

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

ALTON SCHALLOCK,

Petitioner,

Case No. 149-334

vs.

JUDGMENT

STATE PERSONNEL BOARD,

Respondent.


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

The above entitled review proceeding having been heard by the Court on the 6th day of July, 1976, at the City-County Building in the City of Madison; and the petitioner having appeared pro se; and the respondent Board having appeared by Assistant Attorney General Robert J. Vengeront; and the Court having had the benefit of the oral argument by petitioner and counsel for the respondent and of the briefs filed by them; and the Court having filed its Memorandum Decision wherein Judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the Decision of the Board denominated "Opinion and Order" dated November 25, 1975, entered in the matter of Alton L. Schallock, appellant, v. Lester Voigt, Secretary, Department of Natural Resources, and C. K. Wettengel, Director, State Bureau of Personnel, Respondents, Case No. 74-22, be modified so as to provide for the dismissal of the proceeding with respect to the respondent Voigt, and, as so modified, said Decision be, and hereby is, affirmed.

Dated this 17th day of July, 1976.

By the Court:


Reserve Circuit Judge

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

ALTON SCHALLOCK,

Petitioner,

Case No. 149-334

vs.

MEMORANDUM DECISION

STATE PERSONNEL BOARD,

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 labeled "Opinion and Order" dated November 25, 1975, rendered in the matter of Alton L. Schallock, appellant, v. Lester Voigt, Secretary, Department of Natural Resources, and C. K. Wettengel, Director, State Bureau of Personnel, Respondents.

BACKGROUND FACTS

Petitioner Schallock was born November 15, 1923, and has been an employee of the Department of Natural Resources (hereafter DNR) for 13 years. Since sometime in 1967 his classification has been Natural Resource Specialist 2. His work assignments during his employment by DNR are as follows:

6/63 - 9/65	Park Manager, Kettle Moraine Forest - Whitewater
9/65 - 9/70	Assistant Forest Supt., Kettle Moraine Forest - Eagle
6/70 - 6/71	Park Group Manager, Wildcat Mt., Mill Bluff, Elroy-Sparta
6/71 - present	Staff Assistant to District Director, Southeast District - Milwaukee

On October 17, 1973, DNR caused a notice to be issued for the filling of the position of Natural Resources Specialist 4 - District Forester for a vacancy existing in the Southeast District by promotional competitive written and oral examination. On November 5, 1973, petitioner submitted

his application for this position. He took and passed the examination and was certified as eligible for possible appointment. The appointing authority of DNR then appointed a panel of three to interview those certified as eligible and to recommend who the panel decided should be appointed. This panel consisted of Kroehn, Director of the Southeast District, Trecker, Supervisor of Forestry for the Southeast District, and Hogan, who was also a DNR employee. The panel on March 3, 1974, interviewed the three applicants, including petitioner, who had been certified as eligible by reason of passing their examination, together with a fourth candidate who had been certified as eligible by reason of lateral transfer. The panel members then submitted their written report (Respondent's Exhibit 1) in which they set forth their evaluation of each of the four candidates and recommended for appointment Denney, who had ranked No. 1 in taking the examination.

As a result of the panel's recommendation Denney was appointed. By letter dated March 26, 1974, (Board's Exhibit 1) ^{petitioner} /appealed to respondent State Board of Personnel (hereafter the Board) which letter was entitled "Re: Discriminatory Actions Natural Resources Spec. 4 Interview", and attached to the letter was an "Appeal Brief" in which petitioner set forth the grounds of his appeal. His attack on the interviewing panel was that the members were biased against him. However, the brief went on to state that since his transfer to the Southeast District he had been excluded from any forestry duties, had been forced to pay his own expenses in attending forestry conferences, and that his duties since his transfer could best be described as "Clerk-Typist or what have you". It asserted that by reason of these facts petitioner had obviously been "forced into a position where he cannot compete with other applicants who have been treated very differently." The prayer of the brief was "that interviews for this position be nullified and be conducted again by a neutral body where previous discriminatory acts cannot be a factor in selection of an applicant for said position."

