STATE OF WISCONSIN **OFFICIAL** PERSONNEL BOARD

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EDWARD E. RYCZEK,

Appellant,

v.

C. K. WETTENGEL, Director,
State Bureau of Personnel,

Respondent.

Case No. 73-26

* *

OPINION

AND

ORDER

Before AHRENS, Chairman, JULIAN, STEININGER and WILSON.

OPINION

Background Facts

On July 1, 1964, the Appellant commenced his employment with the workmen's compensation claims unit of the Justice Department. Assistant Attorney General Gordon Samuelson was in charge of the unit which consisted of 8 lawyers, 2 investigators, and 4 legal secretaries. The unit defends workmen compensation claims brought against the State and prosecutes claims brought against third parties who negligently injured State employees. The Appellant's duties involved conducting independent investigations of each claim assigned to him, gathering evidence, evaluating the claim, negotiating with attorneys, and making recommendations to the attorney handling the case. The position requires extensive skill and experience in investigative techniques, medicine, and law. Appellant performs his duties by and large in the eastern half of Wisconsin, while another employee, R. Hillner, who has the same classification and salary range as Appellant, performs his duties in the western half of the State.

The chief investigator in the unit was Milo Ottow who trained Appellant in the job for a brief period before the Appellant conducted investigations

on his own. Mr. Ottow also performed the job of reviewing certain workmen's compensation files for evaluation submitted to the unit by the Workmen's Compensation Division of the Department of Industry, Labor and Human Relations. Mr. Ottow was an Investigator 3 at salary range 13, while Appellant was an Investigator 2 at salary range 11. Mr. Ottow had many years of experience in workmen's compensation claims investigation and litigation and retired in late 1970. He continued his employment on a limited term basis. The Appellant trained Mr. Hillner, who joined the unit after Mr. Ottow's retirement, for a brief period. Thereafter, Mr. Hillner conducted his own investigations independently.

On January 21, 1973, Appellant was reallocated to a newly created position of Workmen's Compensation Claims Investigator 2 at the same salary range he had last been assigned. The reallocation was the result of a survey of positions in the investigation series. Formerly, such positions were designated Investigator 1, 2, or 3; and as a result of the survey, 26 new classifications were created. The various position classifications were assigned to pay ranges on the basis of a hierarchy of responsibility. Senior investigators were assigned to salary range 11. Leadworkers or investigators with program responsibility were assigned to range 12. Supervisors or investigators with major program responsibility were assigned to range 13. The survey included a wide range of positions in the consumer protection field in the Department of Agriculture, motor vehicle investigation in the Department of Transportation, positions in the Insurance Commissioners Office and Public Service Commission and the Justice Department. Three positions were assigned salary range 13 not on the basis of supervisory duties, but on the basis of "program coordination" responsibilities.

On January 24, 1973, the Appellant filed an appeal with the Board. He claimed he should have a classification comparable to Mr. Ottow's former position and that he had been told he would progress into Mr. Ottow's

position upon the latter's retirement. The appeal came on for hearing before a panel of Board members consisting of Chairman Ahrens, and Members Brecher and Julian. Since then Mr. Brecher has been replaced by Member Wilson. Since only two members of the Board heard live testimony and they do not constitute a quorum of the Board, this matter has been considered by a quorum of the Board through a reading of the transcripts and the entire record.

We find the foregoing to be the background facts in the matter and will make additional findings of fact pertinent to the various matters at issue in our discussion of those issues.

Appellant's Right to Appeal the Reallocation of His Position

The Director of the Bureau of Personnel established job classifications and assigns salary ranges, subject to the approval of the Board. Bureau staff members conducted the study and the Director recommended that the new classifications and salary ranges be adopted. The matter is set for consideration at one of the Board's monthly meetings. The record does not indicate what kind of notice is given of such proposed action. In any event, the record is clear that Appellant did not receive any notice concerning the Board's consideration of the Director's recommendations concerning investigator classifications. We find that he did not receive notice of the Board consideration of such matter and conclude that his not having appeared and objected at that time does not bar this appeal.

