

Time Limit: Jurisdiction

Wis. Pers. Bd. Case No. 378 (Jan. 29, 1971)

STATE OF WISCONSIN

BEFORE THE STATE BOARD OF PERSONNEL

Keith Scott,)
Appellant,)

vs.)

Edward E. Estkowski, Chairman,)
Department of Industry, Labor)
and Human Relations,)
Respondent.)

MEMORANDUM OPINION

Appellant was a permanent employe in the classified service of the State of Wisconsin and was employed by the Respondent in Milwaukee, Wisconsin.

A letter dated August 18, 1970 was delivered to Appellant which letter, inter alia, notified the Appellant that the effective date of discharge was August 19, 1970.

The Appellant dated a letter of appeal to this Board, dated September 1, 1970. It was received in the State Bureau of Personnel, which acts for this Board in clerical matters, on September 3, 1970. August 29, 1970 was a Saturday. August 31 was a Monday.

S. 16.24(1)(a) which governs this type of appeal reads in part:

" . . . within ten days after the effective date of such action of the appointing officer, the employe may appeal to the board and within 30 days after the date of the appeal, the board shall hold a public hearing thereon".

The 10th day after the effective date of the action was August 29, 1970. Because the Board's offices were not open on August 29 and 30, we presume that the 10th day became August 31, 1970.

The Board in its procedures requires the Appellant to file a statement of contentions and the Respondent to file a reply. This procedure was followed by the parties in this matter. The Respondent's reply did not mention the fact that the Appellant's appeal may not have been timely.

The Respondent first raised the question when the hearing on the appeal convened on December 4, 1970. Respondent at that time, on the basis of the fact that the appeal had not been taken timely, moved the Board to dismiss the appeal for lack of jurisdiction. The Board reserved ruling on the motion and proceeded to hear the matter on the merits.

This Board for many years and in several similar instances has held that if a s.16.24 or a s. 16.05 appeal was not taken within the time prescribed by the statute that the Board had no jurisdiction. This Board has never felt that there could be anything less than literal compliance, that the parties could not stipulate jurisdiction or that the Respondent could waive it.

There is much authority that the right of appeal to a reviewing administrative agency is purely statutory and all applicable statutory requirements must be complied with to sustain such appeal; that the time for taking an administrative appeal is generally prescribed by statute or regulation and timely application has been held necessary, delay beyond the statutory time being fatal.

This Board proposes to adhere to the position that it has always taken; this is, that the matter of time within which an appeal may be taken is a jurisdictional matter, and if the appeal be not taken within the prescribed time that the Board has no authority to pass on the merits of the appeal.

The argument of most able counsel that the 10 day limitation of s.16.24 is a statute of limitation and not jurisdictional has been well developed. If it be such, it must be pleaded as an affirmative defense or made the subject of a motion before responsive pleadings to the complaint are issued.

The crux of such an argument is that a s. 16.24 hearing is not an "appeal", but a de novo proceeding. While the s. 16.24 hearings do have that aspect, they are not de novo in the sense that an initial decision is being made. That decision has already been made by the appointing officer. This Board reviews the facts that he acted upon to ascertain whether or not there is substantial evidence of the specification relied upon, so that the decision of the appointing officer be neither arbitrary nor capricious.

If the s. 16.24 hearings conducted by this board be not appeals and if the 10 day limitation be a statute of limitation, there still remains the question of whether or not the Respondent had raised it in a timely manner when he first presented it at the start of the hearing and had not raised it in his Reply to the Appellant's Contentions.

s. 16.24 Wis. Stats. merely states that the appointing officer must "furnish in writing the reasons for his action"; that the employe "appeal"; and that the Board hold a public hearing thereon. The statute does not provide for any pleadings in the nature of a complaint or answer.

For years, this board held hearings on such a sterile format, often never knowing in advance what the issues were and hearing hours of testimony that often was on matters that were not disputed or proved immaterial or irrelevant to the question.

To aid the Board, procedures were adopted as referenced in the manual: "Comments on Procedures Before the Personnel Board". These procedures include a statement of Contentions by the Appellant and a Reply by the Respondent. The Board has found that adherence to these procedures has in most instances expedited the hearing and enabled the Board to more intelligently react to the testimony and evidence.

The Board has never made the procedures a part of the Board Rules as promulgated by the Administrative Code. The Board never had the desire or thought that it had the power to establish such a code of adjective law. The procedures have never been regarded as any more than suggested procedures. The Board has never been inclined to set any procedural "traps" for either party. In many hearings this Board has permitted the parties or one of them to go beyond the confines of the issues as determined by the Contention and Reply if in that party's sole judgment, he desired to.

There being no formal, legalized procedures before this Board, even if the 10 day limitation be a statute of limitation, it is concluded that its assertion by motion at the start of a hearing is a proper assertion of the bar.

The appeal of Keith Scott should be dismissed for lack of jurisdiction and it would be improper for the Board to comment on the merits of the case.

If required as a decision, Counsel for the Respondent shall draft Findings of Fact and Conclusions of Law, consonant with this opinion.

Dated: January 29th, 1971.

STATE BOARD OF PERSONNEL

BY

James H. Brecher
William A. Johnson
William A. Johnson
Julian D. Calhoun

Member Brecher did not participate in this Opinion.

STATE OF WISCONSIN
BEFORE THE STATE BOARD OF PERSONNEL

KEITH SCOTT, :

Appellant, :

vs. :

ORDER TO DISMISS

EDWARD E. ESTKOWSKI, CHAIRMAN, :
DEPARTMENT OF INDUSTRY, LABOR :
AND HUMAN RELATIONS, :

Respondent. :

The appellant, Keith Scott, by letter of appeal to the Board of Personnel dated September 1, 1970, and received by said board on September 3, 1970, purportedly appealed from a written notice of discharge delivered to appellant on August 18, 1970, by respondent, Edward E. Estkowski, Chairman, Department of Industry, Labor and Human Relations, pursuant to sec. 16.24 (1) (a), Wis. Stats., and a hearing before the Wisconsin State Board of Personnel was scheduled on December 4, 1970, at Milwaukee, Wisconsin. On said hearing date Robert Sugerman, attorney at law, appeared for the appellant; Arnold J. Spencer and Uclair W. Brandt, attorneys at law, appeared on behalf of the respondent.

Prior to the taking of any evidence, a motion to dismiss the appellant's appeal was made by Arnold J. Spencer and Uclair W. Brandt, attorneys for the respondent, on the ground that the Board of Personnel was without jurisdiction to hear the matter, as the appellant had failed to file his request for a hearing within the ten-day appeal period provided in sec. 16.24 (1) (a), Wis. Stats.

The Board of Personnel reserved its ruling on the motion to dismiss and heard the appeal on its merits. At the conclusion of the hearing the board requested that the parties file briefs with respect to the respondent's motion to dismiss the appeal.

After reading the briefs filed on behalf of the appellant and respondent and being advised in the premises with respect to the respondent's motion to dismiss appellant's appeal, the Board of Personnel issued its memorandum opinion

on January 29, 1971, sustaining the respondent's motion that the Board of Personnel lacked jurisdiction because the appellant failed to file his appeal from the respondent's letter of discharge until after the expiration of the ten-day appeal period provided in sec. 16.24 (1) (a), Wis. Stats.

IT IS ORDERED (1) that the respondent's motion to dismiss was timely; and (2) that the appellant's appeal is, accordingly, dismissed.

Dated: _____, 1971.

STATE BOARD OF PERSONNEL

By _____

