STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

KATHRYN GLASNAPP,

Petitioner,

vs.

STATE OF WISCONSIN (Personnel Board),

Respondent.

JUDGMENT

Case No. 162-443

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

The above entitled review proceeding having been heard by the Court on the 1st day of October, 1979, at the City-County Building in the city of Madison; and the petitioner having appeared by Attorney Richard V. Graylow of the law firm of Lawton & Cates; and the respondent Board having appeared by Assistant Attorney General Robert J. Vergeront; and the Court having had the benefit of the argument and briefs of counsel, and having filed its Memorandum Decision wherein Judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the Order of respondent State of Wisconsin (Personnel Board) dated April 11, 1978, entered in the matter of Kathryn Glasnapp, et al., Appellants, v. Secretary, Department of Health and Social Services and Deputy Director, Bureau of Personnel, Respondents, be, and the same here is,affirmed.

Dated this 19th day of October, 1979.

BY THE COURT:

Reserve Circuit Judge

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STATE OF WISCONSIN (Personnel Board),

Respondent.

MEMORANDUM DECISION

Case No. 162-443

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is a proceeding by petitioner Kathryn Glasnapp under ch. 227, Stats., to review an order of the State Personnal Board dated April 11, 1978, which dismissed the appeal of petitioner and five fellow employees from the denial by the Deputy Director of the Bureau of Personnel of the Department of Administration of a request that these six employees be reclassified from the position of Disabilities Claim Adjudicator (DCA) 2 to Disabilities Claim Adjudicator (DCA)3.

STATEMENT OF FACTS

Only the petitioner has sought review in this court of the respondent Board's order. Therefore, this statement of facts is confined to those facts which relate particularly to petitioner.

Petitioner has worked as an employee of the Bureau of Social Security since February 4, 1974. This bureau is part of the Division of Vocational Rehabilitiation of the Department of Health and Social Services (hereinafter the Department). When she commenced this employment she was classified as a DCA1, and on the basis of her satisfactory performance of the duties of that position she was reclassified by the Department in February, 1976, as a DCA2.

Pers 3.03, Wis. Adm. Code, as of the time material to this controversy vested the power in the Director of the Bureau of Personnel of DOA to make reclassification of positions. Also

at times material herein sec. 16.03(2), Stats., provided that the Director could delegate certain personnel matters, including reclassifications, to a department to act "within prescribed standards." For some years prior to September 16, 1976, there existed a delegation of power from the Director to the Department to make reclassifications. However, on September 16, 1976, the delegated power to the Department to reclassify from DCA2 to DCA3 was rescinded by the Director.

On July 1, 1975, the Personnel Services Section of the Division for Vocational Rehabilitation of the Department issued a three page policy and procedural manual on reclassification procedures (Appellant's Exhibit 1). Article III, A, of this manual provided:

> "The following reclassification actions can be accomplished if the individual meets appropriate training, experience and performance requirements."

There followed a list of positions which could be advanced one step under this provision. Included was advancing from a DCA2 to a DCA3 position.

The evidence established that during the period commencing in 1972 and extending to September, 1976, a considerable number of DCA2s had been reclassified DCA3 on the basis of their training, experience and performance without actually having performed essential portions of the duties of a DCA3.

The attempts to have petitioner reclassified a DCA3 was apparently initiated by petitioner's supervisor, Viola Mae Seefeldt, by letter dated December 15, 1976, to Jacqueline G. Rader, recommending such reclassification (Respondent's Exhibit 5). The actual request for such reclassification was made by William Kuntz, Chief of Personnel Services Section, and went to the Bureau of Personnel and was denied by letter dated April 18, 1977, to Kuntz by P. Stephen Christenson, Supervisor of Classification and Survey Unit of the Bureau, but actually signed by Jean Dumas, Personnel Specialist, (Respondent's Exhibit 10). The principal reasons advanced for this denial of the reclassification request was that the class specifications for

the DCA3 position stated that persons in this position are involved in the "total disability claims adjudication process"; the total disability claims adjudication process includes continuing disability investigations and reconsiderations; and petitioner was not assigned the responsibility for continuing disability investigations and reconsiderations. There was evidence that petitioner had not performed any work in continuing disability investigations, but her supervisors were of the opinion she was fully capable of doing this.

Further facts will be hereinafter set forth in connection with the court's decision of the issues.