The Board's approval of the abolishment and recreation of classifications with assigned pay ranges does not prevent it from considering this

appeal. Respondent argues that the appeal does not concern an action or decision of the Director, but of the action of the Board itself. Section 16.07(1), Wis. Stat., 1971 provides that "the director shall... establish grade levels and classifications...subject to the approval of the board." The board only has a negative control over the director's action at that point. The board does not act, it only approves or rejects the action of the director. If the director's action is approved it is no less his action. It becomes subject to Section 16.05(1)(f), Wis. Stats., 1971, which provides that interested parties may appeal actions of the director to the Board. That section makes no express exception of director actions, which were subject to approval by the Board. Pers. 26.02, Wis. Adm. Code, October 1972 provides "Personnel actions which are appealable include: (1) Position..., reallocations..." The director's action in abolishing and creating classifications is subject to board approval, while the reallocation of individual former positions in an old class to a new class, or reallocation, is appealable. We conclude that the latter action is not the action of the Board, but of the director and may be the subject of an appeal.

Burden of Proof

The question of which party should carry the burden of proof is not at issue here. The parties have agreed that the burden of proof is on the Appellant.

The issue of what the burden of proof should be has been resolved by Reinke v. Personnel Board, 53 Wis. 2d 123, 137, 191 N.W. 2d 883 (1971) where it was stated that:

> "...the standard to be used by the Personnel Board in making its findings should be that used in ordinary civil actions, to a reasonable certainty by the greater weight of the credible evidence standard."

The Appellant, therefore, must prove his case by the greater weight of the credible evidence.

The Board Must Determine Whether the Director's Action Was Correct or Incorrect on its Merits

The Director's action in reallocating the Appellant's position must be judged by the Board as to whether it was correct or incorrect and not as to whether it was arbitrary. Appellant contends that the Director's action should be affirmed, if it is correct, and rejected, if it is incorrect. The Respondent contends that the test to be applied to the Director's reallocation action is whether it was arbitrary, capricious, and without any rational basis. We agree with the Appellant.

The statute does not provide any limitation on the Board's power to examine the director's action. Section 16.05(1)(f) Wis. Stats, 1971, provides:

> "Hear appeals of interested parties and of appointing authorities from actions and decisions of the director. After such hearing, the board shall either affirm or reject the action of the director, and in the event of rejection, may issue an enforceable order to remand the matter to the director for action in accordance with the board's decisions."

The statutory language does not command that the Board reject the action of the director, only if it is arbitrary. It does not say that if the Board determines that the director's actions are incorrect that it must, nevertheless, affirm such action merely because it might also determine that the director had not been totally unreasonable. No express limitation is found in the statute and, therefore, we conclude that none was intended by the Lesiglature.

The Director's rules indicate that the standard that the Board should apply is whether the director's action was correct. Pers 3.05, Wis. Adm. Code., October, 1972, provides:

> "Reallocation or reclassification appeals. If the employee or appointing authority believes the classification action to be incorrect on the basis that the class specification on which the action was based does not adequately reflect the duties and responsibilities of the position, he or she shall, upon written request, be entitled to an appeal from such action provided in Wis. Adm. Code chapter Pers 26." (Emphasis added).

This provision quite clearly specifies that in reallocation appeals the matter to be determined by the Board is whether the classification is correct, not whether the director acted unreasonably. The Board does not adopt the view that might be implied from this provision that the only subject that might be inquired into in a classification appeal is whether the class specification adequately describes the job. Indeed, most classification appeals involve the question whether an employee is correctly classified in one or the other of two classifications and the adequacy of the class specifications is not at issue. While we do not need to consider if this particular section of the director's rules unwarrantedly limits the basis upon which the board may inquire into classification actions, we do believe it does set forth the standard of such inquiry. Namely, whether the classification action was correct.

Past Board cases have used the arbitrary and capricious standard. In Verch v. Bureau of Personnel, Wis. Pers. Bd. Case No. 138, (Sept. 8, 1963) the Board stated that:

> "The Board has no right or authority to upset or reverse an administrative ruling unless it is proved to be arbitrary, capricious, done in bad faith so as to constitute an abuse of judgement and discretion, or have been motivated by reasons religious or political."

