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NORBERT RICH,

Petitioner,

JAN 8 1981.

vs.

Case No. 159084

Personnel  
CommissionSTATE OF WISCONSIN  
(Personnel Board),<sup>1</sup>DECISION ON REVIEWRespondent.  
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This is an action to review a decision and order of the State Personnel Board which dismissed the appeal of the petitioner Norbert Rich against his employer, the Department of Health and Social Services, for lack of subject matter jurisdiction.

Rich was employed as an Institutional Aide II at the Winnebago Mental Health Institute (WMHI). His position was subject to a collective bargaining agreement between the State and the Wisconsin State Employees Union, Council 24, AFSCME. On November 2, 1974, Rich filed a grievance against the Department of Health and Social Services. The basis of his grievance was that he had been required to perform nonemergency mopping at WMHI. The grievance alleged that despite a Union-Management agreement providing that the class description of Institutional Aide II would no longer contain a "related work" provision, the Department had continued to include "performs related work as required" in the job description for aides at WMHI. On February 7, 1975, Rich's grievance was denied by the Department at the third step of the grievance procedure set forth in the collective bargaining agreement. The grievance was not appealed to arbitration under the labor agreement. On February 17, 1975, Rich sought to appeal the denial of the grievance to the Personnel Board, pursuant to sec. 16.05, Stats. (1975). A hearing was held before a hearing examiner on August 3, 1976. The hearing examiner found in favor of Rich; however, the Personnel Board rejected the examiner's proposed conclusions

(1) The Personnel Board is now the Personnel Commission, Ch. 196, Laws of 1977.

and order, and instead dismissed Rich's appeal for lack of subject matter jurisdiction. Rich filed a petition for review in this court on September 13, 1977.

The principal issue in this case is whether the Personnel Board was correct in concluding that it did not have subject matter jurisdiction over Rich's appeal.

#### STATUTES INVOLVED

The State Employment Labor Relations Act (SERLA), Chapter 111, Stats. (1975), provides in relevant part:

Sec. 111.90; Nothing in . . . (the SERLA) shall interfere with the right of the employer to:

- (1) Carry out the statutory mandate and goals assigned to the agency utilizing personnel, methods and means in the most appropriate and efficient manner possible.
- (2) Manage the employees of the agency . . . , assign employees in positions within the agency . . .

Sec. 111.91 (2):

. . . The employer is prohibited from bargaining on: (a) The mission and goals of state agencies as set forth in the statutes.

(b) Policies, practices and procedures of the civil service merit system relating to: 1. Original appointments and promotions specifically including recruitment, examinations, certification, appointments, and policies with respect to probationary periods.

(2) The job evaluation system specifically including position classification, position classification standards, establishment and abolition of classifications, assignment and reassignment of classifications to salary ranges, and allocation and reallocation of positions to classifications, and the determination of an incumbent's status resulting from position reallocations.

Sec. 111.91 (3):

The employer may bargain and reach agreement with a union representing a certified unit to provide for an impartial hearing officer to hear appeals of differences arising under actions taken by the employer under Sec. 111.91 (2), Stats. The hearing officer shall make a decision accompanied by findings of fact and conclusions of law. The decision shall be reviewed by the personnel board on the record and either affirmed, modified or reversed, and the personnel board's action shall be subject to review pursuant to Ch. 227. Nothing in this subsection shall empower the hearing officer to expand the basis of adjudication beyond the test of "arbitrary and capricious" action, nor shall anything in this subsection diminish the authority of the personnel board under Sec. 16.05(1).

In addition to these sections of the SERLA, Sec. 16.05(7), Stats. (1975), is also involved. That section provides:

"The board may be designated as the final step in a state grievance procedure."

#### CONTRACT PROVISIONS INVOLVED

Article X, Section I of the collective bargaining agreement provides:

"The Personnel Board may at its discretion appoint an impartial hearing officer to hear appeals from actions taken by the Employer under Section 111.91(2)(b) 1 and 2 Wis. Stats, . . ."

Article IV of the collective bargaining agreement sets forth a four step grievance procedure which culminates with arbitration.

Section 6 of that article provides:

"The grievance procedure set out above shall be exclusive and shall replace any other grievance procedure for adjustment of any disputes arising from the application and interpretation of this agreement."