THE BOARD'S FINDINGS OF FACT

The Board's findings of fact read:

"1. For approximately three and one half years prior to September of 1976, the authority to reclassify Department of Health and Social Services (DHSS) employes between the Disabilities Claims Adjudicator (DCA) II and III levels was delegated to DHSS by the State Bureau of Personnel.

2. During the period of this delegation, the standard policy was to reclassify employes from the DCA II to III level on the basis of quality of work, time in position, experience, and training at the lower DCA II level. This policy was actually implemented on a regular basis in reclassification requests from at least as early as 1974 until at least as late as 1976.

3. The result of this implementation was that DCA II level employes were automatically reclassified to the higher DCA III level upon completion of one year of satisfactory performance, experience, and training at the lower DCA II level.

4. In April of 1977, the appellants requested reclassification of their positions in DHSS from the DCA II level to the DCA III level.

5. No allegation is made that the appellants do not qualify for the reclassification under the aforementioned standard of time, experience training, and quality of work in their current lower classification.

6. The reclassification requests were denied by the State Bureau of Personnel because the appellants allegedly had not been performing the duties and responsibilities of the requested higher level of classification (DCA III) during the six months prior to the time of their request.

7. The position descriptions submitted with the appellants' requests were inaccurate. In actuality, they had not been performing some of

the duties and responsibilities of the higher DCA III level either at the time of their request or for the six months prior to that request.

8. One of the appellants' main concerns regarding their employment was the availability of promotion and reclassification. During most of their employment, they believed reclassifications would be handled under the previous policy of time and performance in the lower level position."

THE BOARD'S CONCLUSIONS OF LAW

The Board included in its conclusions of law the following:

"3. The Wisconsin Administrative Code, §3.03(2), requires that an employe perform the duties and responsibilities of the higher level position he or she is to be reclassified to for at least six months prior to that reclassification.

. . .

4. The appellants failed to show either that they met this Wis. Adm. Code, § Pers. 3.03(2) test for reclassification or that the provision is inapplicable to reclassifications from the DCA II to the DCA III level.

. . .

6. The appellants do not show a reliance resulting in irreparable injury. Thus equitable estoppel does not lie here and it is not necessary to consider the other elements of estoppel.

7. The appellants thus failed to carry the burden of showing that the respondent's action was incorrect and that they merit DCAIII level classification.

8. The appellants' request for a monetary award in lieu of equitable estoppel cannot be granted because the Board does not have statutory authority to modify actions of the Director. It may only affirm or deny such actions."

THE APPLICABLE WIS. ADM. CODE PROVISION

Pers 3.03(2), Wis. Adm. Code, provides:

"Normally, filled positions will not be reclassified until the incumbent has carried the duties and responsibilities for a period of at least 6 months."

THE ISSUES

The issues raised by petitioner are these:

(1) Whether petitioner was entitled to be reclassified DCA3 on the basis of her training, experience and work performance.

(2) Whether she is entitled to such reclassification on the basis of promises made to her by her supervisors.

(3) Whether she is entitled to such reclassification on the basis of the doctrine of equitable estoppel.

THE COURT'S DECISION

A. Reclassification on the Basis of Training, Experience and Work Performance.

The court determines that under the provisions of Pers 3.03(2) the Board correctly concluded that petitioner had failed to meet the test there laid down that she had performed the duties of a DCA3 for six months. By its finding of fact No. 7 the Board found that petitioner had not been performing some of the duties and responsibilities of a DCA3 for a period of six months. The evidence established that a material part of those duties and responsibilities was conducting of continuing disability investigations and reconsiderations and that petitioner had not done any of that work.

Petitioner stresses the provision of the manual on reclassification procedures (Appellant's Exhibit 1) that reclassification from a DCA2 to a DCA3 position was to be made on the basis of "appropriate training, experience and performance requirements." However, this directly conflicted with the requirement of Pers 3.03(2) that "normally" the person to be so reclassified have carried the duties and the responsibilities of a DCA3 for at least six months. Kuntz, Chief of the Personnel Services Section of the Division of Vocational Rehabilitation of the Department, correctly stated the law when he testified that a division of the Department cannot write a procedure which would supersede the rules of the Director of the Bureau of Personnel (Tr. 22).

Furthermore, the request that petitioner be reclassified a DCA3 was not made until after the delegated authority of the Department to make such a reclassification had been rescinded. Thus, the Deputy Director of the Bureau of Personnel who passed

on such request, was empowered to interpret Pers 3.03(2) as requiring that it be denied on the basis that petitioner had not performed a very material part of the duties and responsibilities of a DCA3 for six months. There was no legal requirement that he give any consideration to a Department division manual which conflicted with Pers 3.03(2).

