STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Petitioner, vs. STATE PERSONNEL BOARD, Respondent.	#149-427 MEMORANDUM DECISION ON PETITION FOR REVIEW

This is a proceeding under Chapter 227, Stats., to review a decision and order of the respondent, State Personnel Board, dated December 11, 1975, in the matter entitled Donald R. Ferguson v. Wilbur J. Schmidt, Secretary, Department of Health and Social Services, which determined that the petitioner, Department of Health and Social Services, improperly terminated the employment of Donald R. Ferguson and ordered him fully reinstated.

The issue is whether the Board erred in finding that Donald R. Ferguson had acquired tenure or "permanent status in class" and could only be discharged after a fair hearing and upon a showing of just cause.

It is the opinion of this court that, at the time of his dismissal, Ferguson was a probationary employee and did not have permanent status in class. As a result, he had no statutory right to a hearing prior to his dismissal and could be discharged with or without just cause. Consequently, the Board was without statutory authority or jurisdiction to hear his appeal of the Department's decision to terminate him. The order of the respondent, State Personnel Board, is therefore reversed.

The facts in this matter are undisputed and are correctly stated in the Board's opinion, to wit:

> "On August 14, 1970, the Appellant, Donald R. Ferguson, commenced his employment with the State of Wisconsin as a Management Information Specialist 2 with the University of Wisconsin. He satisfactorily completed an original probationary period, and, thereby, acquired permanent status in class in the classified service of the State. On April 23, 1973, Appellant received a promotional appointment to Information Specialist 3 position with the Department of Health and Social Services. On October 8, 1973, approximately five and one half months later, the Appellant was advised that his

employment with the Department was terminated, as of October 19, 1973, a few days before the end of his probationary period of six months. The letter notifying him of such action stated the reasons to be as follows:

> "1. Failure to handle assignments at a level required for a Management Information Specialist 3.
>
> "2. Lack of initiative in learning the scope of the job.
>
> "3. Failure to follow directions in carrying out assignments or asking for clarification when assignments aren't clear.
>
> "4. A continued tardiness, including tardiness when working with the counties.

"Appellant's discharge from the Department was, in practical effect, discharge from State employment."

1. Under secs. 16.05(1)(e) and 16.28, Stats., Ferguson was not entitled to a hearing and a finding of just cause before discharge from the state classified service.

a. At the time of his dismissal, Ferguson was not an employee with permanent status in class.

Section 16.05(1)(e), Stats., provides:

> "The (personnel) board shall:
>
> (e) Hear appeals of employees with permanent status in class, from decisions of appointing authorities when such decisions relate to demotions, layoffs, suspensions or discharges but only when it is alleged that such decision was not based on just cause. After the hearing, the board shall either sustain the action of the appointing authority or shall reinstate the employee fully...."

Section 16.28(1)(a), Stats., provides:

> (1)(a) An employee with permanent status in class may be removed, suspended without pay, discharged, or reduced in pay or position only for just cause. This paragraph shall apply to all employees with permanent status in class in the classified service...."

Under sec. 16.05(1)(e), Stats., the board has statutory authority and jurisdiction to hear appeals from decisions of appointing authorities, such as the petitioner, Department of Health and Social Services, but only when appeals are made by employees with permanent status in class. Under sec. 16.28(1)(a), Stats., such employees may only be dismissed for just cause. The board is

without authority or jurisdiction to hear appeals of probationary employees who, by definition, have not acquired permanent status in class.

The arguments of the respondents, that Ferguson was an employee with permanent status in class, are not persuasive. The board argues in essence that, during his appointment as an MIS 3, Ferguson occupied a dual status: As an MIS 3 in the Department of Health and Social Services, he was probationary; as an MIS 2 in the classified service, he had permanent status in class.

This argument by the board runs counter to one of the stated purposes of Chapter 16, Stats., "...to help the state's agencies furnish the agreed-upon services as efficiently and effectively as possible, avoiding any duplication of effort or waste of money...." Sec. 16.001(1), Stats. That purpose is furthered by interpreting the phrase "permanent status in class" in sec. 16.05(1)(a), Stats., to mean permanent status in class in a particular position. This interpretation is consistent with Pers. 13.11, Wis. Ad. Code, which defines "permanent status in class" to mean:

> "[T]he status of an employe in a position who has served a qualifying period to attain a permanent appointment in a position for that class." (Emphasis added.)

Thus, as the court interprets the statute, Ferguson needed permanent status in class as an MIS 3 before the board could consider his appeal.

Respondent board's reliance on sec. 16.28(1)(a) for a broader interpretation is misplaced. Sec. 16.28(1)(a) applies "to all employes with permanent status in the classified service...." The phrase "in the classified service" merely excludes employees in the classified service from the application of sec. 16.28, Stats. It does not, as the board contends, confer permanent status on Ferguson for so long as he remains in the classified service.

b. A classified employee with permanent status in class in one department loses that status upon promotion to another department.

