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MAURICE H. VAN SUSTEREN,

Appellant,

v.

LESTER P. VOIGT, Secretary, Department
of Natural Resources, and C. K. WETTENGEL,
Director, State Bureau of Personnel,

Respondents.

Case No. 74-105

* * * * *

OFFICIAL

OPINION AND ORDER

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

NATURE OF THE CASE

This is an appeal of an action of the Director of the Bureau of Personnel alleging that he dismissed an appeal filed pursuant to S. 16.03 (4), Wis. Stats., without a hearing.

FINDINGS OF FACT

The Appellant is a permanent employe in the classified service with the Department of Natural Resources. His appeal to the Director was filed September 5, 1974 and concerned a denial of a merit increase which occurred July 18, 1974, alleging that the denial was improper on a variety of grounds. This appeal was dismissed by the Director as untimely. The appeal of the dismissal to this Board alleges as error only that the Director failed to hold a hearing on the appeal pursuant to S. 16.03 (4) (b).¹ The relief requested is as follows:

Wherefore, the Appellant prays the Wisconsin State Personnel Board review the action of the Director in failing to hold the required statutory hearing and order an immediate hearing and grant the Appellant such other relief as may be appropriate.

¹A stipulation between the Appellant and Respondent Wettengel, a copy of which is attached hereto as Appendix A, formulates a different issue.

The subject matter of the appeal to the Director, the merit increase denial, was also pursued in a contractual grievance procedure initiated July 23, 1974. In a decision dated March 26, 1975, the arbitrator allowed Mr. Van Susteren's grievance and granted the merit increase.

The appeal is now before us on Respondent Voigt's objections to the subject matter jurisdiction of the Board. The foregoing facts were stated in Respondent Voigt's brief and were admitted by Appellant.

CONCLUSIONS OF LAW

Appellant's appeal to this Board concerned as it is only with an allegation of the Director's failure to hold a hearing as required by S. 16.03 (4), Wis. Stats., does not present any cognizable issues for the Board at this juncture. As noted above, the Appellant won his grievance concerning his merit increase. It would certainly serve no real function for this Board to order the Director to hold a hearing on Appellant's appeal concerning the denial of the merit increase, as this issue was finally determined in the arbitration. However, in his brief the Appellant urges that we hear his appeal on the merits of the allegation concerning the denial of the merit increase, as part of our general superintending role vis-a-vis the state civil service administration:

In the interests of greater efficiency in the mechanisms of the Department of Natural Resources, the State Personnel Board, in compliance with the general mandate of Wis. Stats. 1973 Sec. 16.001 and 16.017 ought to decide if the present procedure of the Department of Natural Resources is adequate to conform with the command of Sec. 16.086 (5) and (7), p. 2

Appellant goes on to argue that the Board should apply relaxed standards of standing akin to those adopted by certain courts in the context of taxpayers' public interest lawsuits.

Appellant's position is complicated by the consideration that his appeal to the Director was clearly out of time. Sec. 16.03 (4) (d), Wis. Stats., requires that the request for appeal be filed within fifteen days of the effective date of the decision or the date the Appellant receives notice of the decision. The merit increase denial occurred on July 18, 1974, and Appellant must have had notice no later than July 23, 1974, when he filed his first step grievance. Appellant did not in his brief discuss the timeliness problem. Respondent Voigt anticipated in his brief an argument that "respondent's alleged non-compliance with various statutes

represents a continuing violation which can be contested at any time." We agree with Respondent that this interpretation "would render meaningless both S. 16.03 (4) (a) and S. 16.03 (4) (d)." p. 10.

Appellant's suggestion presents a further problem. We have no statutory jurisdiction over a direct appeal from a denial of a merit increase. Such decisions must be appealed in the first instance to the Director via S. 16.03 (4), Wis. Stats. Appeal from the Director's decision is then to the Personnel Board via SS. 16.03 (5) and 16.05 (1) (f).

