STATE OF WISCONSIN PERSONNEL BOARD

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JOHN E. MINOR,

APPELLANT,

v.

JOE E. NUSBAUM, Secretary,
Department of Administration,

Respondent.

Case No. 73-173

* *

OPINION

AND

ORDER

Before AHRENS, Chairman, SERPE, JULIAN and STEININGER.

OPINION

Background Facts

Appellant, John E. Minor, was hired by the Department of Administration under the provisions of the Emergency Employment Act of 1971 (85 Stat. 146, 42 U.S.C.A. Sec. 4871 et seq., effective July 12, 1971) and was classified as a "Career Worker B-7, Trainee." Appellant commenced his employment with the Department on August 7, 1972. Appellant subsequently entered into an "Apprentice Indenture" with the Department, which was approved by the Department of Industry, Labor and Human Relations on February 2, 1973. The Indenture provided that Appellant would apprentice "in the trade, craft or business of Maintenance Mechanic" and that said apprenticeship would continue for a period of three years beginning "on the 31st day of July, 1972."

Sometime after March 13, 1973, the position of Career Worker B-7, Trainee was abolished, and Appellant was reallocated to the classification of "Maintenance Mechanic 1 - Trainee." By certified letter of June 15, 1973, Appellant was notified that his employment with the Department of Administration as a "Trainee Maintenance Mechanic 1" had been terminated, effective June 1, 1973.

On June 27, 1973, Appellant attempted to appeal his discharge to this Board and, in the alternative, to the Director of the State Bureau of Personnel. By letter

of June 29, 1973, Patricia A. Kramer, Personnel Officer with the Department of Administration, informed Appellant that, as he was considered a probationary employee, he had no right of appeal to the Personnel Board. Ms. Kramer indicated that Appellant had a right of appeal to the Director only in cases involving illegal action or abuse of discretion by the appointing authority. Ms. Kramer further stated that "any appeal you may wish to submit regarding your discharge as an employee of the Department of Administration will have to be filed with the Circuit Court of Dane County." Appellant thereafter commenced an action in the Circuit Court for Dane County, but by stipulation dated September 21, 1973, the parties agreed "that this matter may be dismissed upon the granting of an order remanding this case to the State Personnel Board for a determination of the question of whether there was just cause for petitioner's /Appellant's/ discharge from his employment." The order, signed by Judge W. L. Jackman and dated the same day, stated that "upon the foregoing stipulation it is hereby ordered that this case be remanded to the State Personnel Board for a hearing...and determination of the question of whether respondent had just cause to discharge petitioner from his employment..." Pursuant to this order, a hearing in Appellant's case was held on February 27, 1974, before Member Serpe sitting as a hearing officer.

We find the foregoing background facts to be true and to be material to a determination of the issues in the instant appeal.

Appellant Was Classified as a Trainee and Was Serving a Probationary Period at the Time of His Discharge

An examination of the exhibits offered and received in this case reveals that Appellant was considered a trainee and was so classified throughout his employment with the Department. For example, in Respondent's Exhibit No. 9, an "Initial Determination" by the Equal Rights Division of the Department of Industry, Labor and Human Relations dated November 21, 1973, made in response to a discrimination complaint filed by Appellant on June 15, 1973, it was found that the Appellant

began work with the Department of Administration "as a career worker trainee and subsequently became a DILHR-approved indentured apprentice as a Maintenance Mechanic 1, Trainee." In Appellant's Exhibit No. 2, which is the above-mentioned complaint of Appellant before the Equal Rights Division of DILHR and which is signed by Appellant, Appellant refers to himself as a Maintenance Mechanic 1, Trainee. Similarly, in Appellant's Exhibit No. 5, which is a Progress Report on the Appellant by a superior dated December 4, 1972, Appellant's classification is listed as career worker B-7, Trainee. The Report further states that Appellant is making satisfactory progress "at this stage of training" and that "this is the first 3 months' report of a 3 year program." Appellant's Exhibit No. 6, another Progress Report on Appellant dated March 13, 1973, stated, "This is a 6 months Report of a three year training program." The training program referred to is the Maintenance Mechanic apprenticeship Appellant was then serving. Finally, Appellant's Exhibit No. 3, which is the Apprentice Indenture entered into by the Appellant with the Department, it is recited that "the apprenticeship term begins on the 31st day of July, 1972 and terminates upon the completion by the apprentice of 3 years of employment for said employer in said trade, craft or business." It is thus apparent, and we so find, that Appellant was still classified as a trainee and had completed less than a year of his training program at the time of his discharge. Under the terms of Sec. 16.22(5), Wis. Stats., Appellant was therefore serving a probationary period at the time of his discharge.

Sec. 16.22(5), Stats., provides as follows:

> "(5) An employe whose position is classified as 'trainee' shall be on a probationary period for the duration of the training program and may be separated during that period without the right of appeal, at the discretion of the appointing authority. Upon qualifying for the objective classification, he shall serve a probationary period as specified in sub. (1)."

The Apprentice Indenture expressly incorporated rules promulgated by the Department of Industry, Labor and Human Relations under Ch. 106 of the Statutes relating to apprenticeships. See Exhibit "A" of Appellant's Exhibit No. 3; Sec. 106.01(9), Stats.

