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Personnel
Commission
CIRCUIT COURT
Branch 2

DAVE COUNTY

STATE OF WISCONSIN

PATRICK J. LYONS,

Petitioner,

vs.

STATE OF WISCONSIN
(PERSONNEL BOARD),

Respondent.

MEMORANDUM

DECISION

Case No. 160-031

This is a proceeding under ch. 227, Stats., to review a decision and order of the Personnel Board, dated October 12, 1977, which granted the petitioner's request for a rehearing and provided other relief to be described in detail below.

The petitioner has worked at the Wisconsin Department of Revenue since 1956. In late 1972 that Department was reorganized. This resulted in a change of duties and responsibilities of the position then occupied by the petitioner.

On February 18, 1973, C. K. Wettengel, Director, Bureau of Personnel, Department of Administration, reallocated the petitioner from Revenue Administrator III, salary range 1-18, to Revenue Administrator II, salary range 1-17. The petitioner appealed that decision to the Personnel Board.

On November 26, 1974, the Board issued an Opinion and Order which held:

"IT IS ORDERED that the action of the Respondent Wettengel in reallocating the Appellant's classification from Revenue Administrator III to Revenue Administrator II is hereby rejected.

"IT IS FURTHER ORDERED that the Respondent Wiegner initiate the appropriate demotion in lieu of layoff action, pursuant to Wis. Adm. Code Pers 22.

"IT IS FURTHER ORDERED that Respondent Wiegner desist from any action to seek reimbursement from the Appellant for any additional compensation he may have received by the action of the Director in-correctly reallocating his position.

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"IT IS FURTHER ORDERED that Appellant be granted any intervening service-wide salary adjustments including merit to which he would have been entitled."

No review or rehearing of this order was ever pursued; the order stands as originally issued.

On January 21, 1975, in response to the Board's order, *supra*, the Department of Revenue notified the petitioner that he had been demoted from Revenue Administrator III to Revenue Administrator II with a retroactively effective date of February 13, 1973.

On January 22, 1975, the petitioner asked the Board for an investigation pursuant to sec. 16.05(4), Stats., as to whether the Department of Revenue had complied with the Board's November 26, 1974 order. At the same time, the petitioner made an appeal to the Board under sec. 16.05(1)(e), Stats. This appeal was identified by the Board as Case No. 75-7.

On November 26, 1975, the parties in Case No. 75-7 stipulated that the single issue on the appeal was whether or not the Department of Revenue had complied with the Board's order of November 26, 1974. The parties further stipulated at that time to submit the matter for decision on briefs or position papers, reserving the right to request an evidentiary hearing. No such hearing was requested by either of the parties to Case No. 75-7 prior to the date the Board issued its decision in that case.

On January 27, 1976, the Board issued its decision and order in Case No. 75-7. In that decision, the Board held that it had intended to order the Department to provide de jure status to a de facto demotion and not to restore the petitioner to Revenue Administrator III effective February 13, 1973. The petitioner's appeal was accordingly dismissed.

On February 11, 1976, the petitioner moved the Board for a rehearing of the matter at which time he complained that there had been no hearing held with respect to the demotion in lieu of layoff.

On October 12, 1977, the Board issued its opinion and order on the petitioner's motion for hearing. That order provided the following:

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"It is the final order of this board that the motion for rehearing is granted and the action of Respondent reflected in the letter of January 21, 1975 (Appellant's Exhibit 1), demoting Appellant retroactive to February 18, 1973, is rejected with respect to its retrospective operation and Appellant is to be fully reinstated at the Revenue Administrator III level for the period February 18, 1973, to January 21, 1975, and this matter is remanded to Respondent for action consistent with this decision."

It is this decision of the Board which is before the court on the petition for review. The petitioner raises two issues: the propriety of the October 12, 1977, order in light of sec. 16.05 (1)(e), Stats.¹; and the need for a hearing prior to issuance of that decision.

IS THE BOARD'S ORDER UNLAWFUL UNDER SEC. 16.05(1)(e), STATS.?

The petitioner argues that the respondent acted in excess of its limited powers under sec. 16.05(1)(e), Stats., when, instead of either entirely affirming the Department's action or reinstating him to the position of Revenue Administrator III up to the date of the order, the Board ordered only that his demotion not be imposed retroactively. That statute reads:

"16.05 Duties of Personnel Board

(1) The Board shall:

"(e) Hear appeals of employes with permanent status in class, from decisions of appointing authorities when such decisions relate to demotions, layoffs, suspensions or discharges 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. Any action brought against an appointing authority by an employe 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." sec. 16.05(1)(e), Stats.

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The Board's jurisdiction under that statute is admittedly narrow. Yet, for the reasons discussed below, the court believes that the Board acted within its lawful authority when it issued the order in question.

The proceeding out of which the order issued was invoked, in part, at the petitioner's request under the authority of sec. 16.05(4), Stats., which reads:

"The board may 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. If the results of an investigation disclose that the director, appointing authority or any other person acted illegally or to circumvent the intent and spirit of the law the board may issue an enforceable order to remand the action to the director or appointing authority for appropriate action within the law. Any action brought against the director or appointing authority 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 findings."

Under this statute, the Board's authority goes far beyond the powers delegated to it under sec. 16.05(1)(c), Stats. The stipulated issue before the Board was, as noted above, to determine whether the Department of Revenue had complied with the Board's order of November 26, 1974. Thus, the subject presented to the Board fell within its jurisdiction under sec. 16.05(4), Stats. The petitioner has not contended that the Board lacked authority under this statute to issue the order in question, nor does the court believe that any such argument would have merit. Sec. 16.05(4), Stats., authorizes the Board to issue orders concerning the enforcement of "all matters touching the enforcement and effect" of the civil service laws. The petitioner invoked that authority and will not be heard now to complain of an unlawful exercise of Board powers. The court holds that the Board's October 12, 1977 order was within that entity's lawful powers.