On oral argument petitioner's counsel directed the court's attention to a statement made by Robert C. Cohen, Director of the Bureau of Social Security Disability Insurance, in the Division of Vocational Rehabilitation of the Department, in a letter dated May 10, 1977, to Kuntz (Appellant's Exhibit 5) protesting the denial of the reclassification request in which he stated, "For all the above reasons, we believe that the denial was arbitrary and capricious, coming after years of individuals being reclassified into said position performing such duties" (emphasis added). The court deems that the inconsistency of the Acting Director's denial of the request for reclassification with past Department policy has been adequately explained so that the court should not reverse on that ground under the provision of sec. 227.20(8), Stats.

B. Promises Made by Petitioner's Supervisors.

Petitioner contends testimony she gave at the hearing before the Board establishes that she had been promised reclassification to the DCA3 position on the basis of one year's experience as a DCA2 and satisfactory work performance.

She testified that in the fall of 1975 while then classified as a DCA1 she had a conversation with Stanley ~~Kelin~~ Klein, one of her supervisors, and was asked these questions and gave these answers with respect to this conversation (Tr. 46-47):

> "Q Okay, now directing your attention to your employment with the Bureau at any time, can you tell me if you had any conversations with any of your supervisors, either first line or on up the line, having to do with how and when you would be reclassified?
>
> A Yes; well, we had discussed--I had first discussed reclassifications in the fall of 1975 with my supervisor at that time, Stanley Klein. At that

time it was in regard to the reclassification from a DCA 1 to a DCA 2.

Q What'd Klein tell you, if anything, about the reclassification?

A Well, at that time we discussed it and he said my work was satisfactory, that there would be no problem for me being reclassified at that time.

Q Were you doing the work of a 2 at that time?

A I was doing the work of a DCA 1."

Following this testimony petitioner was asked whether subsequent to the fall of 1975 she had any conversations with any supervisors "regarding reclassification from a 1 to a 2 or 2 to 3 and how it would be accomplished," (Tr. 47). Her answer and ensuing testimony is as follows (Tr. 47-49):

"A Yes, I discussed it with Viola Mae Seefeldt and--

Q When?

A The fall of 1976.

Q What if anything did she tell you?

A She told me that she was very anxious to see me reclassed to a DCA3. There were various things that she felt I could be doing under that classification.

Q All right, during the course of your employment with the Bureau, can you tell me how you felt reclassification from either a 1 to a 2 or a 2 to 3 would be accomplished?

A Yes, I felt that they would be accomplished by putting in the time at the grade--you know, the time in grade.

Q All right.

A Things are specified, which normally was--for a 1 to 2, it was two years at a 1 level; for a 2 to 3, it was one year at the DCA 2 level. As long as your work proved to be satisfactory.

Q Okay. And your basis for that feeling was what?

A Because of the conversations I had had with my supervisors--and not only with them, but with other people in the agency who had been themselves reclassed and who were looking forward to being reclassed.

Q All right, did you believe your supervisors?

A I most certainly did.

Q Why?

A I had no reason not to believe them because I was aware of the past practice of the agency.

Q What effect did that have--that is, the statements of your supervisors on your continuing employment with the Bureau, if any?

A When I first joined the Bureau, one of my main concerns was the availability of promotion and also reclassification, and it had a great deal to do with staying. It certainly does."

An analysis of this testimony given by petitioner discloses that in the conversation with Klein in the fall of 1975 nothing was said about a reclassification from a DCA2 to a DCA3 position. The evidence is to the effect that the DCA1 position was merely a training position to enable an employee to advance to a DCA2 position. In the conversation with Seefeldt no promise was made by her that petitioner would be reclassified a DCA3, but only that Seefeldt was anxious to have petitioner so reclassified. Seefeldt did take prompt steps to initiate the request for this reclassification. The further testimony by petitioner that her feeling, that one would be reclassified from a DCA2 to a DCA3 after one year in the DCA2 level, was "Because of the conversations I had with my supervisors," did not identify the supervisors nor state what they said.

The court is of the opinion that this testimony was too indefinite upon which to ground any finding that any supervisor who stood in the position of her appointing authority had promised her reclassification as a DCA3 after one year's experience as a DCA2 and satisfactory work performance in that position. Therefore, the further issue of the legal effect of such a promise, if it had been made, need not be considered.