Similarly, in Penniston v. State Bureau of Personnel, Wis. Pers. Bd. Case No. 136, (July 6, 1963), the Board stated that:

> "The action of the Bureau of Personnel on August 9, 1963... was arbitrary, capricious and without due regard for job content and hence was an abuse of administrative discretion."

These cases show that in the past this Board has used the standard of whether or not the Director's action was arbitrary and capricious in deciding whether or not to overrule his decision. We believe that in these past cases the Board was in error and they and their progeny are here overruled. Not only does the statute and the director's rules require this result, but so does Reinke, supra. There the Court said:

> "We equated substantial evidence with that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion." Reinke v. Personnel Board, at 135, citing Robertson Transportation Company v. Public Service Commission, 39 Wis. 2d 653, 658, 159 N.W. 2d 636, (1968).

The arbitrary and capricious standard is essentially the same as the standard of whether there is any substantial evidence to support the Director's decision or, as put in Robertson enough evidence to satisfy a reasonable man that the Director acted properly. Our reasoning for this is that if a reasonable man would not believe that the Director acted reasonably, then the Director's actions must have been arbitrary and capricious. Once we find that there is no real difference between the substantial evidence standard and the arbitrary and capricious standard, our decision that the use of the arbitrary and capricious standard is improper is dictated by Reinke, where the Court stated that:

> "The substantial evidence test is applicable only on judicial review and therefore the Board misinterpreted its functions when it found there was substantial evidence to support the action of the appointing authority." Reinke, at p. 134.

In other words, the test of arbitrary action is a judicial test of the decisions of administrative agencies, such as the Board. The Board's function is that of a hearing agency where the individual State employee

and the State official meet on an equal footing to present their evidence and argue their cause before an impartial agency impowered to decide the dispute. The arbitrary standard is no more applicable to the Director's actions than it is to disciplinary action by appointing authorities. Reinke applies to both.

Appellant's Position Was Correctly Assigned to Pay Range 11

On or about July 1, 1964, Appellant was hired as an Investigator. At that time, he was advised by Mr. Ottow, Mr. Samuelson, and Mr. Sieker, another Assistant Attorney General, that upon Mr. Ottow's retirement the Appellant would advance to Mr. Ottow's Investigator 3 classification. In the administration of a merit system based upon a competitive examination neither Ottow, Samuelson, nor Sieker had any authority to give such advice or to make such a promise.

We find the Appellant's present duties are not the same as those formerly performed by Mr. Ottow. Mr. Ottow was the Chief Investigator in the unit and was generally regarded as the Appellant's supervisor. Mr. Ottow assigned cases to either the Appellant or himself, by and large, on the basis of whether they arose out of the eastern or western part of Wisconsin, but in addition, on the basis of their respective workloads. Furthermore, Mr. Ottow reviewed and evaluated certain case files submitted to the unit by the Workmen's Compensation Division of DILHR and had primary responsibility for that work. Even with Mr. Ottow's retirement he continued to perform such work on a limited-term basis, and the Appellant now performs such work only in Mr. Ottow's absence. Moreover, Mr. Hillner also does this same work on occasion. We conclude, therefore, that one of the reasons Mr. Ottow

was classified as Investigator 3 under the old series, with a salary range 13, was because he performed supervisory duties and had supervisory responsibilities.

We find that the duties and responsibilities of the Appellant's position are adequately described in the class specifications for Workmen's Compensation Claims Investigator 2. Appellant's duties involve basically work similar to other senior investigators and do not involve duties and responsibilities involving the supervision of other investigatory personnel or responsibilities for coordinating investigative programs. These latter elements are common to class specifications for positions assigned salary ranges 12 and 13.

We find that the Appellant performs the same work in the eastern part of the State as Mr. Hillner performs in the western part of the State. Their work is for all practical purposes identical and we conclude that they are both appropriately classified as Workmen's Compensation Claims Investigator 2's.

We conclude that the Respondent's action in reallocating the Appellant's position to the Workmen's Compensation Claims Investigator 2 class was correct.

ORDER

IT IS ORDERED that the action of the Respondent is hereby affirmed.

Dated July 3, 1974

STATE PERSONNEL BOARD

BY

Percy L. Julian, Jr., Vice-Chairman