

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

ELIZABETH M. SHEDA,

Petitioner,

DECISION ON REVIEW

vs.

STATE OF WISCONSIN
(Personnel Board),

Respondent.

Case No. 158-117

BEFORE HON. RICHARD W. BARDWELL, CIRCUIT JUDGE, BRANCH #1

The petitioner seeks review, under Chapter 227, Stats., of a decision and order of the State Personnel Board, which found that she had been properly transferred and denied her request for reinstatement to her previous position.

Petitioner has been an employee of the Department of Health and Social Services, Division of Corrections (department) since September 1969. From 1969 until June 30, 1976, she held the civil service classification of Account Examiner 2 and was employed at the Black River State Camp. Her position was wholly funded by federal grant.

In the spring of 1976, the prison superintendant was notified that the federal funds which paid the salary of petitioner and three other employees were being cut off as of July 1. The prison reappplied for federal grant and subsequently received sufficient funding for one and one-half positions. By letter dated June 2, 1976, Sheda was notified that her position at Black River was being eliminated, and that she would be "reassigned" to the Oakwood State Camp. The letter further stated that her failure to accept the reassignment would be

claim of reprisal and retaliation.

Two issues are presented for review:

I. Whether the department failed to follow prescribed procedures, thereby denying petitioner rights protected by law.

II. Whether the finding of the respondent, that petitioner was not transferred in reprisal for her grievances, is supported by substantial evidence.

The first issue consists of two sub issues: (a) Was petitioner transferred to a new position or laid off from her former job? (b) If it was a transfer, was the proper procedure followed?

TRANSFER OR LAYOFF

Petitioner argues that the respondent incorrectly concluded that a "transfer" had occurred, and further argues that the action of the department constituted a "layoff." The gravamen of the complaint is that by refusing to categorize the action as a layoff Sheda was denied her "bumping" rights.

Section 16.23, Stats., provides:

"A transfer may be made from one position to another only if specifically authorized by the director."

This language is repeated in Wis. Administrative Code sec. Pers 15.03. Sec. Pers 15.01 of the Code defines transfer as:

"...the movement of an employe with permanent status in class from one position to a vacant position having the same pay rate or pay range maximum and for which the employe meets the qualification requirements."

Section 16.28 (2), Stats., provides, in part:

"Employees with permanent status...may be laid off because of a reduction in force due to a stoppage or lack of work or funds"

The procedure for making layoffs is found in Administrative Code sec. Pers 22.035. However, Administrative Code sec. Pers 22.04 provides for alternatives to layoffs:

"In the event that the services of an employe with permanent status in class are about to be terminated by layoff in a given class as a result of a reduction in force, these alternatives shall be available, in the order listed below, in lieu of separation...:

"(1) TRANSFER. The employe shall have the right to move to a vacancy in the same class and approved option within the agency...."

"(2) BUMPING. Where no vacancy exists, the employe identified for layoff shall be entitled to exercise bumping rights within the employing unit...."

A careful reading of the statutes and rules cited above reveals that there is no mandate that the employee be laid off when there is a reduction in the work force. Sec. 16.28 (2), Stats., provides that employees "may" be laid off, not "shall" or "must" be laid off. The Personnel Board interpreted this to mean that rather than terminating the employee's position, the agency may affect a transfer. This does not appear to be an unreasonable interpretation, nor one which contravenes the purpose of the statute. In such cases, this court will defer to the interpretation of the agency charged with the statute's enforcement. DeLeeuw v. DILHR, 71 Wis. 2d. 446, 449, 238 N.W. 2d. 706 (1976); Milwaukee Transformer Co. v. Industrial Comm., 22 Wis. 2d. 502, 510, 126 N.W. 2d. 6 (1964).

TRANSFER PROCEDURE FOLLOWED

Having determined that the agency may transfer an employee in lieu of separation, the court must consider whether the transfer was properly made. Petitioner argues that sec. 16.23, Stats., requires that the director of the Bureau of Personnel personally authorize the transfer, but that in this case the transfer was signed only by the supervisor of the certification section of the bureau. In support of this position, reference is made to sec. 15.02 (4), Stats.

Sec. 15.02 (4), Stats., is inapplicable. That section deals with the ability of department heads to allocate duties within their departments, and provides that the head may not reallocate functions assigned by law to specific officers or units of the agency. This statute is not concerned with the authority of an officer in a department to delegate his duties to a subordinate. In the absence of a controlling statute, the court is guided by the rule in Steele v. Gray, 64 Wis. 2d. 422, 430, 219 N.W. 2d. 312 (1974), which states that only discretionary duties and powers are nondelegable.

The Personnel Board found that the approval of the director, required by sec. 16.23, Stats., was ministerial in nature and not discretionary. The record reveals that authorization, or "certification," has consistently been handled by a subordinate to the director, according to established guidelines and criteria, and involves no

discretion. We therefore hold that, under the rationale of Steele v. Gray, supra., this transfer was properly authorized.

Petitioner argues that by categorizing this reassignment as a transfer rather than a layoff, she has lost the right to "bump," i.e. move to a lower classification within the same institution. This argument misconstrues the clear language of the rule. Administrative Code sec. Pers 22.04, quoted above, provides two alternatives to being laid off. First, the employee may transfer to a vacancy in the same class within the agency. Secondly, where no vacancy exists, the right to bump attaches. However, no bumping rights follow unless no vacancy exists.

Secs. 227.15 and 227.16, Stats., provide for judicial review of administrative decisions "which adversely affect the substantial interests" of the claimant. In the case at bar, it is immaterial whether this is considered a layoff or transfer. Had the agency followed layoff procedures, the only alternatives available to petitioner would have been the transfer to a vacancy at another prison or unemployment. These same alternatives were presented to Sheda by the department. It may be that this court lacks jurisdiction to consider this case because petitioner lacks standing. We say this because it appears that the transfer did not adversely affect any substantial interest of the petitioner. We nonetheless hold that the conclusion of the board, that the transfer was proper, is correct.

II. The second thrust of Sheda's argument is that she was transferred in retaliation for her numerous grievances, and that the respondent's finding to the contrary is unsupported by the evidence.

An agency's finding of fact is conclusive if supported by substantial evidence. Chicago, Milw., St.P. & Pac. RR. v. DILHR, 62 Wis. 2d. 392, 396, 215 N.W. 2d. 443 (1974). The test of "substantial evidence" is whether reasonable minds could arrive at the same conclusion reached by the agency and not whether the finding is supported by the great weight or clear preponderance of the evidence. DeGaynor and Co., Inc. v. DNR, 70 Wis. 2d. 936, 939-40, 236 N.W. 2d. 217 (1975); Robertson Transportation Co., Inc. v. PSC, 39 Wis. 2d. 653, 658, 159 N.W. 2d. 636 (1968).

Several witnesses testified on behalf of the department, all of whom testified that the reason Sheda's position was eliminated was due to a lack of funding. There was no testimony, other than that of the petitioner, supporting her claim of a retaliatory transfer. On this evidence, the board could reasonably conclude that Sheda was transferred, and her position at Black River eliminated, due to the loss of federal funds.

Accordingly, the decision and order of the Personnel Board, denying petitioner's request for reinstatement and sustaining the action of the department, is hereby affirmed. Counsel for the respondent may prepare the requisite judgment affirming the findings and order under review. A copy of the proposed judgment should be furnished counsel for the petitioner before submission to the court for signature.

Dated November 16, 1978.

BY THE COURT:

Richard W. Bardwell
Circuit Judge

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