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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 4

DANE COUNTY

DALE CATTANACH, SECRETARY,
WISCONSIN DEPARTMENT OF
TRANSPORTATION,

Petitioners,

vs.

MEMORANDUM DECISION

WISCONSIN STATE PERSONNEL
BOARD, (*Kleiner*)

Case No. 158-485

Respondent.

The Department of Transportation has petitioned for review the August 1, 1977, decision of the State Personnel Board, (hereafter referred to as the Board) pursuant to ch. 227, Stats

The Board rejected the July 1, 1976, decision of Mr. Robert Barnes, Chief of Personnel Services, Department of Transportation, which denied reclassification of Mr. Barry Kleiner's position from Engineering Technician 3 to Engineering Technician 4. The petition for review raises three issues regarding the Board's action: 1) Are the findings of the Board supported by substantial evidence in the record?; 2) Did the Board act in excess of its statutory authority in that its order did not remand the matter to the director for further action in accordance with the Board's decision?; and 3) did the Board act in excess of its statutory authority in that its order granted back pay for a period beginning 45 days after appeal to the Board?

The court may set aside agency action or remand the case if

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it finds that the agency's action depends on any finding of fact not supported by substantial evidence in the record. Sec. 227.20 (6), Stats. The petitioner argues that the Board's finding that Mr. Kleiner spent 33 1/3% of his time giving guidance to Milwaukee County personnel concerning winter highway maintenance on the night shift is not supported by substantial evidence in the record.

There was conflicting testimony on this issue and the Board chose to believe that evidence which supported the finding that Mr. Kleiner spent 33 1/3% of his time on these duties. The court is not to substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact Sec. 227.20 (6), Stats. There is substantial evidence in the record to support the Board's finding in this regard, and it will not be disturbed

Sec. 16.05 (1) (f), Stats., (1975), gives the Board jurisdiction to hear appeals of denials of reclassification requests. (Sec. 16.05 was repealed and renumbered as Sec. 230.07, Stats., effective February 16, 1978. Sec. 16.05 was the statute in effect at the time the Board heard this appeal).

Sec. 16.05 (1) (f), Stats., (1975), reads as follows:

"(1) The board shall:

(f) 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

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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." (emphasis added).

The petitioner would have the court construe this section as requiring an order remanding the matter to the director. The words of the statute are clear, however, that a remand is discretionary. While a remand order may be appropriate here, in that the director, not the Board, should order the actual reclassification, this error does not make the Board's order unenforceable. The case will be remanded to the Board to allow it to transmit the file to the director for further action consistent with this decision.

The final issue concerns the propriety of the Board's action in granting back pay to Mr. Kleiner as of 45 days after the date of his appeal. The statutes which allow a grant of back pay do not apply in the case of a denial of a reclassification request. See Secs. 16.36 and 16.38 (4), Stats.

Sec. 16.36, Stats., is concerned with invalid appointments and provides that the appointing authority shall pay the compensation of a person who is employed or appointed contrary to the statutes and rules established thereunder. This section does not apply where there has been a denial of reclassification since such action is not an "invalid appointment."

Sec. 16.38 (4), Stats., provides back pay for employees who were "removed, demoted or reclassified" in violation of the Civil Service statutes, and who have been reinstated by order of the Board or any court upon review. This section does not grant back pay for a wrongful denial of reclassification, but applies only in case of a wrongful removal, demotion or reclassification.

The Board apparently bases its authority to grant back pay to a date 45 days after receipt of the appeal on Sec. 16.05 (1) (f), Stats. The 45 day period is derived from Sec 16.05 (2), Stats., which requires the Board to hold a hearing on an appeal within 45 days after receipt of the request for an appeal.

The parties cite two Dane County Circuit Court cases in which the court affirmed the Board's grant of back pay to a date 45 days after the appeal: Van Laanen v. State Personnel Board, No. 153-348, May 31, 1977, and Nunnelee v. State Personnel Board, No. 158-464, September 14, 1978.

The March 19, 1976, decision of the Board in the Van Laanen case granted back pay to the date of a previous Board decision which improperly denied jurisdiction Van Laanen v. Knoll and Carballo, Case No. 74-17. The Board found that it was not an abuse of their implied powers under Sec. 16.05 (1) (f), Stats., to require retroactive reclassification for salary and benefit purposes. It compared its power to require back pay to the right of restitution following the remand of a judgment or decree. In its

Amendment to the Opinion and Order issued March 23, 1976, the Board made the reclassification retroactive to a date 45 days after the date of appeal. The Board found that the Sec. 16.05 (2), Stats., requirement that a hearing be held within 45 days after appeal evinced a legislative intent that appeals be disposed of promptly. As the Board stated:

"An employe wrongfully denied reclassification is not entitled under s. 16.38 (4) to salary and benefits retroactive to the date of denial, but he or she is entitled to a prompt disposition of his or her appeal and the resultant appropriate reclassification."
Van Laanen v. Knoll and Carballo, Case No. 74-17,
Amendment to Opinion and Order, March 23, 1976, p. 2.

Reserve Circuit Judge Currie affirmed the Board's action in all respects after concluding that the Board had no authority to grant further back pay. Van Laanen v. State Personnel Board, Dane County Circuit Court, Case No. 153-348.

In Nunnelee v. State Personnel Board Dane County Circuit Court, Case No. 158-464, this court affirmed an order of the Board granting back pay to a date 45 days after the date of appeal. Again, the court found that the Board had no authority to grant further back pay to the employee.

From a review of these cases and the relevant statutes I find that the Board had implied authority under Sec. 16.05 (1) (f) to grant back pay to a date 45 days after receipt of the appeal. Although such back pay is not required in all cases, the Board may, in its discretion, grant it in certain cases. The court is not to substitute its judgment for that of the agency on discretionary

matters. Sec. 227.20 (8), Stats. Moreover, the agency's interpretation of the statutes from which its powers derive is entitled to great weight.

"(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." Pabst v. Department of Taxation, 19 Wis. 2d 313, 120 N.W. 2d 77 (1963).

The Board's interpretation of its statutory authority to grant back pay is rational and does not conflict with any legislative or judicial mandates. Therefore, the Board's order granting back pay to Mr. Kleiner as of 45 days after receipt of the appeal is affirmed.

The case is remanded to the Board to allow it to transmit the matter to the director for further action consistent with this decision.

Counsel for the Board may prepare an appropriate order for my signature.

Dated at Madison, Wisconsin, this 8th day of August, 1979.

BY THE COURT:



William F. Eich
Circuit Judge

cc: Michael Perino, Asst. A.G.
David Lasker
Donald R. Goldberg, Atty. for Barry Kleiner