STATE OF WISCONSIN STATE PERSONNEL BOARD

MAURICE H. VAN SUSTEREN,

Appellant,

v.

LESTER P. VOIGT, Secretary,
Department of Natural Resources,

Respondent.

Case No. 73-126

MAURICE H. VAN SUSTEREN,

Appellant,

v.

LESTER P. VOIGT, Secretary,
Department of Natural Resources,

Respondent.

Case No. 73-128

OPINION AND ORDER

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

FINDINGS OF FACT

These findings are based on documents contained in the files of the Wisconsin State Personnel Board or that of the Clerk of the Dane County Circuit Court. The Appellant filed an appeal in 73-126 on September 11, 1972. This was an appeal from the decision of the appointing authority removing Appellant from the permanent position of Chief, Examining Section, to Acting Chief, Research Section as set forth in memoranda dated August 28 and 29, 1972, from John Beale and Andrew Damon, respectively. It was further alleged that this action constituted a demotion and the appeal was taken pursuant to S. 16.05 (1) (e), Wis. Stats. By order entered October 4, 1972, this Board referred this appeal to the Respondent for processing as a grievance through the statewide grievance system, with the proviso that the Appellant could appeal the Respondent's decision on the grievance.

On November 6, 1972, following the remand to the Respondent and his decision, the Appellant filed an appeal with the Personnel Board from that

decision. A new Personnel Board file, 73-128, was opened for this appeal.

Approximately contemporaneously with the filing of his initial appeal, 73-126, with the Personnel Board, Appellant filed an appeal with the Director of the Bureau of Personnel. This also appealed his removal from Chief, Examining Section, to Acting Chief, Research Section, as set forth in the August 28th and 29th memoranda, alleging the violation of various statutes and further alleging that the action taken was illegal and an abuse of discretion. This case later became No. 73-127 when it was appealed to the Personnel Board.

On November 3, 1972, Appellant petitioned the Circuit Court of Dane County for review of the Personnel Board's failure to hold a hearing in Case No. 73-126, the Circuit Court case number was 137-471.

On November 6, 1972, the Appellant filed with the Personnel Board an appeal concerning failure of the Director to hold a hearing on the appeal that had been filed on or about September 11, 1972. A new Personnel Board file, No. 73-127, was opened for this appeal.

On May 16, 1973, the Circuit Court entered a judgment and order in Case No. 137-471, in pertinent part as follows:

> . . . this matter shall and hereby is remanded to the Wisconsin State Personnel Board for hearing before the Personnel Board as provided in Sec. 16.05(1)(e), Stats., with respect to the claim of the petitioner that he was demoted without just cause... .

In the meantime, Appellant petitioned the Circuit Court for review of the Personnel Board's failure to hold a hearing on his appeal of the failure of the Director to hold a hearing — i.e., Personnel Board Case No. 73-127. The Circuit Court case number was 138-189. An opinion and judgment was entered May 21, 1973. The court noted that the parties were in agreement that the record should be remanded to the Board and that 137-471 had been remanded and that "probably the issues that plaintiff seeks to be heard by that agency can include those he here complains were not heard by it." The return was remanded to the Board "for such proceedings as it determines be had and the above entitled action is hereby discontinued."

Following this remand, the parties agreed to defer proceedings in 73-126 and 73-128. Prehearing conference, August 10, 1973. The Personnel Board

entered an opinion and order January 10, 1974, in 73-127, requiring the Director to hold a hearing on Appellant's appeal in accordance with S. 16.03 (4)(d), Wis. Stats. Such a hearing was held April 2, 1974. The Appellant then presented evidence concerning his status as chief hearing examiner. A decision was entered July 15, 1974, wherein the Director stated that the issue was "Was the transfer of the Appellant to Chief of the Research Section proper?" He held that the creation of the position and the transfer was not accomplished in accordance with the Wisconsin Statutes and personnel rules and that the transfer was null and void. He ordered the Respondent to return the Appellant to his former position as hearing examiner.

This decision was appealed to the Personnel Board by the Respondent on August 29, 1974. A new Personnel Board file, No. 74-93, was opened for this appeal. The appeal was heard on the basis of the record made at the hearing before the Director. In his brief which he filed with the Personnel Board the Appellant argued that the "Evidence Clearly Establishes Mr. Van Susteren Was the Chief Hearing Examiner on August 28, 1972, And Should Be Returned to this Position." Headnote VI, p. 16, brief of Appellant. The Appellant concluded this section of his brief as follows:

> It is our position that the portion of the order by the Director of Personnel which was as follows:
>
> 'I order the Respondent to return the Appellant to his former position as Hearing Examiner.'
>
> is incorrect in that his former position was Chief Hearing Examiner.
> p. 17.

In an opinion and order entered December 24, 1974, the Personnel Board concluded "that Mr. Voigt's action in changing Mr. Van Susteren's duty assignment was unlawful," p. 17, found that Appellant formerly held the position of Chief Hearing Examiner, ordered that he be reinstated to that position, and otherwise affirmed the Director.

Respondent filed a petition for review of this decision with the Dane County Circuit Court, Case No. 145-300. The court affirmed the aforesaid decision of the Board except to the extent that the Board modified the decision of the Director by ordering that the Appellant be reinstated to the position of Chief Hearing Examiner.