There is no evidence that the legislature intended that an employee with permanent status in class should retain that status after applying and being promoted to another department in the classified service. It would be a strange result if classified employees could skip from department to department and job to job within the classified service, all the while maintaining an umbilical

link to the original job through which the employee gained permanent status in class. The state, faced with the possibility that its wandering employee might one day return to reclaim his original job, would be forced to fill the position with a temporary employee or run the risk of ending up with two employees with permanent status in class occupying one position in the department.

Section 16.22(1)(a), Stats., provides in part:

> "(1)(a) All original and all promotional appointments to permanent, sessional and seasonal positions in the classified service shall be for a probationary period of 6 months.... Dismissal may be made at any time during such periods."

In construing or interpreting a statute, the court is not at liberty to disregard the plain, clear words of the statute. State v. Pratt, 36 Wis. 2d 312, 317, 153 N.W. 2d 18 (1967). This section of the statute is not ambiguous.

Nor does the court see any substantive difference or expansion between the statute and the corresponding provisions of Pers. 14.03(2), Wis. Ad. Code, which provides in part that "the appointing authority may dismiss the promoted employe from the service without the right of appeal."

Original and promotional appointments are treated equally. Both are subject to six-month probationary periods. In both, the employee may be dismissed during the six-month period. The term "dismissal" is not ambiguous in meaning. Its definition cannot reasonably be expanded to include "demotion," the board's argument notwithstanding.

An exception to the above statutory rule allowing dismissal is set forth in sec. 16.22(1)(d):

> "A promotion or other change in job status within a department shall not affect the permanent status in class and rights, previously acquired by an employe within such department." (Emphasis added.)

Ferguson lost his permanent status in class when he applied for and accepted a position in the Department of Health and Social Services and quit his job with the University of Wisconsin. This result is clear from the plain words of sec. 16.22(1)(a), Stats. Upon acceptance of a new position in a different department, he lost the protection afforded him under sec. 16.28(1), Stats., and came under the provisions of sec. 16.22(1)(a), Stats. The only exception to outright dismissal is restricted to a class of employees with permanent status in class who are promoted within

a department. Ferguson is not a member of that class. Though the difference may seem slight and the result harsh, if there is any reasonable basis upon which the legislation may constitutional rest, the court must assume that the legislature had such fact in mind and passed the act pursuant thereto. State ex rel. Carnation M. P. Co. v. Emery, 178 Wis. 147, 160, 189 N.W. 564 (1922).

The petitioner Department has suggested two bases on which the distinction may constitutionally rest. First, the legislature might have found it important to protect employees promoted within the same department from the all too familiar bureaucratic practic of "up and out," protection not needed by the employee who volunta gives up a position in one department to seek a position in anothe department in the classified service. Second, the legislature might have found it impractical to require a department to which an employee is promoted to use the employee in the same or a substantially similar position to the one the employee performed i his former department if the employee fails to complete promotiona probation. Granted that a move from one department to another mig not involve any more than a few steps across a hallway. Still, the move is similar to leaving a job with one company and taking a new job with another company, and the legislature could have made a reasonable distinction between the two situations.

2. Did the respondent State Personnel Board have the power to declare Pers. 14.03 invalid as in excess of statutory authority?

Since the court has decided that the Board was without jurisdic to act in this matter, it is not necessary to the disposition of this review to examine the power of the Board to declare Pers. 14. Wis. Ad. Code invalid. If the tribunal lacks jurisdiction of the subject matter, its proceedings are absolutely void in the broades sense of the term. Damp v. Town of Dane, 29 Wis. 419 (1872).

3. Did Ferguson have a constitutional right to a hearing before dismissal?

The only issue in this review proceeding is whether the Board

___ U.S. ___, No. 74-1303 (June 10, 1976). There, the court said that a property interest in employment could be created by statute or contract. Whether such a guarantee has been given can be determined only by an examination of the particular statute in question.

Bishop held that where the employee, although classified as a "permanent employee," held his position at the will and pleasure of the city and the procedural rights granted the employee by the city ordinance were not violated, then discharge did not deprive him of a property interest protected by the Fourteenth Amendment. As a probationary employee in an MIS 3 position, Ferguson held his position at the will and pleasure of the appointing authority. None of Ferguson's procedural rights were violated. Consequently, Bishop would hold that Ferguson had no constitutional rights that were violated by his dismissal from the MIS 3 position with the Department of Health and Social Services.

The order of the State Personnel Board is hereby reversed.

Dated: June 28, 1976.

BY THE COURT:

/s/ William C. Sachtjen

William C. Sachtjen, Judge

c: Rice, Clifford, Graylow