Because of the allegations in petitioner's appeal brief which indicated that he was not being assigned duties compatible with his Natural Resource Specialist 2 classification and was the subject of discriminatory treatment, the Board, pursuant to the authority vested in it by sec. 16.05 (4), Stats., directed that an investigation be conducted by holding a formal hearing before Hearing Officer Ahrens. This hearing was held May 13, 1975, and the transcript of this hearing together with the exhibits received in evidence constitute part of the record returned to this Court. The Board's decision states it was agreed that these five issues be the subject of the hearing:

- (1) Was it predetermined before Appellant sought the promotion to Natural Resources Forester IV that he would not be selected?
- (2) Did the Department of Natural Resources prohibit Appellant from participating in forestry related activities so as to lessen his chances for the promotion?
- (3) Assuming Appellant was assigned duties outside his class specifications, did this place Appellant at a disadvantage in competing for a promotion?
- (4) Was the interviewing board biased against Appellant?
- (5) Since his voluntary transfer to the Southeast District Office in June of 1971, has Appellant had to perform duties which are not in his class specifications?

Petitioner disputes that he ever agreed that his transfer to the Southeast District was voluntary on his part.

THE BOARD'S FINDINGS OF FACT

While not labeled as findings of fact, the Board in the opinion portion of its decision made these findings which the Court determines constitute findings of fact for purposes of ch. 227, Stats. (Pages 10-11):

"Appellant spent most of his time attempting to prove that he was not performing duties and responsibilities within

his classification. (Issue No. 5, supra.) Most of his duties involve working with various forms and requisitions. A resource background was needed to properly and accurately fill out most of these forms. About twenty per cent of his time was spent in supervising the snowmobile trail program.

"Appellant filed to establish that the majority of his time was spent on tasks outside his classification. In fact, the record indicates that most of his time was spent on duties which called upon his resource experience and educational background.

"Appellant did establish that his transfer to the Southeast District Office was involuntary. It is true he had requested a transfer from Wildcat Mountain Park but evidently had not wanted to be transferred to the new district office. But the question of voluntariness is not an important aspect of the last issue. Appellant did not show how this transfer adversely affected him.

"Appellant failed to produce any evidence which would go to establish the bias which is a large part of issues numbered one through four. On issue four he stated only that Thomas Kroehn, District Director of the Southeast District, Milwaukee, was on the interviewing panel. However, there was no evidence produced which showed Mr. Kroehn's alleged bias toward Appellant. The Interview Evaluation sheet (Respondents' Exhibit No. 1) appeared to be straight forward (sic) and did not indicate any predisposition on the part of the interviewing board.

"Appellant never really confronted issue number three. No evidence was produced specifically on this issue.

"Regarding issue two, Appellant did elicit testimony from Mr. Kroehn that Appellant had to pay his own expenses to forestry meetings and conferences and had to attend them on his own time. However, there was strong rationale for the state not paying Appellant's way. The topics of the meetings were not in the area in which Appellant was working. The state cannot be expected to send employees to meetings from which it will receive at best tangential benefit.

"Finally, Appellant did not establish issue number one. The evidence of his job duties did not show that he had no chance at all for the promotion to Natural Resources IV."

As a result of petitioner's testimony before the hearing officer it became apparent to the Board that petitioner attacked his transfer to the Southeast District in 1971 and the Board made these additional findings on that issue (Page 7):

"Appellant's classification and pay range remained the same before and after the transfer. The transfer necessarily involved a change of duties. A list of potential duties was drawn up by Appellant, Robert W. Conners, Personnel Administrative Officer 2, Department of Natural Resources, Alta Ehly, Natural Resources Administrator 3, Department of Natural Resources, and Edgar Trecker, Supervisor of Forestry in the Southeast District. That the duties which Appellant actually performed did not encompass all of the ones that were thought to be potentially part of the new job in the new district does not mean that Appellant was demoted. . . ."

THE BOARD'S CONCLUSION OF LAW

The Board's decision did not label any of the legal conclusions expressed in the opinion portion of its decision as conclusions of law. The Board's material legal conclusions are stated in its decision under the heading "Conclusions" as follows:

- (1) The Board had no jurisdiction over petitioner's appeal with respect to the filling of the position of the Natural Resources Specialist 4 - District Forester position.
- (2) The Board had no jurisdiction over petitioner's appeal as it related to the issue of his 1971 transfer to the Southeast District.
- (3) The petitioner had failed to meet his burden of proof with respect to the five above quoted issues stated at page 10 of the Board's decision.

