

STATE OF WISCONSIN

BEFORE THE STATE BOARD OF PERSONNEL

Edward J. Stoltz,)
Appellant,)
vs.) DECISION
G. H. Bakke, Chairman,)
Highway Commission,)
Respondent.)
#216

Cases such as this one may tend to open Pandora's box, but this Board has not made the civil service law of the state. It does, at times, interpret the law; and it has the power to implement the law by rules, but neither of these exercises may rewrite that law. It is the duty of this Board to protect the merit system as the Legislature intended it to be.

This case is before the Board on the final level of consideration of a grievance. The Board is not so sure that in its more important implications, this is a grievance matter. It has greater significance as an appeal from an act of the Director. If so, it was not presented to this Board in a timely manner. However, it is a matter freely brought to the attention of this Board; and the Board fully intends to treat it as an investigation under s. 16.05(3) of the Wisconsin Statutes.

Stoltz is a permanent employe in the classified service of the State of Wisconsin as a Right-of-Way Agent 2 in the Highway Department in the Waukesha District. A Right-of-Way Agent 3 position became open; and Wilber Anderson, another Right-of-Way Agent 2 was moved into it. The Highway Department requested the Director to audit what Anderson was doing. Upon audit, it was decided that Anderson was doing the work of a Right-of-Way Agent 3; and his position was, accordingly, reclassified as such.

Stoltz contends that he is better qualified, more experienced, and had passed the examination for both Right-of-Way Agent 3 and 4-- Anderson had never taken these examinations. He contends that he, and not Anderson, should have been assigned to the "3" position.

The Highway Commission contends that Anderson was the most qualified, having worked more in the "3" area while he was a "2" than did Stoltz and that it is management's prerogative to determine which of several qualified personnel it wants to groom for and ultimately advance to a higher position.

This Board is not going to decide whether Stoltz, Anderson, or someone else is the best qualified to move up. This Board does not have that right, nor does the Commission nor the Director.

Apparently, under a mistaken extension of s. 16.105(1m) of the Wisconsin Statutes, the Director, at times, will audit the contents of a certain job; and if the incumbent is performing at a higher level than the job he was hired to fill, the job will be reallocated to a higher class, and the incumbent will automatically move with the reallocation of his position. This is not a reallocation of a position to another class. It is the reclassification of an individual and, if upwards, a promotion.

Anderson was a Right-of-Way Agent 2, which is a well-defined, existing class. Right-of-Way Agent 3 is a well-defined existing class. When Anderson was made a "3", there was no reallocation of any position as contemplated by s. 16.105 (1m). The Right-of-Way Agent 2 and 3 positions remained in the same grade and salary range in which they had been. Anderson was simply moved from one position to another in a higher classification.

The applicable statutes are quite clear and have been on the books for many years.

s. 16.10(1), Wisconsin Statutes, reads:

"Appointments to, and promotions in the classified service, shall be made only according to merit and fitness, which, except as otherwise provided by law shall be ascertained so far as practicable by examinations which so far as practicable, shall be competitive."

s. 16.10(3), Wisconsin Statutes, reads:

"No person shall be appointed, transferred, removed, reinstated, promoted, or reduced as an officer, clerk, employe, or laborer in the classified service in any manner or by any means, other than those prescribed in s.s. 16.01 to 16.32."

It is true that under s. 16.17(4), the requirement of competition may be waived by this Board in cases where exceptional qualifications of a scientific, professional, or educational character are required. However, this Board has never made such a waiver for Right-of-Way Agent 3 and there is no reason why it should.

It is true that there are several positions in the classified service that the Legislature has prescribed be filled in methods other than those set forth in s.s. 16.01 to 16.32, but Right-of-Way Agent 3 is not one of them.

Any contention that these statutes are not to be literally interpreted or are invalid has been put to rest since the Supreme Court handed down State ex rel Buell v. Frear, 146 Wis. 291. The court considered certain provisions of s. 2 of ch. 363, Laws of 1905, which were identical to s.s. 16.10(1) and 16.10(3):

"We perceive no unreasonable restriction in the nature of this regulation for the exercise of the discretion of the appointing officer to select an appointee found to possess the qualifications pursuant to the tests prescribed by law. The tests are to be practical in their nature and appropriate to ascertain the fitness and skill of the applicant and impose no unreasonable conditions or restrictions on the appointing officer in the exercise of his power, and clearly serve to aid him in selecting competent servants."

This case firmly bulwarked competitive examination as the heart of a merit system of civil service.

Hence, the Board concludes that the only way a state employe can move from one position to another at a higher level is by examination unless examination is impracticable, and that such examination must be competitive if practicable.

This Board can justify the promotion by reallocation of a Right-of-Way Agent 1 to a Right-of-Way Agent 2 because to be a "2," an employe must have served an apprenticeship as a "1." It is a trainee position, and all satisfactory "1's" should become "2's" automatically after a year of experience. It may not be practicable to give examinations for "2's."

However, the Right-of-Way Agent 2 position is not a trainee position. The Right-of-Way Series Position Standard states:

"But only a small percentage of Right-of-Way Agents 2 will progress to Right-of-Way Agent 3."

The Standard further states on page 6:

"Since the II level is the journeyman level, the complexity of the work, by itself, will not substantiate any further upward movement. The type of work allocated to the III level is described in the next paragraph. After three years of progressively responsible right-of-way experience at professional level right-of-way work, at least one year of which has been at the Right-of-Way Agent II level, an employe is qualified for the III level."

This Board has heard no argument that admission to the "3" level by the examination route is not practicable or that it is not practicable that such examinations should be competitive. Entry into the "3" level by competitive examination does not pervert the working concept of the "2" level. As a matter of fact, competitive examinations have been given for this position.

The most that any Right-of-Way Agent 2 has a right to expect is that after a year at the level, there is no question of his qualification to be admitted to competition for a "3" level position.

It is this Board's conclusion that the only route to a Right-of-Way 3 position is by the way of competitive examination leading to certification and ultimate selection from among those certified.

The object of Wisconsin's civil service law is to place the public service on a basis of fitness and efficiency, through recognition of skill and proficiency upon entrance into the service and of experience and merit in securing promotions, and by giving security in continuance in service.

To conclude other than this Board now does would be in sub-
version of the merit system.

Wilber Anderson illegally holds the position of Right-of
Way Agent 3 in the Waukesha District of the Highway Department. It
likewise would be illegal to place Stoltz in such a position without
following the procedures outlined above.

This Board recommends that the Highway Commission restore
Wilber Anderson to the position of Right-of-Way Agent 2 without prejudice
to any salary or rights he may have gained while occupying a "3" position,
that said Commission request the Director for a certification of eligibles
for any Right-of-Way Agent 3 positions that may be vacant, that the Director
certify to the Commission three eligibles from an existing register, or if
there be no such register, from one created by a competitive examination.

If within ten days after this decision has been issued, steps
have not been taken to comply with the recommendation, this Board shall
consider what order can be entered to enforce compliance with the decision.

Dated at Madison, Wisconsin

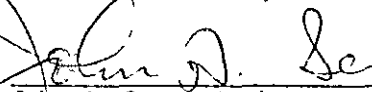
This 31st day of August, 1967

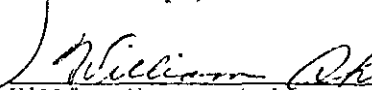
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