

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

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VERNE H. KNOLL, Acting  
Director, State Bureau  
of Personnel,

Petitioner,

Case No. 151-292

vs.

STATE PERSONNEL BOARD,

JUDGMENT

Respondent.

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

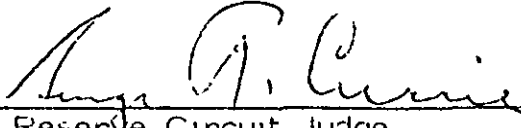
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The above entitled review proceeding having been heard by the Court on the 6th day of September, 1977, at the City-County Building in the City of Madison; and the petitioner having appeared by Assistant Attorney General John J. Glinski; and the respondent Board having appeared by Attorney James H. Bailey; and the respondent Clarence Alderden having appeared by Attorney Richard V. Graylow 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 Opinion and Order of respondent State Personnel Board dated March 22, 1976, in the matter of Clarence Alderden, Appellant, v. C. K. Wettengell, Director, State Bureau of Personnel, Respondent, Case No. 73-87, be, and the same hereby is, affirmed.

Dated this 20th day of September, 1977.

By the Court:

  
Reserve Circuit Judge

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VERNE H. KNOLL, Acting  
Director, State Bureau  
of Personnel,

Petitioner,

Case No. 151-292

vs.

MEMORANDUM DECISION

STATE PERSONNEL BOARD,

Respondent.

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

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This is a proceeding by petitioner, Acting Director, State Bureau of Personnel (he and his predecessor in office are hereafter referred to as the Director), instituted pursuant to ch. 227, Stats., to review an opinion and order of respondent State Personnel Board (hereafter the Board) dated March 22, 1976, which order directed that appellant Clarence Alderden "receive the difference between the Maintenance Mechanic 3 (SR 3-10) and Craftsmen Electrician pay rates from April 29, 1973, to June 8, 1975." The Board's opinion contains findings of fact that serve the same function as would formalized findings of fact.

#### STATEMENT OF FACTS

The matter of Alderden's correct position classification status first came before the Board as a result of Alderden timely appealing a reclassification notice by the Director changing his classification from that of Maintenance Mechanic 2 to Maintenance Mechanic 3, such change being effective April 29, 1973. In its opinion and order dated June 2, 1975 (hereafter Opinion and Order I), the Board found that since Alderden had been classified Maintenance Mechanic 2 in July, 1970, he had performed the work of a Craftsman Electrician at the Wisconsin Correctional Institution at Fox Lake; concluded that Alderden should properly be reallocated

[reclassified] as Craftsman Electrician and directed the Director to reallocate him to Craftsman Electrician classification. No appeal was taken by the Director from this opinion and order.

The matter came before the Board a second time as the result of Alderden writing the Board requesting that the effective date of reallocation be April 29, 1973. The Board's opinion and order in this second matter (hereafter Opinion and Order II) are dated November 24, 1975. In its opinion the Board found that the Director following the issuance of Opinion and Order I had made Alderden's reallocation to Craftsman Electrician effective July 8, 1975. The Board concluded that, inasmuch as it had found in Opinion and Order I that Alderden had been performing the work of Craftsman Electrician since his appointment as Maintenance Mechanic 2, the effective date of the ordered reallocation should have been April 29, 1973. It also determined that Alderden was entitled to the rate of compensation he would have received but for the violation of sec. 16.38(4), Stats., in improperly allocating him to the Maintenance Mechanic 3 position. Because there was no proof before the Board with respect to what was the nature of the work performed by Alderden subsequent to the original hearing held May 31, 1974, it ordered the Director within ten working days to supply the same by affidavit, and Alderden was given the right to respond "in kind" within ten working days.

After the proof directed or authorized to be provided specified in Opinion and Order II had been submitted, the Board issued its opinion and order which is the subject of this review (hereafter Opinion and Order III). In its opinion the Board found that Alderden had not performed the duties of Craftsman Electrician from May 31, 1974, until June 8, 1975, inasmuch as his supervisors "because of the events of the hearing" had changed Alderden's duties so that he was not performing those of Craftsman Electrician, but those of Maintenance Mechanic 3. It further found:

"In essence Appellant was penalized for exercising his right to appeal. Management decided to not assign to Appellant those duties which gave rise to the appeal. It was established at the hearing that a second Craftsmen Electrician was needed and that Appellant was performing the duties and responsibilities of that position."

The Board further determined:

"Therefore, we conclude that Appellant's position should have been reallocated from Maintenance Mechanic 3 to Craftsmen Electrician effective April 29, 1973. Further, we conclude that he should receive the difference in pay between those two classifications from April 29, 1973 to June 8, 1975.

