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 DOROTHY WAGGONER & ETHEL DENNISTON, *
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 Appellants, *
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 v. *
 *
 MANUEL CARBALLO, Secretary, *
 Department of Health & Social *
 Services, *
 *
 Respondent. *
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 Case No. 427 *
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OFFICIAL

INTERIM
OPINION AND ORDER

Before: JULIAN, Chairperson, SERPE, WILSON and DEWITT, Board Members.

OPINION

The facts recited here are based on documents on file with the Board in the administrative record of this case and on copies of the memorandum decision and judgment in Dane County Circuit Court Case No. 134-442.

This case was originally filed as an appeal from the denial of Appellants' grievance at the third step by Appellant. By a decision dated October 8, 1971, the appeal was dismissed for lack of jurisdiction. Appellants petitioned for review in Dane County Circuit Court, Case No. 134-442. The court held that the matter was within the jurisdiction of the Board, and made the following comment:

For the reasons herein stated, we deem it appropriate relief to remand this case to the Personnel Board with instructions that they take the necessary action to insure that the petitioners receive fair and accurate performance valuations for the period in question.

Counsel for the petitioners may prepare an appropriate judgment for the court's signature.
Memorandum decision dated July 21, 1972.

The ensuing judgment that was entered August 11, 1972, read in pertinent part as follows:

IT IS FURTHER ORDERED AND ADJUDGED that said Respondent Personnel Board enter an order directing Wilbur J. Schmidt, Secretary of the Department of Health and Social Services, to prepare and file a fair and accurate evaluation report

for the petitioners, Ethel Denniston and Dorothy Waggoner, for the period of April 1, 1969, through March 31, 1970, and, upon receipt of said fair and accurate evaluation reports, that said Secretary of the Department of Health and Social Services then consider and determine the eligibility of said petitioners for merit salary increases retroactive to July 1, 1970.

Following remand to the Board we entered an order on September 15, 1972, which is set forth in pertinent part as follows:

NOW THEREFORE IT IS ORDERED AND ADJUDGED that Wilbur J. Schmidt . . . is ordered to prepare and sign an appropriate evaluation report for each of the appellants herein for a merit determination for an award or denial of a merit salary increase to become effective July 1, 1970, and upon such determination, to pay such award, if any, as so determined, to the appellants herein.

By letter dated February 21, 1973, to the Board members the counsel for the Appellants stated in part as follows:

The actions of Mr. Schmidt [following the entry of the foregoing order] do not comply with the judgment and order of the Circuit Court of Dane County or the order of the State Personnel Board. In both instances Mr. Schmidt was ordered to prepare and file fair and accurate evaluation reports In view of the fact that Mr. Schmidt's failure to comply is in the first instance a violation of the order of the State Board of Personnel . . . I am asking the State Board of Personnel to renew its order to Mr. Schmidt with specific directions to prepare fair and accurate evaluation reports

The Board responded by a letter dated September 24, 1973, in pertinent part as follows:

The case comes to the Board in its role as the final step in the state grievance procedure and the court's decision was based on the Board's general authority under the predecessor subsection to Section 16.05(4) regarding the power to enforce the provisions of Subsection 2 of Chapter 16 of the Wis. stats. That Section provides that '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 sixty (60) days after the date of the Board's findings.' In view of the foregoing, the Board determined that it would not take any further action in the matter.

Despite this letter, counsel for the Board wrote Mr. Fred Hinickle of the Department of Health and Social Services on October 3, 1973, and stated that notwithstanding the September 24, 1973, letter:

. . . both Chairman Ahrens and Vice-Chairman Julian have indicated to me that whatever the validity of the Board's position as stated in that letter, they feel that the matter should have been resolved differently than it has been.

Mr. Ahrens requested that I contact Mr. Schmidt and ask him if he could not simply prepare performance evaluation reports for the two employes in question.

By letter dated October 18, 1973, Mr. Schmidt forwarded performance rating reports to the Personnel Board Chairman and advised that no merit increase for "year in question" would be allowed. Copies of this letter and the rating reports were forwarded to Appellants' counsel by the Board's secretary by letter dated October 22, 1973.

By letter dated August 11, 1975, Appellants' counsel filed with the Board a petition for hearing requesting "a hearing on the facts so that the Personnel Board may determine what is a fair and accurate evaluation report with respect to the petitioners." This petition was opposed by the Respondent and the parties have filed briefs on the question of whether a hearing should be granted as requested.

The Respondent takes the position that this petition is an attempt to enforce compliance with the Board's order following remand and as such should be denied because enforcement power is lodged exclusively in the judiciary. See, e.g., 73 CJS Public Administrative Bodies and Procedure S. 256. We do not agree that this petition should be categorized as a proceeding to compel enforcement in the sense contemplated by the foregoing citation. The record "enforce" in general means "to cause to be executed or performed, to cause to take effect, or to compel obedience to, as to enforce law or rules." Ex parte Darnell, 76 So. 2d 770, 779, 202 Ala. 71 (1954). The Appellants' petition seeks a "hearing on the facts so that the Personnel Board may determine what is a fair and accurate evaluation report with respect to the petitioners."

It was certainly contemplated by the circuit court that this determination should be made by this Board. At this juncture, the Appellants are not requesting that the Respondent be compelled to do anything. This is unlike the situation following the entry of the order on September 15, 1972, following remand. Then the Respondent had not filed any evaluation reports and the Appellants sought a compulsory order compelling the preparation of the reports.

The Respondent further contends that the petition should be denied on the ground that:

The unexcused excessive delay in petitioning for a hearing prejudices irremediably Respondent's right to prove that the performance evaluation reports herein are both 'fair and accurate.'

P. 4, letter from Respondent's counsel dated October 30, 1975.

The Appellants contend that there is no prejudice to the Respondent and that the documentation for the reports is still available.

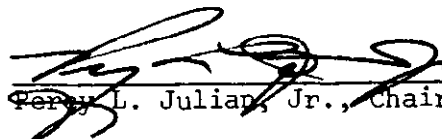
There undoubtedly is some prejudice to the Respondent's position due to the inevitable effect of lapsed time on the memories of the witnesses. However, the presence of supporting documentary materials may alleviate the prejudice to large degree. This objection by Respondent to the petition potentially partakes of equitable estoppel or laches, waiver, and failure of prosecution. Factual matter concerning the degree of prejudice and the reasons for the delay in filing the petition come into play in the consideration of whether any or all of these doctrines should be invoked. If the parties are unable to reach agreement on the submission of this objection on the basis of affidavits or other documentary evidence, we will schedule a short evidentiary hearing at which the parties may present evidence on the Respondent's objection concerning the delay in filing this petition.

ORDER

IT IS HEREBY ORDERED that counsel consult in an attempt to reach agreement concerning a manner of further proceeding in accordance with the foregoing opinion and report within fifteen (15) working days of the date of entry of this order of the results or status of these consultations.

Dated April 20, 1976.

STATE PERSONNEL BOARD


Perry L. Julian, Jr., Chairperson