It is apparent that the Board considered the five issues referred to in (3), above, were properly before the Board by reason of its investigation made pursuant to sec. 16.05 (4), Stats.

THE BOARD'S ORDER

The order portion of the Board's decision reads:

"IT IS HEREBY ORDERED that this appeal against Respondent Wettengel be dismissed for lack of jurisdiction.

"IT IS FURTHER ORDERED that the decision of Respondent Voigt be affirmed."

While it is clear that the dismissal as to Wettengel relates to petitioner's appeal with respect to the filling of the Natural Resources Specialist 4 - District Forester position, it is not clear what the decision of Voigt is that the Board ordered affirmed.

In the very last paragraph of the opinion portion of the Board decision the Board states: "Therefore, after reviewing all possible bases of appellate jurisdiction over Respondent Voigt, we find that we have none." If the Board had no jurisdiction over Voigt then it should have dismissed the appeal inasmuch as it lacked jurisdiction to affirm any decision of Voigt's.

THE COURT'S DECISION

A. Jurisdiction Issue With Respect to Filling the Natural Resources Specialist 4 - District Forester Position.

Section 16.03 (2), Stats., provides in part:

"The director may delegate, in writing, any of his ministerial functions set forth in this subchapter to a department head, within prescribed standards when he finds such agency has personnel management capabilities to perform such functions effectively and has indicated its approval and willingness to accept such responsibility by written agreement. . . ." (Emphasis added.)

Section 16.03 (4) (a), Stats., provides:

"The director or his designated representative shall hear appeals of employees from personnel decisions made by appointing authorities when such decisions are alleged to be illegal or an abuse of discretion and such decisions are not subjects for consideration under the grievance procedure, collective bargaining or hearing by the board."

Section 16.04 (1) (b), Stats., provides:

"(1) Each appointing authority shall:

"(b) Appoint persons to the classified service, designate their titles, assign their duties and fix their compensation, all subject to this subchapter and the rules of the director." (Emphasis added.)

Section 16.20 (1) and (2), Stats., provide:

"(1) Appointing authorities shall give written notice to the director of any vacancy to be filled in any position in the classified service; and the director shall certify, pursuant to this subchapter and the rules

of the director, from the register of eligibles appropriate for the kind and type of employment, the grade and class in which the position is classified, the 3 names at the head thereof, which have not been certified 3 times.

"(2) Unless otherwise provided in this subchapter and rules pursuant thereto, appointments shall be made by appointing authorities to all positions in the classified service from among those certified to them in accordance with sub. (1). Appointments shall be made within 60 days after the date of certification unless an exception is made by the director. If an appointing authority does not make an appointment within 60 days after certification he shall immediately report in writing to the director the reasons therefor. If the director determines that the failure to make an appointment is not justified under the merit system, he shall issue an order directing that an appointment be made."

Acting pursuant to the authority given him by sec. 16.03 (2), Stats., Director Wettengel delegated certain ministerial functions relating to the recruitment, examination and certification of employees to the Secretary of DNR. The conducting of the examination of applicants for the position of Natural Resources Specialist 4 - District Forester was handled by the personnel officer of DNR under authority of the Secretary. The appeal of petitioner did not relate to anything done in the examination process including the certification of the list of eligible candidates. Rather the appeal was confined to the alleged bias of the interviewing panel.

The power to appoint from a list of eligibles is discretionary and cannot be compelled by mandamus. Marranca v. Harbo (1962), 76 N.J. Super. 429, 184 A. 2d 765, 772.

Wisconsin's Civil Service Act limits the power of the appointing authority to appoint from a list of three eligibles, but leaves discretion in the appointing authority to appoint any one of the three. State ex rel. Buell v. Frear (1911), 146 Wis. 291, 302-303, 131 N.W. 832. All the appointing authority need to do to comply with the provisions of the law is to appoint from among those certified as eligible. 15 Am. Jur. 2d Civil Service . Section 23, p. 485.

The power of the Director of the Bureau of Personnel "is limited to submitting the names of three persons from which the employee must

be selected" Berg v. Seanman (1937), 224 Wis. 263, 266, 271 N.W. 924. Here this power had been delegated by the Director to the Secretary of DNR.