"We wish to emphasize that we are not holding today that management has no prerogative to change the duties and responsibilities of an appellant while an appeal is pending. However, where management changes those duties as it did in the instant reallocation appeal without prior approval of this Board and for no other purpose than because of the appeal itself, then we conclude that the appellant whose position we have determined to have been improperly classified is entitled to back pay. Such back pay will be measured by the difference in the pay rates of the two classifications where the appellant's position has been reallocated by Board order to the higher paying classification. Further, such back pay will be measured from the date that the appellant's position was originally wrongfully reallocated including any time during which the appellant was not performing the duties and responsibilities of the higher paying classification."

As previously mentioned herein, by the Board's order of March 22, 1976, it was ordered that Alderden receive the difference between that of Maintenance Mechanic 3 and Craftsmen Electrician pay rates from April 29, 1973, to June 8, 1975.

#### THE ISSUES

The only issue raised in the petitioner Director's petition for review to this Court was that Alderden should only have received pay at the Maintenance Mechanic 3 rate from May 31, 1974, to June 8, 1975. However, in his brief and reply brief petitioner seeks to raise other issues such as that Opinion and Order I were erroneous in requiring Alderden to be reclassified Craftsman Electrician.

The Court deems that the only issues it is required to resolve are these:

(1) May the petitioner raise any issues on this review other than were raised in his petition for review?

(2) Did the Board properly make the award of the back pay differential it did in Opinion and Order III?

#### THE COURT'S DECISION

##### A. Right of Petitioner to Raise Issue Not Raised in Petition for Review

Petitioner's reply brief cites as authority for his right to raise issues not raised in his petition for review the Supreme Court's decision in Claflin v. Department of Natural Resources, 58 Wis. 2d 182, 206 N.W. 2d 392 (1973). The pertinent statement made in that decision appears in the third sentence of the following paragraph (at p. 187):

"The right of appeal from a statutory administrative tribunal in a ch. 227 proceeding is dependent upon strict compliance with this statute. One of the purposes of sec. 227.16(1), Stats., is to maintain the orderly administration of the judicial process. But another purpose and policy of ch. 227 is to afford an aggrieved party every opportunity to get into court and secure a reversal upon any grounds that the statute may countenance so long as he apprises his adversaries of the nature of his grievance at least by the time the appeal comes on for hearing."

It is apparently petitioner's position that so long as an issue was raised in his brief prior to hearing before the Court it is immaterial that it is not raised in the petition for review. This is not the law as this Court understands it. This Court has repeatedly refused to pass on issues not grounded on the petition for review. The only way that a petitioner may raise grounds of attack upon the decision appealed from that are not stated in his original petition for review is to move to amend such petition, and this petitioner did not do. The third sentence of the above quoted paragraph from the Claflin case was dictum under the facts of that case because no part of the decision was grounded thereon and the words "so long as he apprises his adversaries of the nature of his grievance at least by the time the appeal comes on for hearing" is in this Court's opinion better stated by inserting the word "properly" immediately preceding the word "apprises".

Furthermore, the Director did, pursuant to the Board's Opinion and Order I, reclassify Alderden Electrician Craftsman instead of timely appealing from such order. By not appealing therefrom the petitioner is now precluded from raising that issue even if he had amended his petition for review to do so. The Court does not consider apposite the authorities cited by petitioner on the issue of whether Opinion and Order I together with Opinions and Orders II and III all constitute one appealable decision.

B. Propriety of the Back Pay Award

Section 16.38(4), Stats., provides:

"(4) RIGHTS OF EMPLOYEE. Any employe who has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and who has been reinstated to such position or employment by order of the board or any court upon review, shall be entitled to compensation therefor from the date of such unlawful removal, demotion or reclassification at the rate to which he would have been entitled by law but for such unlawful removal, demotion or reclassification, and such employe shall be entitled to an order of mandamus to enforce the payment or other provisions of such order."

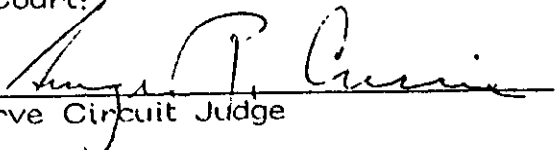
A removal of Alderden occurred effective May 31, 1974, by his supervisor Walker arbitrarily and substantially altering his duties so as to no longer reflect the job classification he had been occupying, albeit without the Director's acknowledgment, for a period of almost four years. Opinion and Order I in reality reinstated Alderden to the job classification he de facto had been occupying.

The Court concludes that the Board properly included the time from May 31, 1974 to June 8, 1975, in the period for which Alderden was awarded the back pay differential.

Let judgment be entered affirming the respondent Board's Opinion and Order III which is the subject of this review.

Dated this 10<sup>th</sup> day of September, 1977.

By the Court:

  
Reserve Circuit Judge