In determining whether the Personnel Board had subject matter jurisdiction in this case we must keep in mind the general rule of administrative law that an administrative agency "has only those powers which are expressly conferred or which are fairly implied from the four corners of the statute under which it operates"; State (DOA) v. ILHR Dept., 77 Wis. 2d 126, 136, 252 N.W. 2d 353(1977). In general, "any reasonable doubt of the existence of an implied power of an administrative agency should be resolved against the exercise of such authority"; State v. ILHR Dept., supra. See also, Racine Police and Fire Commission v. Stanfield, 70 Wis. 2d 395, 399, 234 N.W. 2d 307(1975); 3 Sutherland Statutory Construction (4th Ed.) at 150, sec. 65.02.

Rich contends that the Personnel Board had jurisdiction over his case under the authority conferred by Sec. 111.91(3), Stats.; under Article X, Section 1, of the collective bargaining agreement; and under Sec. 16.05(7), Stats. Both the State Personnel Board and the Department of Health and Social Services refute plaintiff's contentions in this regard and maintain that no statute confers subject matter jurisdiction upon the Board in this case.

Sec. 111.91(3), Stats., sets up a mechanism by which the State and a union representing State employes may agree to have an impartial hearing officer hear appeals on differences arising under actions taken by the State with respect to prohibited subjects of collective bargaining. That section specifically refers to Sec. 111.91(2), Stats., which delineates the subjects which are prohibited subjects of bargaining, (see statute quoted above).

The contract between the State and Council 24 does contain a provision that the Personnel Board may appoint an impartial hearing

officer to hear appeals on differences regarding State actions with regard to these prohibited subjects. Based upon the statutory and contracted provisions, it is clear that the Personnel Board would have jurisdiction over Rich's appeal if his appeal concerns one of the prohibited subjects of bargaining enumerated in Sec. 111.91(2), Stats.

Rich contends that his appeal falls within the subject set forth in Sec. 111.91(2)(b)(2), Stats.: "Policies, practices and procedures of the civil service merit system relating to . . . the job evaluation system specifically including position classification (or) position classification standards . . ." Rich's grievance was based on the habitual assignment by DHSS of duties such as mopping to Institutional Aides. Rich's brief states that the assignment of mopping duties to Aides rather than Building Maintenance Helpers is "clearly" an action concerning position classification and position classification standards. However, it is our understanding of "position classification" and "position classification standards" that they do not encompass Rich's complaint. Rich is not complaining that he was improperly classified as an Institutional Aide. Rather, he is concerned about duties assigned to that position. Sec. 111.91(2)(b)(2) concerns the job evaluation system; i.e., how positions are classified in light of the duties and responsibilities assigned by management. A "position classification" is a classification of positions which are "substantially similar in respect to authority, responsibility and nature of work required." "Position classification standards" are "the required knowledges, skills, abilities, education, training, and experience or any such other credentials which a person shall possess to insure reasonable prospects of success in the position." Sec. 16.07(1), Stats.(1975); Sec. Pers. 2.04. See also, William Ray vs. VW, Case No. 78-129-PC, State Personnel Commission. We agree with the DHSS that Rich's complaint concerns a permissive subject of bargaining (i.e., work assignment) rather than a prohibited subject of bargaining under Sec. 111.91(2), Stats. Therefore, the Board does not have authority to hear Rich's case under Sec. 111.91(3), Stats. Similarly, Art. X of the contract does not apply, since that section is also limited by the provisions of Secs. 111.91(2) and (3), Stats.

Nevertheless, Rich contends that Sec. 16.05(7), Stats., confers subject matter jurisdiction upon the Board. That section provides that appeals to the Board may be made the last step in a state grievance procedure. The contract between the State and Council 24, however, provided that arbitration was to be the final step in a grievance procedure which the contract states is the "exclusive" procedure for adjustment of disputes arising out of the agreement. Under the contract, Rich's final recourse was a demand for arbitration, a demand which he did not make. We therefore conclude that Sec. 16.05(7), Stats. is inapplicable.


Rich alleged violations by the DHSS of rules of the Personnel Board. He now contends that this shows his complaint was a non-contractual grievance. Yet he does not allege the violation of any specific civil service statute or personnel rule. We agree with the DHSS that if Rich contended that the action of DHSS in assigning him mopping duties was illegal or an abuse of discretion his proper remedy was to make an appeal to the direction of the bureau of personnel, not the Board. Sec. 16.03(4), Stats.(1975); Sec. Pers. 26.03, Wis. Adm. Code.

Based upon the foregoing, we conclude that the Personnel Board was correct in determining that it did not have subject matter jurisdiction in this case. Accordingly, plaintiff's petition that the Board's order be overturned is denied.

Counsel for the Board may prepare a formal written order effectuating the court's holding, copy of which should be submitted to counsel for petitioner before submission to the court for signature.

Dated this 23rd day of December, 1980.

By the Court:

  
Richard W. Beckwith  
Circuit Judge