

NOTE. Affirmed by Court of Appeals
Ehly v. St Pers Bd 78-719
(6-26-79)

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

MINA A. EHLI,

Petitioner,

DECISION ON REVIEW

vs.

RECEIVED

STATE PERSONNEL BOARD,

Respondent.

Case No. 158-371

SEP 28 1978

**Personnel
Commission**

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

The petitioner seeks review under ch. 227, Stats., of an order of the respondent Personnel Board (board) dated August 1, 1977. The board's order reversed a denial by the Director of the Bureau of Personnel of petitioner's request for reclassification from the position of Teacher 1 to the position of Teacher 2, remanding the matter for reclassification and retroactive payment of salary and benefits to a date 45 days after the date on which the appeal was filed with the board.

The petitioner, who had formerly been employed in classified state service, received her certification as a teacher in May 1975. On September 14, 1975, she was appointed to a teaching position at Central Wisconsin Colony, which was classified as a Teacher 1 position. On October 10, 1975, the petitioner filed a grievance, claiming that she should have been hired and classified as a Teacher 2 because she had over one year's teaching experience prior to being hired. The grievance was denied on the ground that the teaching experience was gained prior to certification as a teacher.

The petitioner appealed to the board on December 15, 1975. The board decided that teaching experience need not be acquired after certification; that the petitioner had the requisite experience; that she was entitled to have her position reclassified prospectively to that of Teacher 2; and that retroactive pay could only be allowed to a date 45 days after the appeal was filed with the board. The board remanded the matter to the Deputy Director of the Bureau of Personnel and the appointing authority for action on the reclassification request and payment of salary and benefits retroactive to February 8, 1976, 45

days after the appeal was filed with the board.

The petitioner does not object to the board's determination that she is entitled to reclassification of her position. The claim is that the reclassification should be retroactively effective to the date of hiring, or alternatively, to the date that the appeal was filed with the board.

The sole issue on review is whether the board, after a determination that an employee's position has been misclassified, may award back pay retroactively to a date prior to the date on which it is required by statute to act on an appeal.

If the board has such authority, it must be found in the provisions of the civil service subchapter of ch. 16, Stats., which defines the powers and duties of the board. The petitioner contends that the authority to award retroactive back pay is found in sec. 16.05 (1) (f), Stats., which provides that the board shall:

"Hear appeals of interested parties and of appointing authorities from actions and decisions of the director. After such hearing, the board shall either affirm or reject the action of the director and, in the event of rejection, may issue an enforceable order to remand the matter to the director for action in accordance with the board's decisions..."

The statute does not contain an express grant of authority to award back pay when the board determines that a position in the civil service has been misclassified. The board, as a creature of legislation, can exercise only those powers which are conferred expressly or by necessary implication in the statutes. Racine Fire & Police Commn. v. Stanfield, 70 Wis. 2d 395, 399 (1975); Am. Brass Co. v. State Bd. of Health, 245 Wis. 440, 451 (1944). As stated in 2A Sutherland, Statutory Construction (4th ed.), s. 55.03, p. 382:

"[A] standard for judging as to what side effects should be held to flow from a statute by way of implication or inference is that the statute embraces such consequential applications and effects as are necessary or essential or natural or proper. Although these are not terms having precise meaning capable of measured application, it seems fairly indicated that in order for a consequence to be implied from a statute it must be one for which there is greater reason in favor of it than merely that it is consistent or compatible or not out of harmony with the act from which it is implied."

No section of the civil service subchapter expressly grants the board the authority to award back pay to an employee when the board determines that the employee's position is misclassified. Nor can we

deem this power to be a necessary implication of the stated purposes of the civil service system to: (1) furnish efficient state services by competent personnel; and maintain a personnel management program based on the merit principle. Sec. 16.01 (1) and (2), Stats. Such power may well be harmonious with the statute, but it is not an essential consequence. Our high court has consistently applied the rule that any reasonable doubt of the existence of an implied power of an administrative agency should be resolved against the exercise of such power. State ex rel. Farrell v. Schubert, 52 Wis. 2d 351, 358 (1971); Dept. of Admin. v. ILHR Dept., 77 Wis. 2d 126, 136 (1977). We therefore agree with other circuit courts which have held that the board's power to award back pay when it determines that an employee's position is improperly classified is not a necessary or essential consequence of sec. 16.01 (1) (f), Stats. See Van Laanen v. State Personnel Board, Dane County Circuit Court Case No. 153-348 (Decision of the Hon. George R. Currie, Reserve Circuit Court Judge, filed 4/1/77) and Nunnelee v. State Personnel Board, Dane County Circuit Court Case No. 158-464 (Decision of the Hon. William Eich, Circuit Judge, filed 9/14/78).