C. The Estoppel Issue

In Gabriel v. Gabriel, 57 Wis. 2d 424, 429 (1972), it was held that three factors must be present to establish equitable estoppel: (1) action or inaction which induces (2) reliance by another (3) to his detriment.

The court very much doubts that the past practice of the Department for at least three and a half years prior to September, 1976, of reclassifying DCA2s to DCA3 positions on the basis of training, experience and satisfactory work performance,

and then failed to accord petitioner such reclassification, would constitute wrongful action sufficient to meet the first of the three enumerated factors in order for equitable estoppel to lie. The Board did not come to grips with this issue but concluded that petitioner did not meet the third factor of acting to her detrimant in her reliance on the past practice because she had suffered no irreparable injury.

The petitioner contends she met the acting to her detriment test by continuing in her employment instead of exercising her option to quit and seek other employment, and cites this court's decision in Landaal v. State of Wisconsin (Personnel Board), case no. 138-392, Dane County Circuit Court (1973).

In the Landaal case the petitioner Landaal, an employee at Central State Hospital, accepted a promotion to a position at the Wisconsin State Prison. As a result he received a salary increase of $30 per month. Before the six months probationary period had expired he requested a transfer back to his prior position, and the warden made the transfer back. Landaal continued to receive his increased salary for about sixteen months when the state reduced his salary so as to eliminate payment of the $30 per month increase. The Personnel Board affirmed the action of the Department of Health and Social Services in reducing Landaal's salary by $30 per month effective as of the date he resumed the duties of his former position with the Central State Hospital. This left the Department free to carry out its expressed intention of recouping the excess salary payments paid him of approximately $480.

This court in the Landaal case reversed the portion of the Board's order that had affirmed the Department's order which held that Landaal's salary was reduced $30 per month as of the date of his transfer back to his former position, but held this decrease in salary was effective as of the date the Department notified him he had been paid $657 per month in error and it was reducing his salary back to $627 per month. The court's basis for holding that Landaal was entitled to retain the additional

$30 per month was that the Department was equitably estopped from claiming such payment was made in error. The court in its memorandum decision stated:

> "There is no question but what petitioner relied on this action of the state through its appointing officer by his acceptance of the transfer back to the position of Officer 2 and relied upon the state's inaction by continuing in the Officer 2 position and conforming his style of living to the salary being paid him.
>
> In so acting, the petitioner acted to his detriment as that term is understood in the law. A person suffers a detriment in law where he foregoes an alternative course of action upon the inducement of another."

The reason given in the court's decision for not permitting Landaal to continue to receive the salary of $657 per month beyond the date when he was notified that this salary had been paid to him in error was that as of that date he could have exercised the alternative of quitting his employment rather than working at the reduced salary.

There was a further reason why Landaal was not entitled to receive the $657 per month salary after he had been notified that it had been paid to him in error. This is that to permit him to receive such salary after that date would be to invoke equitable estoppel against the state, not as a defense, but to gain affirmative relief. Two of the leading Wisconsin cases on making equitable estoppel against the state are Libby, McNeill & Libby v. Department of Taxation, 260 Wis. 138 (1951), and Park Bldg. Corp. v. Industrial Comm., 9 Wis. 2d 78 (1959). Both dealt with situations in which equitable estoppel against the state was sought to be invoked as a defense against state action. The court knows of no Wisconsin case where equitable estoppel has been held a proper basis for gaining affirmative relief against the state, or a state agency.

The court is of the opinion that equitable estoppel may only be invoked against the state, or a state agency, as a shield, never as a sword. There are strong reasons of public policy why a person or corporation which has been misled to its detriment by conduct of the state should be entitled to defend by inter-

posing that as a defense where the state seeks affirmative relief grounded on such an act of reliance. There are equal reasons of public policy why a person or corporation should not be permitted to have affirmative relief against the state grounded on equitable estoppel. The right to recover money not grounded on tart damages, or to obtain a particular employment in state service, should be required to be grounded either on statutory right or contract law.

For these reasons the court has concluded that petitioner cannot invoke equitable estoppel as a ground to obtain reclassification as a DCA3.

Let judgment be entered affirming the order of respondent Board which is the subject of this review.

Dated this 15th day of October, 1979.

BY THE COURT:

Reserve Circuit Judge