

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

CORBIN L. NUNNELEE,

Petitioner,

vs.

STATE PERSONNEL BOARD,

Respondent.

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MEMORANDUM DECISION

Case No. 158-464

Petitioner Nunnelee seeks review pursuant to Ch. 227, Stats., of an Opinion and Order of the State Personnel Board. In an Order entered on March 24, 1977, the Board rejected a decision of the Director of the State Bureau of Personnel which denied Nunnelee's request for reclassification from Cashier I to Cashier 2. The Board directed the parties³ to file additional information regarding appropriate relief. On August 1, 1977, the Board entered a second Opinion and Order in which it concluded that Nunnelee "is entitled to a reclassification to Cashier 2 with back pay and benefits retroactive to August 8, 1975." The Board remanded the matter to the Director of the State Bureau of Personnel "for action in accordance with the Board's decisions."

In her appeal to this court, Nunnelee contests the Board's determination that it has no statutory authority to order back pay and benefits prior to August 8, 1975. The Board contends that because the legislature has not expressly provided for relief retroactive to the time at which an employee's position is misclassified, and because it has provided for retroactive relief in cases of removal, demotion and reclassification [sec. 16.38(4)], back pay

may not be ordered prior to the date on which the Board is required to hear the employee's appeal. [Sec. 16.05(2), Stats., provides that a hearing shall be held within 45 days after receipt of the appeal.]

On August 21, 1973, Nunnelee was hired to perform the duties of a Cashier 1 in the dining room of Kronshage Hall on the campus of the University of Wisconsin-Madison. Early in 1975, she suggested to Dorothy Brewer, Personnel Manager of the Division of University Housing, that the responsibilities which she was actually required to undertake did not jibe with the Cashier 1 job description but were included within the Cashier 2 job description. On March 13, 1975, Brewer requested an audit of the position. Thomas Herman, Personnel Analyst with the State Bureau of Personnel, reviewed the position on May 8, 1975, and concluded that it was properly classified as a Cashier 1 position. Nunnelee appealed this decision to the State Personnel Board on June 24, 1975. In her letter of appeal, Nunnelee explained that she did not substantially dispute the Bureau's factual findings as to the duties she performed; rather, she was contesting the Bureau's interpretation of the classification descriptions as they applied to those duties. (Board's Exhibit #1)

The following issues were presented on appeal: (1) Whether Nunnelee's "lead work" duties qualified her for reclassification to a Cashier 2 position; (2) whether the nature of the supervision she received qualified her for reclassification; (3) whether the combination of "lead work" duties and degree of supervision mandated reclassification; (4) whether, if reclassification was in order,

Nunnelee would be entitled to retroactive adjustment of her status to the date when she first began performing Cashier 2 duties.

On March 21, 1977, a proposed opinion and order was submitted to the Board by Chairperson DeWitt, affirming the Bureau's denial of reclassification, based on the conclusion that Nunnelee did not perform under "general supervision," as was required of a Cashier 2. In its Order dated March 24, 1977, the Board adopted the proposed opinion and order but rejected the ultimate conclusion set forth therein. The Board stated that, "The reason for changing the proposed conclusion is because it does not take into account the appellant's personnel functions in determining whether she worked under 'general supervision'. . . ." [Nunnelee v. Knoll, 75-77 (3/24/77)]
The Board ultimately ruled that Nunnelee had been improperly classified.

The single issue facing this court is whether the State Personnel Board may order the award of back pay and benefits retroactive to a time prior to the date on which it is statutorily required to hold a hearing, (45 days after receipt of a request for a hearing), when it determines that an employee's position has been misclassified.

Subchapter II of Chapter 16, Stats., entitled "Civil Service," is comprised of sections 16.01 - 16.38. The sole references to retroactive compensation contained within this subchapter are set forth in sections 16.36 and 16.38, neither of which is applicable to the Nunnelee case. Sec. 16.36, entitled "Invalid Appointments," provides that:

"Any person employed or appointed contrary to this subchapter, or to the rules established thereunder,

shall be paid by the appointing authority so employing or appointing, or attempting to employ or appoint him, the compensation agreed upon for any service performed under such appointment or employment, or attempted appointment or employment, or in case no compensation is agreed upon, the actual value of such services and any expenses incurred in connection therewith, and shall have a cause of action against such appointing authority, for such sum and for the costs of the action. No appointing authority shall be reimbursed by the state for any sums so paid or recovered in any such action."

This section confers upon an employee a private cause of action against one who appoints him/her to a position in violation of the civil service rules. Sections 16.36 and 16.38(2), Stats., were enacted to halt the practice of filling state jobs with political favorites. The legislative scheme requires adherence to the applicable civil service rules in order for employment to be effected, i.e., there cannot be an implied contract of employment. In State v. Industrial Commission, 250 Wis. 140, 144 (1946), Justice Rosenberry, writing for the court, stated that:

"The state having prescribed with exactness how one may become an employee and prohibited employment except on compliance with the requirements of the statutes even if the services were of value and were accepted by the state, the person rendering them does not become an employee. Under the act one appointed contrary to its provisions may have a claim against the officer appointing him but has none against the state."