This conclusion is reinforced by the fact that the board is granted the power to award back pay in other situations. Sec. 16.05 (1) (e) provides that the board shall:

"Hear appeals of employes with permanent status in class, from decisions of appointing authorities when such decisions relate to demotions, layoffs, suspensions, discharges or reductions in pay 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 employe fully..."
(emphasis added)

The underscored language could be interpreted as an express grant of authority to the board to order back pay where an employee has been wrongfully demoted, laid off, suspended, discharged, or reduced in pay. Whether or not this section is read as an express grant of such authority in these enumerated situations, it is clear from sec. 16.38 (4), Stats., dealing with the rights of employees, that the board has such power:

"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..."

Thus it appears that the scheme of ch. 16, Stats., provides for different remedies in different situations. Where an employee is wrongfully removed, demoted, or reclassified, the board is empowered under the language of sec. 16.05 (1) (e), Stats., and by necessary implication under sec. 16.38 (4), Stats., to remedy that wrongful act by an award of back pay. No such power is granted where the board directs that a position be reclassified after determining that it is improperly classified.

The difference between these situations justifies the grant of authority to the board to award back pay in certain cases and prospective relief only in others. Back pay is available where an employee who holds a particular position is removed or demoted. It is also available where an employee is "reclassified from or in any position or employment..." prior to an appeal to the board. This has reference to two situations: (1) where a position is reclassified upward by the appointing authority or director and the employee who formerly held the position is not promoted to fill the new position; and (2) where a position is reclassified downward by the appointing authority or director and the employee serves in the new capacity. When such actions are taken wrongfully, the board can make the employee whole by reinstatement with pay retroactive to the time of the wrongful act which deprived the employee of a position or of a portion of the former salary.

By contrast, back pay is not available to an over-qualified employee who serves in a position that is underclassified when that position is reclassified by the board. Like the employee who is demoted, removed or reclassified from or in a position, the over-qualified employee has accepted a position with certain duties, pay and benefits. Unlike the employee who is demoted, removed or reclassified, however, the over-qualified employee is not subjected to an action

which changes the terms of employment after commencing service in that position. He or she has not suffered a wrongful act. Such an employee, like this petitioner, may seek reclassification of the position he or she holds by the appointing authority or the director. When such reclassification is denied, an appeal may be taken to the board. If the board determines that the position should be reclassified, as here, it does not necessarily mean that the employee will be appointed to the new position. Positions are classified. Employees are not classified, but are appointed to fill positions. Sec. 16.07 (2) (d), Stats., provides that:

"If after review of a filled position the director reclassifies or reallocates the position, he shall determine whether the incumbent shall be regraded or whether the position shall be opened to other applicants."

See also Peters v. Personnel Board, 254 Wis. 227, 231 (1949) where the court stated that the reclassification of a position does not of itself affect the status of the employee holding the position. Where an employee successfully persuades the board that the position he or she holds should be reclassified upward, and continues in the new position, that benefit is prospective in nature, and the statutes provide only for prospective increase in pay.

The petitioner argues in the alternative that she was "reclassified" within the meaning of sec. 16.38 (4), Stats. That this is not so is demonstrated from the discussion above. She must show that she was removed, demoted or reclassified from or in the original position, Teacher 1, and that the board or a reviewing court has subsequently reinstated her. No reclassification took place prior to the board's decision. This case involves a denial of a reclassification request by the director, not a reclassification by the director. The plain terms of sec. 16.38 (4), Stats., do not cover the petitioner's situation.

For the reasons stated the decision of the board is affirmed in all respects. Counsel for the board may prepare an appropriate form of judgment, a copy of which should be furnished counsel for the petitioner before it is submitted to the court for signature.

Dated September 22, 1978.

BY THE COURT:

Richard W. Badwell
Circuit Judge