A rule pertinent to our inquiry here stated as follows: "The Indenture shall state the extent of the probationary period in hours, if possible, but in no case shall it exceed six calendar months. The probationary period shall constitute part of the apprenticeship period." See 4 Wis. Adm. Code Section IND 85.08(4). The Apprentice Indenture for Maintenance Mechanics provides, as it did in the instant case, for a probationary period of precisely six months.

It is of course clear that, to the extent that a rule promulgated by an administrative agency conflicts with an express and specific statutory command, the latter must prevail. There is no statute in Ch. 106 of the Statutes which specifically sets out the maximum time periods for the probationary period of an apprentice. The six month maximum was the innovation of the Department of Industry, Labor and Human Relations. This is not therefore a case in which an attempt need be made to harmonize conflicting statutes. Sec. 16.22(5), Stats., prevails.

Before the Circuit Court for Dane County, Appellant contended that by entering into the agreement with Appellant, the Respondent had waived the applicability of Sec. 16.22(5), Stats., to Appellant's case, and the 6-month probationary period under the Indenture having past, the Appellant had attained permanent status in class. See Minor v. State of Wisconsin, Department of Administration, Dane Co. Cir. Ct. Case No. 140-140. But Sec. 16.22(5), Stats., is not a statute conferring a private right on a party which may be waived at that party's option. Rather, Sec. 16.22(5), Stats., is a statute passed for the benefit of the general public in the operation of the civil service law. We think the intent and purpose of the Legislature with respect to Sec. 16.22(5) was that it should not be amenable to waiver by the terms of a written contract. See Vic Hansen & Sons, Inc. v. Crowley, 57 Wis. 2d 106, and cases cited therein. Cf. Jones v. Preferred Accident Ins. Co., 226 Wis. 423, 425-426. See also School District v. Teachers' Retirement Fund Assoc., 163 Or. 103, 95 P. 2d 720, 125 A.L.R. 720 (1939); Grandview Inland Fruit Co. v. Hartford Ins. Co., 189 Wash. 590, 66 P. 2d 827, 109 A.L.R. 1472 (1937). We conclude that the provisions of Sec. 16.22(5),Stat

could not be waived by the Respondent's entering into the indenture with the Appellant.

Accordingly, we find that Appellant was classified as a trainee during the term of his employment with Respondent; that he was engaged in a training program during said term; and that he was serving a probationary period throughout the entire period of his employment up to the date of his discharge.

This Board is Without Subject Matter Jurisdiction of the Instant Appeal, and Such Juriscition May Not Be Conferred By Stipulation of the Parties

This Board, it need hardly be said, has only such power as the statutes confer upon it, and adherence to the terms of the statutes under which it operates is required. See Mid-Plains Tel., Inc. v. Public Serv. Comm., 56 Wis. 2d 780, 786. But cf. Evans v. Dept. of Local Affairs and Development, 62 Wis. 2d 622, 626-627. In the instant appeal we have found that the Appellant at the time of his discharge was classified as a trainee and was serving a probationary period. Sec. 16.22(5), Stats., by its terms denies to Appellant the right of appeal to this Board. Moreover, a probationary employee, by definition, has not attained permanent status in class. See Wis. Adm. Code section Pers 13.10. Sec. 16.05(1)(e), Stats., provides that this Board shall hear appeals from the discharge actions of appointing authorities of only those employees with permanent status in class. The Legislature has thus manifested its intent in two separate sections of Ch. 16 of the Statutes to deny to those situated as is the Appellant the right to appeal their discharges to this Board and to preclude the Board from exercising jurisdiction over such appeals.

Finally, Respondent in his brief, under the heading entitled "Nature of Appeal," states that "the Appellant, by stipulation of the parties, appealed the Respondent's action to the Personnel Board under the provision of Section 16.05(1)(e), Wis. Stats. (1971)." (Emphasis supplied.) But "jurisdiction of the subject matter is not conferred by consent of the parties or by estoppel." Wisconsin E.R. Board v. Lucas,

3 Wis. 2d 464, 472. See Wisconsin Gas & E. Co. v. Fort Atkinson, 193 Wis. 232, 247; Scott v. Estkowski, Wis. Pers. Bd. Case No. 379 (January 29, 1971), at p. 2. See also, Szuszka v. Milwaukee, 15 Wis. 2d 241, 243; Mitler v. Associated Contractors, 3 Wis. 2d 331, 333. The principle that subject matter jurisdiction may not be conferred on an administrative body any more than upon a court by stipulation of the parties is one of nearly universal acceptance. See, e.g. Gulf American Corp. v. Florida Land Sales Board, 206 So. 2d 457, 462 (Fla. App. 1968); Springville Com. Sch. Dist. v. Iowa Dept. of Pub. Inst., 252 Iowa 907, 109 N.W. 2d 213, 217 (1961); Insurance Company of North America v. Commissioner of Insurance, 327 Mass. 745, 101 N.E. 2d 335, 342 (1951); Soars v. Soars-Lovelace, Inc., 346 Mo. 710, 142 S.W. 2d 866, 871 (1940); Nagy v. Ford Motor Co., 6 N.J. 341, 78 A. 2d 709, 713 (1951). The only body that can confer jurisdiction on this Board is the Legislature, and where, as in the instant case, it has seen fit to deny it, we are powerless to act. This appeal must therefore be dismissed.

ORDER

IT IS ORDERED that the Appellant's appeal from the action of the Respondent is dismissed.

Dated January 3, 1975

STATE PERSONNEL BOARD

BY

William Ahern