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Aside from the powers delegated to the Board under sec. 16.05 (4), Stats., the court further believes that the Board's order was within its authority under sec. 16.05(1)(e), Stats. The petitioner argues that the Board was bound under the latter statute to either affirm the Department's retroactive demotion or to return him to his position as Revenue Administrator III, effective from February 18, 1973, through and including the present time, thus invalidating entirely the demotion proceedings. The court disagrees with this argument.

Sec. 16.05(1)(e), Stats., authorizes the Board to either sustain the appointing authority's decision or to reinstate fully the appealing employee. Where the Board decides not to sustain the appointing authority's actions, the question becomes what constitutes "full" reinstatement. The first Board decision in this matter, dated November 24, 1974, determined that the petitioner's former position as Revenue Administrator III had been abolished and ordered the appointing authority to initiate demotion in lieu of layoff action. Because that decision was never challenged or modified, the Board's determinations on those matters became final and binding. Accordingly, the extent to which the petitioner could be reinstated was thus limited to the effective date of the subsequent demotion. In its October 12, 1977 order, the Board determined the effective date of the demotion to be January 21, 1975 and reinstated the petitioner in his former position up to that date. The court is of the opinion that the Board's action was "full" reinstatement within the meaning of the statute. Holding otherwise would lead to an absurd result: the Board would be required to restore the petitioner to his former position after the Board had determined the position no longer existed and after the Board had ordered the petitioner's demotion from the position merely because the appointing authority erroneously implemented the Board's demotion order. If the petitioner wished to accomplish an invalidation of all the effects of the Department's efforts to demote him in lieu of layoff (Brief, Page 6), his efforts would have been better directed at seeking review of the Board's November 26, 1974 decision. As the case is presented to the court in its present status, however, the court finds no violations of sec. 16.05(1)(e), Stats., jurisdictional limitations.

THE NEED FOR AN EVIDENTIARY HEARING

The petitioner argues that the Board erred when it issued its decision without providing the petitioner "an evidentiary hearing designed to identify the particular Revenue Administrator III who was to be demoted in lieu of being laid off" (Petition,

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Paragraph 13). As noted above the parties to the initial proceeding involving the Department's demotion action stipulated to a single issue and reserved the right to request an evidentiary hearing. The Board noted, and an examination of the record similarly indicates, that the petitioner did not request any such hearing prior to the Board's January 27, 1976 decision on the petitioner's appeal and request for an investigation. It appears that this request was made for the first time with the motion for rehearing on February 11, 1976. Although the procedure to be followed on motion for rehearing is uncertain, as indicated by the parties' arguments with respect to the Board's authority to entertain such motions,² the court does not regard the absence of an evidentiary hearing at the initial appeal stage to be an error which the Board was compelled to remedy upon rehearing because the petitioner effectively waived an opportunity to have one. The court cannot conclude, as the petitioner argues, that the Board deprived him of an opportunity to litigate specific issues: his stipulation limited the issues before the Board and his failure to timely request an evidentiary hearing resulted in its waiver.

The petitioner objects (Brief, Page 13) to the Department of Revenue's participation in the review proceedings on the basis that the Department should have instituted an independent review of the Board's orders rather than be allowed to participate in this action. Sec. 227.16, Stats., permits parties to the administrative action under judicial review to participate in the review proceedings. The Department of Revenue was a party to the Personnel Board proceeding which resulted in the decision before the court on this petition for review. Furthermore, it is not apparent how the petitioner is prejudiced by the Department's activity. The court rejects the petitioner's arguments regarding the Department's lack of standing.

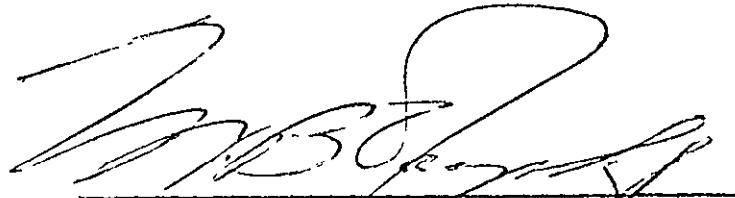
The respondent suggests that it would have been more appropriate for the Board to order the petitioner's demotion effective 15 days after January 21, 1975 (Brief, Pages 9-10). This result derives from Wisconsin Administrative Code section Pers. 22.05 which requires written notice 15 days prior to the effective date of any reduction in position. The court agrees that this is indeed the proper course of action. Under the authority of sec. 227.20(5), Stats., the court therefore modifies the effective date of the petitioner's demotion in lieu of layoff from January 21, 1975, to February 5, 1975.

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For the reasons stated above, the decision and order of the State Personnel Board, as modified, is affirmed.

Dated this 30 day of October, 1973.

BY THE COURT:



Michael B. Torphy, Jr., Judge,
Circuit Court, Branch 2.

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FOOTNOTES

1. Although the petitioner refers to sec. 16.05(1)(f), Stats., as the authority for his claim throughout his Petition and Brief, the court believes that sec. 16.05(1)(e), Stats., is what is intended: that is the subsection cited in the letter of January 22, 1975, in which an investigation and appeal were sought and, more importantly, it pertains to actions of appointing authorities such as the Department of Revenue; sec. 16.05(1)(f), Stats., applies only to actions of the Director of the Bureau of Personnel and there is no such action before the court on the petition for review.
2. The question of an administrative agency's authority to grant rehearings has subsequently been resolved by the passage of ch. 414, Laws of 1975.