The interviewing panel is not a creature of statute, but was a process which the Secretary as the appointing authority created to aid him in making the appointment from the certified list of eligible candidates. Bias of the interviewing panel against petitioner which affected the making of the appointment is a wrong for which the law should provide a remedy.

It is clear that such remedy was not an appeal by petitioner to the Board. Administrative agencies such as the Board have only such powers as are expressly granted to them by statute or necessarily implied. American Brass Co. v. State Board of Health (1944), 245 Wis. 440, 15 N.W. 2d 27. In Baken v. Vanderwall (1944), 245 Wis. 147, 150, 13 N.W. 2d 502, it was stated with specific reference to the Personnel Board:

". . . The powers of the board are fixed by statute and are limited in authority as defined by the statute creating it. . . ."

Nowhere is there any statute clothing the Board with authority to hear an appeal when bias is alleged as influencing the making of the appointment by the appointing authority from the list of certified eligible candidates. The sole remedy provided by statute for such a wrong is that provided by sec. 16.03 (4) (a), Stats., quoted supra, viz., an appeal to the Director.

Therefore, the Board properly dismissed petitioner's appeal with respect to Director Wettengel and should have done the same with respect to Secretary Voigt for lack of jurisdiction of the Board in so far as the appeal related to the issue of filling the position of Natural Resources Specialist 4 - District Forester.

B. Jurisdiction With Respect to the Transfer of Petitioner to DNR's Southeast District.

Petitioner takes sharp issue with the Board's statement of the fifth of the five agreed upon issues which were to be considered at the hearing in which his transfer to the Southeast District was referred to as a voluntary one. This wording was probably grounded on the Connors letter to petitioner dated May 13, 1971 (part of Board's Exhibit 5), which stated Ely and Connors had met with petitioner and wife on April 19, 1971, "to consider your request for transfer." Petitioner's position is that he was opposed to being transferred to the Southeast District and therefore the transfer was an involuntary one. The Court deems that whether the transfer was voluntary or involuntary is immaterial and for the purposes of the jurisdictional issue will be considered as involuntary.

In its decision the Board stated:

"Section 16.05 (1) (e) grants this Board the authority to hear appeals involving demotions, lay-offs, suspensions or discharges where it is alleged that the decision of the Appointing Authority was not based on just cause. Under the facts of this appeal none of these categories can be applied to Appellant's situation. Appellant does claim that he was demoted because his duties and responsibilities have changed, becoming more clerical since his transfer. However, the definition of demotion as found in Administrative Code Section Pers. 17.01 states:

"A demotion is the movement of an employee with permanent status in one class to a position in another class that has a lower single rate or pay range maximum.

Because petitioner retained the same classification, pay and pay raise maximum after the transfer as before, the Board determined that there had been no demotion. Thus it properly determined that sec. 16.05 (1) (e), Stats., gave it no jurisdiction to hear an appeal with respect to such transfer.

Furthermore, sec. 16.05 (2), Stats., provides that "The Board shall not grant an appeal under sub. (1) (e) or (f) unless a written request therefor is received by the Board within 15 days after the effective date of the decision, or within 15 days after the appellant is notified of such decision, whichever is later."

If Kroehn, petitioner's supervisor, acting for the Secretary as appointing authority, persisted in giving petitioner work assignments which

were not within his classified job specifications, an appeal might lie to the Director under sec. 16.03 (4) (a), Stats., but such matter is not directly appealable to the Board.

For the reasons stated above the Court determines that the Board was without jurisdiction to hear petitioner's appeal with respect to his 1971 transfer to the Southeast District.

C. The Board's Findings With Respect to the Investigation

It Conducted Pursuant to Sec. 16.05 (4), Stats.

Section 16.05 (4), Stats., provides:

"(4) The board may make investigations and hold hearings on its own motion or at the request of interested persons and issue recommendations concerning all matters touching the enforcement and effect of this subchapter and rules prescribed thereunder. If the results of an investigation disclose that the director, appointing authority or any other person acted illegally or to circumvent the intent and spirit of the law the board may issue an enforceable order to remand the action to the director or appointing authority for appropriate action within the law. Any action brought against the director or appointing authority for failure to comply with the order of the board shall be brought and served within 60 days after the date of the board's findings."

