

STATE OF WISCONSIN

STATE PERSONNEL BOARD

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 MAURICE H. VAN SUSTEREN,
 Appellant,
 v.
 C. K. WETTENGEL, Director
 State Bureau of Personnel,
 Respondent.
 * * * * *

OPINION
AND
ORDER

Case No. 73-127

Before AHRENS, Chairman; BRECHER; SERPE; JULIAN; and STEININGER.
 JULIAN, writing for himself and the other Board Members.

OPINION

This appeal is an appeal from the action of the Director of the Bureau of Personnel in failing to hold a hearing pursuant to Section 16.03(4), Wis. Stats., 1971, on the Appellant's appeal alleging illegal personnel action by the Department of Natural Resources.^{1/}

On September 11, 1972, the Appellant filed two separate appeals arising out of work reassignments in the Bureau of Legal Services in the Department of Natural Resources. The one appeal was directed to Carl Wettengel, Director of the Bureau of Personnel. In it, Appellant alleged that the work assignment referred to in memoranda attached to the appeal was illegal and requested that the Director rescind the Department's action and hold a hearing under Section 16.03(4)(a), Wis. Stats. This appeal does not allege in any way that the Appellant was demoted. The other appeal was directed to the Personnel Board and the same memoranda attached to the Director's appeal were attached to this one. The second appeal alleged that the Appellant's transfer from a permanent position as Chief, Examiner Section to an acting position as acting head of the Research Section constitutes a demotion, without just cause and, further, Appellant requests a hearing before the Personnel Board under Section 16.05(1)(e).

1/ While the Department is not a Respondent in this appeal, it is a Respondent in two related appeals currently pending before the Board in Case Nos. 125 and 128, and filed a brief in this matter.

Both appeals were referred by the Personnel Board to an attorney for the Department of Administration for his opinion on jurisdiction. The attorney advised the Board that the Director's appeal was covered by the State-wide grievance procedure and if not there resolved, would be susceptible of appeal to the Personnel Board, which acts as the final step in that grievance procedure. Similarly, the attorney advised the Board that the demotion appeal should be referred to the State-wide grievance procedure, where it might be subsequently appealed to the Personnel Board or the Board under a certain suggested condition, might reinstate it as a demotion case. On October 4, 1972, the Board entered an Order On Remand, referring the demotion appeal to the third step in the grievance procedure. The Board's records do not indicate that either the Director or the Board did anything with respect to Appellant's appeal to the Director, except that on January 4, 1973, the Director wrote the Appellant a letter relating to the demotion appeal.

On November 3, 1972, the Appellant appealed to Circuit Court the Board's failure to hear the appeal grounded in his alleged demotion.

On November 6, 1972, the Appellant filed an appeal with the Personnel Board on the grounds that the Director had failed to hold a hearing on his appeal to the Director.

Also on November 6, 1972, the Appellant appealed to the Personnel Board the third step disposition of the grievance, which was created by the Board's Remand Order of October 4.

On December 27, 1972, the Appellant appealed to the Circuit Court the Board's failure to compel the Director to hold a hearing on his appeal to the Director relative to allegations attending his change in work assignment.

On May 10, 1973, in the Circuit Court appeal of the demotion case, the Court determined that all of the parties, that is, the Appellant, the Board, and the Department, agreed that the Board must hold a hearing on the matter and the Court ordered that the case be returned to the Board for that purpose.

On May 21, 1973, in the Circuit Court appeal of the failure of the Director to hold a hearing, the Court determined that likewise all of the parties agreed that matter must be returned to the Board for hearing and the Court so ordered.

On August 10, 1973, a prehearing conference was held on the three separate appeals then pending: 1) the alleged demotion; 2) the alleged failure of the Director to accord Appellant a hearing upon his appeal to the Director; and 3) the appeal from the third step of the State-wide grievance procedure. The Appellant, the Director, and the Department all appeared by counsel; however, the Director's appearance was limited to this one case in which he was named as a Respondent. The parties agreed that in the Director's hearing appeal there is no need for any kind of hearing on the facts before the Board, since there is only the legal question of the Board's jurisdiction to be resolved, and that the parties would argue that matter in briefs. Counsel for the Director has not filed a brief, while counsel for the Appellant and the Department have done so.

Appellant's contention is that Section 16.03(4), Wis. Stats. requires the Director to hear appeals of employes which allege illegal personnel action by appointing authorities. That Section provides as follows:

(a) The director or his designated representative shall hear appeals of employes from personnel decisions made by appointing authorities when such decisions are alleged to be illegal or an abuse of discretion and such decisions are not subjects for consideration under the grievance procedure, collective bargaining or hearing by the board.

(b) The director, in connection with appeals or investigations conducted by him may administer oaths, take testimony and examine such public records as are required. All officers and other persons under civil service shall attend and testify when requested to do so by the director.

(c) Any person not under the civil service who appears before the director by order shall receive for his attendance the fees and mileage provided for witnesses in civil actions in courts of record, which shall be audited

and paid upon presentation of proper vouchers; but no witness subpoenaed at the insistence of parties other than the director shall be entitled to compensation from the state for attendance or travel, unless the director certifies that his testimony was relevant and material to the matter investigated.

