Board grounded its result on the failure to have given Burkholder any notice of his reclassification in February, 1971. Such notice was required by Section Pers. 3.04, Wis. Adm. Code.

However, such notice of reclassification would not in itself have given Burkholder notice of the transportation exclusion. The Court is of the opinion that the only legal effect of the failure to give such notice of reclassification was to extend Burkholder's time for appealing the reclassification to the Director of the State Bureau of Personnel until such time as Burkholder actually learned of this reclassification, regardless of whether as of that time ^{when} he had learned of such reclassification he then knew of the transportation exclusion in the job classification specifications of the Education Consultant 2 position.

Burkholder received the bulletin (Appellant's Exhibit 5) which D.P.I. addressed to all Education Consultant 1's dated April 15, 1974, telling how to apply for reclassification as an Education Consultant 2. This establishes that he must have known his classification was Education Consultant 1 by April 15, 1974, at the latest, and he took no steps to appeal such classification.

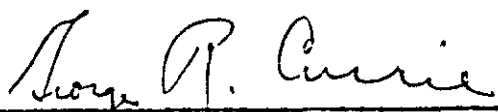
The Court adheres to its conclusion stated in the memorandum decision that it was arbitrary within the meaning of sec. 227.20 (1)(e), Stats., 1975, for the Board to have taken the action it did,

viz., rejecting the denial of Burkholder's petition for reclassification and remanding the matter for the purpose of having his application processed without regard to the pupil transportation exclusion.

The Court, therefore, denies the respondent's motion that the Court hold a hearing on its application for reconsideration.

Dated this 6th day of October, 1976.

By the Court:



Reserve Circuit Judge