This statute did not require the Board to make an investigation as this was discretionary on its part. The Court commends the Board for deciding to exercise its discretion to make an investigation because the papers which petitioner filed with the Board strongly indicated such an investigation was warranted. While the Board might have conducted such an investigation by other means than conducting a formal hearing, it certainly was within the discretion of the Board to do so by means of such a hearing.

Unfortunately because of lack of funds the petitioner elected to act without counsel at the hearing. Furthermore, he did not request the subpoenaing of any witnesses. Although the hearing officer on several occasions advised him of his right to bring out facts by narrative testimony of his own, he did not avail himself of this opportunity as he should have.

The Court is satisfied from facts stated in oral argument and in his brief petitioner could have made a much stronger showing than he did in his brief narrative testimony.

The Board made findings of fact with respect to all five agreed upon issues. Under these findings of fact, which have been set forth in full, supra, the Board had no basis on which to grant petitioner any relief. Therefore, the Court's review with respect to the Board's investigation is confined to the issue of whether there is substantial evidence in view of the entire record as submitted to support these findings of fact. Sec. 227.20 (1), Stats., provides in part that in review of an administrative decision:

"The court may affirm the decision of the agency, or may reverse or modify it if the substantial rights of the appellant have been prejudiced as a result of the administrative findings, inferences, conclusions or decisions being:

* * *

"(d) Unsupported by substantial evidence in view of the entire record as submitted, . . ."

In considering whether a particular administrative agency finding is supported by substantial evidence in view of the entire record as submitted, a court must keep in mind the test laid down by the Supreme Court for determining what constitutes substantial evidence. A recent statement of this test is found in Daly v. Natural Resources Board (1972), 60 Wis. 2d 208, 219-220, 208 N.W. 2d 839, quoting with approval Reinke v. Personnel Board (1971), 53 Wis. 2d 123, 135, 138, 139, 191 N.W. 2d 833:

"(T)he term 'substantial evidence' should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision; but on the other hand, if a reasonable man, acting reasonably, could not have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside."

The evidence presented with respect to each of these five issues and the Board's conclusion with respect thereto follow:

- (1) Whether it was predetermined before petitioner sought the promotion to Natural Resources Special 4 that he would not be selected.

There was no direct evidence presented that petitioner would not be promoted to the Resource Specialist 4 position before he sought the promotion through the taking of the examination for the position. Therefore, any finding with respect to that issue had to be grounded on an inference drawn from other facts. Petitioner contended that the confinement of his duties to largely clerical work made it a foregone conclusion he would not be promoted to other work. On the other hand, Kroehn testified that he was satisfied with the way petitioner performed his work.

The Board specifically found, "The evidence of his [petitioner's] job duties did not show that he had no chance at all for promotion to Natural Resources IV." The Court cannot hold that this was not an inference which a reasonable person in the Board's position could have drawn from the evidence.

- (2) Did DNR prohibit petitioner from participating in forestry related activities so as to lessen his chances for the promotion?

The evidence adduced by petitioner on this issue was that petitioner was denied reimbursement for expenses he incurred in attending forestry conferences which he attended on his own volition without request from Kroehn or DNR.

In questioning Kroehn at the hearing petitioner asked Kroehn why petitioner had to pay his own expenses in attending forestry meetings "whereas other foresters were reimbursed for those expenses" (Tr. 98). Kroehn answered that at that point petitioner was not "doing primary work responsibility in a forestry area" (Tr. 98).

Trecker who, as Supervisor of Forestry and Recreation for the district, had charge of forestry work assignments in the district, testified that the reason he did not assign forestry work to petitioner, except for a report petitioner was asked to prepare in 1972, was, "Since I am not your supervisor, I chose to utilize the individuals who I felt would be able to do the job who were under my direct supervision and control and who I felt confident could do the work" (Tr. 83).

The Board's finding of fact with respect to this issue was:

" . . . The topics of the meetings were not in the area in which Appellant was working. The state cannot be expected to send employees to meetings from which it will receive at best tangential benefit."