(d) The director shall not grant an appeal under this subsection unless he receives a written request therefor within 15 days after the effective date of the decision, or within 15 days after the appellant is notified of such decision, whichever is later. Within 45 days after the receipt of such request, the director shall hold a hearing thereon and shall either affirm or reject the action of the appointing authority. The hearing shall be open to the public except that the director may hold a closed hearing at the request of the appellant, if the request therefor is received no later than the request for a hearing.

(e) No action of an appointing authority relating to appointments shall be upset unless the action is appealed within 6 months after the effective date of the action. This limitation shall not apply when there is fraud or gross irregularity on the part of the appointing authority.

Appellant argues that the statute simply says the Director shall hear appeals relative to allegedly illegal personnel actions by appointing authorities and that in this proceeding, the Board should order him to do so.

The Department contends that the Director does not have jurisdiction, since the decision involved here is a subject "for consideration...in a hearing by the board" and, more specifically, in the pending demotion case. The Department's argument is not well taken. Appellant's appeal to the Director does not allege that he was demoted. Rather, he alleges that his reassignment contravened the provisions of Section 15.02(4), Wis. Stats. and various provisions of Chapter 16, Wis. Stats. relative to job classification, appointments, and transfers. He further alleges that the Department's action "is illegal and an abuse of discretion." The fact that the Appellant in one of the papers in the Circuit Court action on this matter referred to the action as a demotion, as the Department argues in its brief, does not determine the nature of the appeal to the Director, which carefully describes the bases of the appeal in terms of

illegalities relative to his change of assignment. Moreover, the two separate appeals make clear that the Appellant's allegation that he was demoted goes only to the circumstance that he was transferred from a permanent position in the civil service to an acting position. The illegalities he alleges in regard to the creation of the Research Section in the Bureau of Legal Services are those he included in his appeal to the Director. We conclude that the decision here involved is not a subject for "hearing by the board" as the phrase is used in Section 16.03(4)(a), Wis. Stats.

A more substantial challenge to the Director's authority in the matter arises from the language of the statute excluding those matters subject to consideration under the State-wide grievance procedure. Such procedure is found in the Administrative Practices Manual, Personnel, Employment Relations, Section I D. 1. b., which provides as follows:

b. A grievance is defined as a personnel problem involving an employe (or group of employes sic) expressed feeling of unfair treatment or dissatisfaction with aspects of his working conditions within the agency which are outside his control. However, only those complaints which allege that an agency has violated, through incorrect interpretation or unfair application:

1. a rule of the Personnel Board or a Civil Service Statute (s. 16.01 - 16.32, Wis. Stats.)

...

may be appealed to the State Personnel Board.

Since the Appellant alleges personnel action affected by a violation of Section 15.02(4), Wis. Stats., such allegation is outside the scope of the State-wide grievance procedure. Indeed, this aspect of the Appellant's claim clearly fits within the Director's initial authority regarding personnel action which is alleged to be illegal.

The Administrative Practices Manual provision, cited above, attempts to limit the jurisdiction of the Personnel Board over appeals to it arising out of the State-wide grievance procedure. The Manual has not

been authorized by the Board. Nor have these sections been approved by the Board. The Manual is the creature of the Bureau of Personnel, which has no legal authority to proscribe the jurisdiction of the Personnel Board. For purposes of this appeal, we need not reach the question whether the limits on the Board's jurisdiction described in the Manual are correct.

The Department, at the prehearing conference, raised a question concerning the Board's jurisdiction to hear appeals from Step 3 decisions in the grievance procedure. We consider that objection to be without merit. See Section 16.05(7), Wis. Stats., 1971 and Waggoner and Denniston v. Personnel Board, Dane Co. Cir. Ct., Case No. 134-422, July 21, 1972. Assuming arguendo that such an objection was well taken, it would create sufficient reason not to foreclose a Director's hearing on that ground, since in that regard both the Appellant and the Department are in agreement that the Director does have authority to hear the matter. We conclude that the Appellant should be able to urge upon the forum he selects, that is, the Director, that his claim is appropriate for the Director to hear within the broad grant of authority contained in Section 16.03(4), Wis. Stats., and is not excluded by any exception to that authority.

ORDER

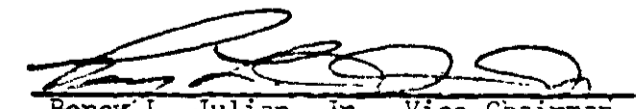
IT IS ORDERED that, within 45 days after the receipt of a copy of this Order, the Director of the Bureau of Personnel shall hold a hearing and make a determination either affirming or rejecting the action of the appointing authority on Appellant's appeal to the Director as provided in Section 16.03(4)(d), Wis. Stats., 1971.

Dated

January 10, 1972⁴

STATE PERSONNEL BOARD

BY


Percy L. Julian, Jr., Vice-Chairman