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Personnel Commission

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 2

JANICE BROM,)
)
) Petitioner,) MEMORANDUM
)
 vs.)
) DECISION
 STATE PERSONNEL BOARD,)
)
) Respondent.) Case No. 160-352
)

This is a proceeding under ch. 227, Stats., seeking review of a decision of the State Personnel Board, dated November 15, 1977, which denied the petitioner's request for an investigation under sec. 16.05(4), Stats., and dismissed her appeal.

The petitioner had applied for employment as "Job Service Assistant I in the Black River Falls Area" pursuant to an announcement by the Department of Industry, Labor and Human Relations (DILHR). The announcement to fill the vacancy for that position indicated a required typing ability of 35 net words per minute. The personnel department of DILHR certified three names to the Director of the Wisconsin Rapids Job Service District, the appointing authority for the position. The petitioner ranked third on the qualifying exam of the three persons certified initially. However, the other two persons in this first group of three either withdrew from consideration or failed the typing test. Although the petitioner was interested in the job, two more persons, Douglas Rank and Stephen Elmer, were certified for the appointing authority's consideration. When Elmer failed the typing test, the name of Judith Wessel was certified. The job was offered first to Rank who declined and then to Wessel who was appointed to the position. The petitioner alleges that Wessel ranked sixth on the qualification exam.

The decision under review on this petition was made after the petitioner's request for an investigation pursuant to sec. 16.05(4), Stats., which reads in part:

"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." (emphasis added)

The petitioner's contention was that the supplemental certification of other names violated the "rule of three" as set forth in sec. 16.20(1), Stats., which states:

"Certification, appointments and registers

"Appointing authorities shall give written notice to the director of any vacancy to be filled in any position in the classified service; and the director shall certify, pursuant to this subchapter and the rules of the director, from the register of eligibles appropriate for the kind and type of employment, the grade and class in which the position is classified, the 3 names at the head thereof, which have not been certified 3 times."

The respondent relies in part on several administrative rules and Bureau regulations. Wisconsin Administrative Code section Pers 12.04 provides:

"(1) Lacking a complete certification, the appointing authority may request additional names to complete the certification. Additional names may be certified and shall be considered in rank order following those originally certified.

"(2) The director may certify additional names from registers of related higher or parallel classes to fill out an incomplete certification, or may make a complete certification from registers of related higher or parallel classes when no register exists for the class requested. This is provided that the examination for the higher or parallel classes have measured the capability of eligibles to perform the work of the class for which certification is to be made."

The Bureau of Personnel's "Wisconsin Personnel Manual" contains the following relevant regulations:

"232.040 'Rule of 3' certification -- The top three ranking eligibles on the Certification Register, who are willing to accept

employment in the geographic area of the vacancy, are certified to the vacancy. If more than one vacancy exists, two eligibles more than the number of vacancies are certified beginning with the top ranking eligibles.

"232.080 Supplemental Certification

A supplemental certification may be made, that is, additional eligible(s) may be certified, in rank order, provided one or more of the eligibles is not interested in, is not available for, or cannot be located for the present vacancy. Eligibles who remove themselves from employment consideration for one vacancy, do not jeopardize their eligibility for certification to future vacancies, as long as their eligibility continues on the Certification Register. . . ."

Judicial review of administrative decisions is very limited in scope. This is particularly true where the decision under review involves an exercise of an administrative agency's discretion, sec. 227.20(8), Stats. That statute mandates that the court "not substitute its judgment for that of the agency on an issue of discretion." The discretion exercised by the Board in this case was its decision not to investigate the circumstances surrounding the petitioner's application for employment. That decision will be examined under the standards of sec. 227.20(8), Stats., to determine whether the case need be reversed or remanded to the Board.

The statute requires the court to reverse or remand a discretionary decision where the "agency's exercise of discretion is outside the range of discretion delegated to the agency by law," sec. 227.20(8), Stats. Sec. 16.05(4), Stats., clearly delegates to the Board discretion as to whether it will hold any investigations. The decision here is obviously within the lawful range of Board discretion.

Section 227.20(8), also requires that the court reverse or remand a discretionary decision where that decision is determined to be "inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency."

The petitioner points to no agency rule which would not allow the Board to exercise its discretion by refusing to hold

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an investigation under sec. 16.05(4), Stats. Nor does the petitioner argue that the refusal here is uncharacteristic of the Board's handling of similar appeals in the past or in any other way inconsistent with Board policies and practices.

Finally, section 227.20(8) requires reversal or remand where the agency's exercised of discretion is in violation of any statutory provision. The petitioner seems to argue that the decision under review, although not in itself violative of any statute, allows a violation of sec. 16.20, Stats., by upholding the supplemental certification and should therefore be reversed or remanded. In a technical sense the decision to supplement certification is not before the court: it has not been pleaded as the agency decision to be reviewed, nor would it appear to be a reviewable decision within sec. 227.15, Stats. Yet because the legality of that Board action is at the center of this controversy, the court will address the question.

The gist of the petitioner's argument on this subject is that sec. 16.20, Stats., does not allow supplemental certification of candidates and that the respondent has improperly relied on the Personnel Manual regulations for authority to accomplish that end in this case. The court disagrees.

The court believes that the respondent has correctly interpreted the case of Berg Seaman, 224 Wis. 263, 271 N.W. (1937), upon which the petitioner relies for the proposition that the Board's power "is limited to submitting the names of three persons from which the employee must be selected," 271 N.W. at page 925, the inference being that there is no additional power to supplement certification. The issue in Berg was not the same as in this case, it referred only to the Board's powers to direct employment; the court did not address the Board's authority to maintain a full certification list of three names by recertification and supplementation. Berg does not stand as authority for the petitioner's argument.

Section 16.20(1), Stats., quoted above, indicates that certification is to be made in accordance with subchapter II of chapter 16 and the rules of the director of the bureau of personnel. The petitioner argues that the Board improperly relied upon regulations found in the Wisconsin Personnel Manual, supra. The court is of the opinion, however, that the Board had sufficient authority to supplement certification under Pers 12.04, Wisconsin Administrative Code, supra, and that the regulations found in the manual, even if relied on by the Board, are merely guidelines for implementation of the policies stated in the administrative rules.

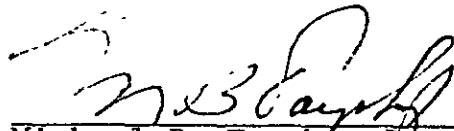
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Thus, even when the legality of the decision underlying the exercise of Board discretion is considered, the court does not find that the Board has violated any statutory provisions. Therefore, there is no basis under ch. 227, Stats., for this court to reverse or remand the case.

Accordingly, the Board's decision is affirmed.

Dated this 18th day of August, 1978.

BY THE COURT:



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