The Court determines that this finding is based on a reasonable inference drawn from the evidence. Furthermore, the evidence presented would not support a finding that the reason petitioner was not assigned forestry related duties was for the purpose of lessening his chances of securing a promotion in that field.

(3) Assuming petitioner was assigned duties outside his class specifications, did this place him at a disadvantage in competing for a promotion?

The Court after a careful review of the record agrees with this finding made by the Board:

"Appellant never really confronted issue number three. No evidence was produced specifically on this issue."

(4) Was the interviewing panel specifically biased against petitioner?

The Board found that with respect to this issue petitioner merely stated that Kroehn was a member of the interviewing panel. However, it is clear from reading the record and from petitioner's arguments addressed to this Court, that petitioner considered the evidence relating to the clerical duties assigned to petitioner by Kroehn, and Kroehn's refusal to pay petitioner's expenses in attending forestry meetings, established

Kroehn's bias against petitioner.

In answer to questions put to him at the hearing by counsel for DNR, Kroehn testified that he was not to his knowledge in any manner biased toward petitioner; and, in discussions with the other two members of the interviewing panel no biases arose that Kroehn was aware of (Tr. 114). The credibility of such evidence was entirely a matter for the Board to determine, it could either accept or reject such testimony. Likewise the inference to be drawn from other testimony was also for the Board to draw subject only to the limitation that they be reasonable inferences. The burden of proof was not on Kroehn to prove his lack of bias, but the burden of proof was on petitioner to establish that Kroehn was biased.

The Board found "there was no evidence produced which showed Kroehn's alleged bias toward Appellant." The Court determines that this finding must be upheld because a finding of bias cannot be grounded on mere suspicion.

Petitioner has emphasized that Trecker was also a member of the three man interviewing panel. While the Board made no specific finding with respect to Trecker's bias, the Court is of the opinion that there is a complete lack of any evidence which would support a finding of bias against Trecker.

(5) Since petitioner's transfer to the Southeast District in June, 1971, has he had to perform duties which are not in his class specifications?

The position and qualification standards of a Natural Resource Specialist 2 are set forth at page 3 of Board's Exhibit 9 as follows:

"This is responsible professional level work in resource management and research for the Department of Natural Resources. Positions allocated to this level, under general supervision, may (1) be in charge of a sub-area, small project or small program (2) serve as a primary assistant to the manager or leader of a area, project or program (3) direct all management or research activities in an assigned territory or district (4) make recommendations for program revision and improvement (5) direct public relations and educational activities in their assigned area of responsibility (6) train and guide assigned personnel in program objectives (7) keep records and make reports relating to assignments."

In a memorandum to petitioner from Connors of the Division of Services of DNR dated May 13, 1971 (Part of Board's Exhibit 5) there was outlined some of the duties of the staff position to which petitioner was being assigned in the Southeast District, these being:

- "1. Coordination of sand blanket requests and obtaining of technical recommendations
2. Coordination of applications for solid waste disposal sites
3. Coordinating the entire land acquisition program for the District
4. Assist Mr. Trecker in the forestry problems in the District as well as assisting the District Director in Resource matters as necessary
5. Maintain contact with Fire Control personnel on Federal Government surplus property for Departmental use"

The memorandum went on to state that the position would permit both office and field work in about equal amounts although it was then unknown what the exact split would be and "a considerable amount of items would have to be 'played by ear'."

Petitioner was never assigned any of the duties of the first three of the five items listed in the Connors memorandum. Kroehn testified that the reason for this was that additional personnel were assigned to the district to perform those duties (Tr. 66-67). The only forestry assignment under Item 4 of the Connors memorandum petitioner had from Trecker was preparing the compilation of statistics in 1972 (Appellant's Exhibit 3), also referred to in the testimony as having occurred in 1973.

Petitioner did perform work in connection with Item 5 of the Connors memorandum and is responsible for ^{the} federal excess property program in the district (Tr. 71).

With respect to the seven listed types of duties to be performed by a Natural Resources Specialist 2 in Board's Exhibit 9, most of petitioner's work has been record keeping under Item 7. Under Item 1 petitioner

has worked on the maintenance contracts and field surveys of the snowmobile trail aid program of the district (Tr. 45). Petitioner serves as the primary assistant to Thomsen, Supervisor of Services for the Southeast District (Tr. 58). This work probably would qualify under Item 2 of Board's Exhibit 9.