The court held that the Board, pursuant to S. 16.05(1)(f), Wis. Stats., had only the power to affirm or reject the decision of the Director. Additionally, the court reversed the Board with regard to that part of its decision on the grounds that the finding was "unsupported by substantial evidence in view of the entire record as submitted," and:

> Furthermore, because his position standards as set forth in Exhibit 11 do not include any supervisory functions, he is not entitled as a matter of law to be restored to any position other than hearing examiner which is his chief function under such position standards.
> p. 18, Memorandum Decision dated May 8, 1975

The Circuit Court judgment has not been appealed. However, the Appellant has requested a hearing in cases 73-126 and 73-128. The Respondent has moved to dismiss on the grounds that the aforesaid judgement and decision in Case No. 145-300 resolved all of the factual and legal issues in these two Personnel Board cases, and that further proceedings are barred by the doctrine of res judicata. He further argues that if there is newly-discovered evidence recourse should have been to the court pursuant to S. 227.19, Wis. Stats. Finally, he suggests that since the court found that Appellant had no statutory rights to the position, a showing that Appellant had a status as chief hearing examiner would be irrelevant as there can be no legal basis for an order of reinstatement.

Appellant has submitted a D.N.R. document relating to his position as chief hearing examiner which he did not have access to at the time of the hearing before the Director. He takes the position that the Circuit Court decision is not binding on the question of his status as chief hearing examiner because "we did not present evidence to show that this was the case because that was not the issue before the Director. . . It is our position that since we did not ever try this issue, it couldn't be binding." Letter from Appellant's counsel dated November 7, 1975.

CONCLUSIONS OF LAW

It is apparent that the various Personnel Board proceedings involved here all concern the same subject matter. In his appeals to the Board, 73-126 & 128, Appellant made different legal arguments concerning the grounds for jurisdiction than were made in the appeal to the Director. This is required by the differing statutory bases for jurisdiction, SS. 16.03(4)(a) and 16.05(1)(e) and (7), Wis. Stats. However, these appeals all involve the same operative facts. If the

facts can be characterized as a demotion appeal is to the Personnel Board pursuant to S. 16.05(1)(e). If the facts can be characterized as "illegal or an abuse of discretion and . . . not subjects for consideration under the grievance procedure, collective bargaining or hearing by the board," then the appeal in the first instance is to the Director pursuant to S. 16.03(4)(a). Appellant characterized the facts alternatively and filed separate appeals simultaneously with both the Board and the Director.

The doctrine of res judicata may be broadly stated as follows:

> . . . an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.
> 46 AM JUR 2d Judgments S. 394.

Pursuant to this doctrine, a judgment by a court reviewing an administrative proceeding may be applied to bar further administrative proceedings. See 2 AM JUR 2d Administrative Law S. 499; 50 CJS Judgments S. 818.

In order for res judicata to act as a complete bar to a subsequent action there must be not only identity of the subject matter, but also of the cause of action. "However, the successful maintenance of a second action on a different cause of action may be precluded by a prior conclusive adjudication as to a particular issue involved in both adjudications." 46 AM JUR 2d Judgements S. 404.

In the cases before us the Appellant has different statutory bases for proceeding than those underlying the adjudicated matter (Board Nos. 73-127 and 74-93, Circuit Court No. 145-300). However, there is no doubt that the issue of the Appellant's status as chief hearing examiner was subject to a "Prior conclusive adjudication." At the hearing before the Director the Appellant testified and put in other evidence concerning his status as chief hearing examiner. In his brief with the Personnel Board on appeal he argued that the evidence supported a finding that he was chief hearing examiner and that the Director's decision was wrong in that regard. The new evidence he has filed does not create any new issue but goes to the question of Appellant's status as chief hearing examiner.

Further, the Circuit Court decision not only determined that the Board finding was not supported by substantial evidence but also that he was

not entitled as a mater of law to be restored to any other position than that of hearing examiner because of the position standards involved. We conclude that the doctrine of res judicata bars further proceedings on these appeals.

The judgment and order of the Circuit Court in No. 137-471 remanded the case "for hearing before the Personnel Board as provided in S. 16.05 (1) (e) . . ." In this case there are no disputed questions of fact as the res judicata determination may be made on examination of the administrative and judicial records of the proceedings involved. Both parties have had the opportunity to and have set forth their arguments in writing on the issues presented by Respondent's motion to dismiss. This is sufficient to afford a "hearing" as required by the aforesaid judgment. If there are no material facts in dispute there is no necessity for a trial-type hearing with testimony and cross examination. Producer's Livestock Marketing Association v. United States, 241 F. 2d 192, 196 (10th Cir. 1957). A full hearing is one in which "ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken." Akron, C. & Y.R. Co. v. United States, 261 U.S. 184, 43 S. Ct. 270, 277 (1923). There is no requirement of oral argument; what is required is a fair opportunity for the parties to present their positions. See Morgan v. United States, 298 U.S. 468, 480-481, 56 S. Ct. 906, 911-912 (1936):

> The 'hearing' is the hearing of evidence and argument . . . Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense.

We conclude there is no requirement for further proceedings on these appeals.

ORDER

IT IS HEREBY ORDERED that these appeals are dismissed.

Dated December 11, 1975. STATE PERSONNEL BOARD

Percy L. Julian, Jr., Chairperson