(See also 1948 Wis.L.Rev. 171 and 1957 Wis.L.Rev. 267.)

Nunnelee is contesting the state's interpretation of civil service classifications--she is not claiming that any individual

violated the civil service rules--and sec. 16.36 is therefore inapposite.

Sec. 16.38(4), Stats., entitled "Rights of Employee," provides that:

"Any employee 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 employee shall be entitled to an order of mandamus to enforce the payment or other provisions of such order."

Careful analysis of the statutory language reveals that this section does not encompass Nunnelee's situation. To trigger the application of sec. 16.38(4), Nunnelee must show that she was removed, demoted or reclassified from or in the Cashier I position, in violation of civil service rules, and that she has been reinstated to the Cashier I position. On the contrary, Nunnelee's case concerns a denial of reclassification. Although the legislature has not provided a definition of "reclassification" in Ch. 16, the term can hardly be defined as including its opposite. A denial of reclassification does not constitute a removal, demotion or reclassification within the plain meaning of those terms, and sec. 16.38(4) is therefore inapposite.

The Board is not expressly authorized by statute to order back pay retroactive to the time at which an employee assumed a position which the Board later deems misclassified. Nunnelee claims, however,

that the Board's authority to order back pay derives generally, by implication, from sections 16.01(1) and (2), and 16.05(1)(f) and (4), Stats.

In his treatise on statutory construction, Sutherland explains that:

"[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." 2A Sutherland, Statutes and Statutory Construction (4th Ed.) sec. 55.03, p. 382.

The power to award back pay cannot be construed as an essential outgrowth of sec. 16.01, which simply articulates: (1) that the purpose of the civil service system is the furnishing of efficient state services by competent personnel and (2) that the policy of the state is the maintenance of a personnel management program based on the merit principle.

Sec. 16.05(1)(f) 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. Any action brought against the director for failure to comply with the order of the board shall be brought and served within 60 days after the date of the board's finding."

In Van Laanen v. State Personnel Board, No. 153-348, April 1, 1977, Dane County Reserve Circuit Judge George R. Currie affirmed the Board's conclusion that this section does not empower the Board to order back pay benefits beyond the last date for holding a hearing under sec. 16.05(2). The authority to order back pay prior to this date does not seem to me to be a necessary and essential consequence of sec. 16.05(1)(f), and I therefore concur with Judge Currie's analysis in Van Laanen.

Sec. 16.05(4), Stats., authorizes the Board to "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." This section is inapplicable to the instant case, which came to the Board by way of sec. 16.05(1)(f), Stats.

Sec. 16.07, Stats., entitled "Classification," provides that the Director of the State Bureau of Personnel shall establish grade levels and classifications for all positions in the classified service subject to the approval of the board. Sec. 16.07(2)(c) refers to reclassification of positions and 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."

This statute draws a distinction between the position and the person filling that position. In an opinion requested by the Director of

Personnel, the Attorney General advised that if a position is reallocated to a higher grade, the person who occupied the position before reallocation could occupy it thereafter only by compliance with the statutes respecting promotion or original appointment. Regarding the director's authority to take action retroactively, the opinion states:

"It is a principle of law that any officer or employe holding his position by force of statutory enactment must find all of his authority within the four corners of the statute, either in express words or by necessary implication. We see nothing in the statute that would give the director either express or implied authority to make a reallocation of a position retroactive. We believe, therefore, that the reallocation of the position is valid but that it did not become effective prior to May 8 when it was made." 36 O.A.G. 317, 319 (1947).

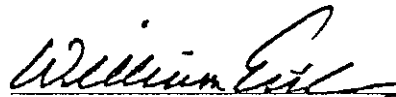
It is well-established that an administrative agency must conform precisely to the statutes from which it derives its power. Baken v. Vanderwall, 245 Wis. 147 (1944), Mid-Plains Telephone v. Public Service Commission, 56 Wis. 2d 780 (1972). The agency's interpretation of the statutes from which its powers derive is entitled to great weight. In Pabst v. Department of Taxation, 19 Wis. 2d 313, 323 (1962), Justice Currie, writing for the court, stated that:

"[I]n fields in which an agency has particular competence or expertise, the courts should not substitute their judgment for the agency's application of a particular statute to the found facts if a rational basis exists in law for the agency's interpretation and it does not conflict with the statute's legislative history, prior decisions of this court, or constitutional prohibitions."

The Board's interpretation of its statutory authority to order back pay is rational and does not conflict with any legislative or judicial mandates. Therefore, I find no ground for setting aside or modifying the Board's action under sec. 227.20, Stats., and the decision of the Board is affirmed. Counsel for the Board may prepare an appropriate order for my signature.

Dated at Madison, Wisconsin, this 14th day of September, 1978.

BY THE COURT:



WILLIAM F. EICH
CIRCUIT JUDGE, BRANCH IV

cc: Marvin L. Walters, Atty. for Pet.
Robert J. Vergeront, Ass't Atty. Gen.

J