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STATE PERSONNEL BOARD

STATE OF WISCONSIN EX REL.  
VIRGINIA B. HART, CHAIRMAN,  
DEPARTMENT OF INDUSTRY, LABOR  
AND HUMAN RELATIONS,

Relator,

vs.

PERSONNEL BOARD,

Respondent.

DECISION ON MOTION  
TO QUASH WRIT OF  
PROHIBITION

This case arose out of the following fact situation:

On February 27, 1975, the Personnel Board received a complaint of sex discrimination from John D. Keleher, whose application for the position of Account Examiner II had been turned down in favor of a female applicant by the Department of Industry, Labor and Human Relations (DILHR) on February 18, 1975. Keleher alleged that he had received the highest grade on the civil service exam among all applicants; that his qualifications in education and job-related experience far exceeded that necessary for the job; that he was much more skilled in the performance of certain job-related tasks than the woman hired; and that the staff in the office in which he sought the job was comprised entirely of women.

On May 23, 1975, the Board conducted a pre-hearing conference, at which DILHR moved to dismiss the Keleher claim on the ground that the Board lacked jurisdiction over a charge of sex discrimination by an appointing authority in the hiring process.

In an opinion dated December 22, 1975, the Board denied the Department's motion. While stating it had no power to proceed on claims of discrimination in the hiring process under the sections affording it jurisdiction over "appeals," Stats. 16.05(1)(e)-(h) and (7), the Board declared that it would assume jurisdiction under Stats. 16.05(4) because the case involved "broad and important policy issues."

The relator subsequently petitioned for the issuance of a writ of prohibition restraining the Personnel Board from further proceedings in the Keleher matter. The Board moved to quash the writ.

The parties have briefed two questions: (1) Is the action contemplated by the Board on the Keleher case in excess of its jurisdiction? (2) If the first question is answered in the affirmative, is this a proper case for prohibition against the Board?

Would the Board exceed its jurisdiction by proceeding in the Keleher matter?

The real issue here is the proper interpretation of Stats. 16.05 and, specifically, Stats. 16.05(4). Stats. 16.05(4) reads:

"(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. \*\*\*"

The Board contends the latter section empowers it to investigate, hold hearings on, and promulgate orders as to specific instances of claimed discrimination, while DILHR contends the Board's authority under that section is limited to a "quasi-legislative" function--to investigate and hold nonadversary hearings and promulgate remedial orders as to an agency's "general examination, application, recruitment or hiring practices." (Emphasis added.) DILHR's position appears to be that Stats. 16.05(4) does not empower the Board to deal with a single claim of discrimination by a single individual in a case such as this.

In support of its position, DILHR points out that Stats. 16.05(1) (e)-(h) and (7) list specific topics on which the Board can hear claims of discrimination and those sections do not include the subject which the Board is attempting to consider here--decisions by an appointing authority in the hiring process. Relying on the doctrine of expressio unius est exclusio alterius, DILHR asserts that the legislature's failure to specifically include that subject among those subject to appeal in Stats. 16.05(1) (e)-(h) and (7) evinces an intent to prohibit the Board from dealing with individual claims of discrimination in the hiring process. Further, DILHR cites the legislative history of the statute and asserts that the legislature intended to keep separate the Board's appellate powers over individual claims in Stats. 16.05(1) (e)-(h) and (7) and the powers of investigation, hearing and remedial

order listed in Stats. 16.05(4), which it contends are to be exercised only with respect to the broad policies of an agency.

If Stats. 16.05(4) were ambiguous and properly subject to the construction argued for it by DILHR, or if some other provision in Stats. 16.05 expressly limited the Board's powers under Stats. 16.05(4) to those to which that section would be limited under DILHR's construction, we would accept DILHR's argument. However, where the plain meaning of a section of the statutes is clear, we cannot ignore it to serve a canon of construction or an inference raised by legislative history. A. O. Smith Corporation v. Department of Revenue, 43 Wis. 2d 420, 429 (1969), 82 C.J.S. Statutes sec. 311, p. 526. The meaning of Stats. 16.05(4) is clear, and we need not go beyond the face of the statute.

There are several aspects of Sec. 16.05(4) which support our conclusion that it expressly empowers the Board to investigate, hold hearings on, and issue remedial orders with regard to individual complaints of discrimination such as that of Mr. Keleher, as well as to regulate the general policies of subject agencies.

First, the statute provides that an investigation and hearings may be initiated "on its [the Board's] own motion or at the request of interested persons." (Emphasis added.) Obviously, an "interested person" could be one aggrieved by a discriminatory decision.

Next, included among the subjects of investigation, hearing, and remedial order are "all matters touching the enforcement and effect of this subchapter and rules prescribed thereunder." One provision of Ch. 16, the civil service chapter, provides that:

"No discrimination shall be exercised in the recruitment, application, examination or hiring process against or in favor of any person because of his political or religious opinions or affiliations or because of his age, sex, handicap, race, color, national origin or ancestry except as otherwise provided."

Mr. Keleher's complaint of sexual discrimination in hiring is properly included among matters "touching the enforcement and effect of this subchapter."

Next, the Board is empowered to take certain action where investigation shows that "the director, appointing authority or any other person acted illegally or to circumvent the intent and spirit of the law." There is nothing in that language to indicate that the Board's power to act is limited to situations in which

an agency's general employment practices are illegal or contrary to the spirit and intent of the law. Rather, the Board is specifically authorized to act whenever a hiring authority has engaged in a violation, whether in a single instance or as a general policy.

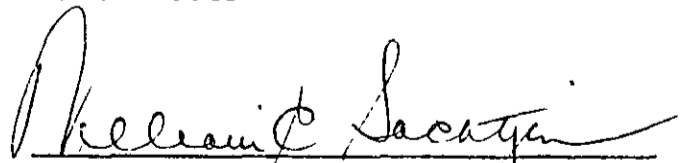
Finally, where the Board finds a violation, it may "issue an enforceable order to remand the action to the director or appointing authority for appropriate action within the law." The normal usage of the term "action" is the "legal demand of one's rights from another" in a forum provided by law. Smith-Webster Co. v. John, 259 F. 549, 551 (Cir. Pa.). [See also old Stats. 260.05 and current Stats. 801.01(1).] The Board's remedial power to remand "the action" to the violating authority clearly includes the power to deal with a single claim of discrimination by a single individual, such as that of Mr. Keleher.

The case relied on by the relator, State ex rel. Department of Administration et al v. Personnel Board et al (Dane Cty. Cir. Ct. 1976, Case #149-295), is distinguishable. In that case, the Board sought to use Stats. 16.05(4) to circumvent the 15-day limitation on the filing of discrimination claims, in clear contravention of the express provisions of Stats. 16.05(2). Here there is no question of the timeliness of Mr. Keleher's claim. In this case, unlike the Department of Administration case, there is nothing in the statutes which expressly prohibits the Board from taking jurisdiction. As indicated before, in light of the plain meaning of the language of Stats. 16.05(4), we cannot accept the DILHR contention that Stats. 16.05(1)(e)-(h) and (7), by use of the expressio unius doctrine, constitute such a prohibition.

We conclude that the relator's contention that the Personnel Board has exceeded its jurisdiction is without merit. Therefore, we need not reach the question discussed in the briefs as to whether prohibition is an appropriate remedy here. The Motion to Quash the Alternative Writ is granted.

BY THE COURT:

Dated: June 10, 1976.

  
William C. Sachtjen, Judge

c Rice, Lasker