Petitioner stated that 80 per cent of his duties during the past four years have been clerical and typing tasks, checking time reports, expense accounts, typing up invoice vouchers and making up field orders and purchase orders (Tr. 31). Kroehn testified petitioner's work on invoice vouchers, field orders and purchase orders is utilized as a method of procurement of goods and services to meet department needs (Tr. 38). In placing orders for goods the decision with respect to where to place the order is made by either Thomsen or petitioner (Tr. 43). Petitioner also screens GSA (General Services Administration) federal fire control surplus property (Tr. 45), which Kroehn estimated took about four days per month (Tr. 47). Kroehn further testified that typing was not petitioner's primary responsibility, but that petitioner did have to type some field orders and purchase orders that he had gotten out in a hurry because "We have been very short-handed in the new district and it was necessary that he pick up and do some of his own typing" (Tr. 62).

The Board's findings of fact in regard to this issue have been fully set forth under the heading "THE BOARD'S FINDINGS OF FACT", supra. Significantly, the Board found that most of petitioner's time "was spent on duties which called upon his resource experience", and that petitioner had "failed to establish that the majority of his time was spent on tasks outside his classification." The Court determines that a reasonable person in the Board's position could make such a finding upon the evidence presented.

The Court has been unable to find evidence to sustain the finding, "About twenty per cent of his [petitioner's] time was spent in supervising the snowmobile program." The Court deems it probable that the Board

drew this inference from petitioner's testimony that 80 per cent of his time was spent in doing his clerical work. However, it is not clear from the record whether petitioner considered his duties with respect to screening GSA fire control surplus property as being office or field work. If part of it was field work, then according to petitioner's estimate he would have spent less than 20 per cent of his time on the snowmobile trails project.

The Court has concluded that it is immaterial whether 20 per cent of petitioner's time was taken up with the snowmobile trails project. Therefore, the finding made with respect to that, while unsupported by the evidence, would not have affected the result.

D. Receiving as Evidence Certain Exhibits.

On May 17, 1976, petitioner filed with the Court certain memoranda and correspondence labeled "Exhibits Relative to This Case" fastened together with a rubber band which petitioner has asked the Court to receive in evidence.

Sec. 227.20 (1), Stats., provides in part:

"The review shall be conducted by the court without a jury and shall be confined to the record, except that in case of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court."
(Emphasis supplied.)

This is the only statute which authorizes the taking of any evidence in court in an agency review action under ch. 227, Stats. The word "agency" in this statute does not refer to the DNR, but to the State Personnel Board. The Court has examined these proposed exhibits and none relate to any irregularities in procedure before the Board. Therefore, the Court is required to limit this review to the record made before the Board.

E. Special Comment of Court.

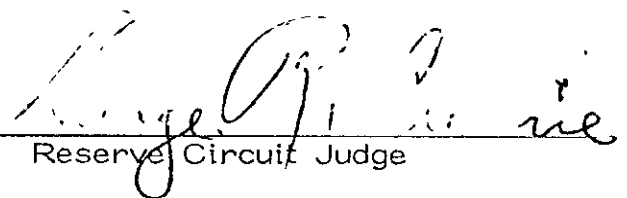
While the Court on this record cannot grant petitioner any relief, it has been much distressed that petitioner should be kept by DNR at a

desk job where he is most unhappy. Petitioner is unhappy because he has not been assigned to outdoor work in the field of park management or forestry in which field his experience and training lay during the first seven years of his employment by DNR. Added to his unhappiness is that he often finds himself with a "clean desk" with nothing to do. His discontent has not only adversely affected himself, but also his wife who suffers from multiple sclerosis. It is not good either for petitioner or the state that petitioner should be retained in a position in which he is so discontented and unhappy. With all the outdoor jobs in the many state parks and forest lands at the command of DNR it ought to be readily possible to remedy this situation by making a meaningful transfer of petitioner.

Let judgment be entered modifying the Board's decision so as to dismiss the proceeding with respect to the respondent Voigt as well as the respondent Wettengel, and, as so modified, affirming the Board's decision.

Dated this 17th day of July, 1976.

By the Court:


Reserve Circuit Judge