We conclude that the subject matter of Appellant's appeal before this Board is moot as a result of Appellant's prevailing in arbitration. We decline to interpret his Board appeal as an appeal of the merits of the denial of his merit increase denial as that appeal to the Director was clearly untimely, its subject matter has also been mooted by the arbitration, and there is no statutory basis for us to hear such an appeal.

The foregoing would appear to dispose of Respondent Voigt's motion, except for the stipulation entered into between the Appellant and Respondent Wettengel, a copy of which is attached hereto as Appendix A. This stipulation in effect attempts to create a new substantive issue, a new appeal to the Director, and a new appeal to this Board. The two parties agreed that the Director would investigate D.N.R.'s alleged failure to follow the statutory and administrative code provisions regarding merit pay and issue a report. It was further stipulated that this report would be appealable to the Board as if it were a decision following a hearing conducted pursuant to S. 16.03 (4).

This stipulation is an inadequate basis for Board jurisdiction. The essence of Appellant's claim runs to the Department of Natural Resources and Respondent Voigt. See paragraphs 2 and 3 of the stipulation. Voigt is a necessary party to any further proceeding before the Board, as the parties stipulated in paragraph 5, but he did not agree to the stipulation. The stipulation is in derogation of statute, S. 16.03 (4), in at least one respect, and does not provide a basis for Board jurisdiction in the absence of an agreement among all the parties.

The stipulation attempts to avoid the fifteen day time for appeal contained in S. 16.03 (4) (d). The stipulation refers to a continuing status — the failure of the Department of Natural Resources to comply

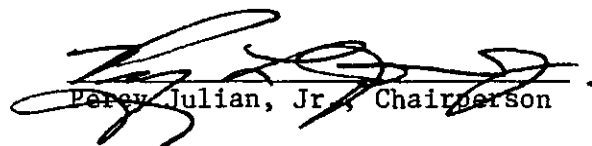
with statutory and administrative code requirements regarding a merit pay administration plan — rather than to a discrete action such as the denial of Appellant's increase. This part of the stipulation raises a number of questions. If an employe has a complaint about an ongoing act or omission of the employer, it is one thing to say there is no specific date when that act or omission affects the employe in such a way that the time for an appeal should commence to run. It is quite another thing when the ongoing act or omission affects the employe in a specific, tangible way such as the denial of a merit increase. The failure of statutory compliance in the administration of the merit increase program within the department is a basis for arguing that the denial was improper. It should not under these circumstances provide an ongoing basis for appeal. A different approach would mean that an allegation of an ongoing defect in personnel administration procedure would provide a continuous period of appeal, and render meaningless the fifteen day appeal time requirements.

It may be that the parties could stipulate to such an appeal, and we do not mean to imply by this decision that they could or could not. However, we are not faced with such a stipulation since a necessary party did not stipulate and opposes Board jurisdiction. We conclude that under these circumstances the stipulation is an inadequate basis for subject matter jurisdiction and the appeal must be dismissed.

ORDER

IT IS HEREBY ORDERED that this appeal is dismissed.

Dated December 4, 1975. STATE PERSONNEL BOARD


Percy Julian, Jr., Chairperson

PERSONNEL BOARD
STATE OF WISCONSIN
MADISON

STATE OF WISCONSIN

PERSONNEL BOARD

1974 FEB 18 AM 10 46

MAURICE VAN SUSTEREN,

Appellant,

STIPULATION

vs.

Case No. 74 105

C. K. WETTENGEL,

Respondent.

The named parties to the proceeding, stipulate and agree that:

1. It is stipulated and agreed that the matter in controversy in this proceeding does not include whether Mr. Van Susteren is entitled to a \$27.00 per month merit pay increase and that the matter is now the subject of an arbitration proceeding between Mr. Van Susteren and the State.

2. The essential claims in this proceeding involve the allegation contained in paragraph 2 of the appeal that the Department of Natural Resources has failed to comply with Wis. Stats. 16.086(5)(a), paragraph 1, and the Wisconsin Administrative Code Pers 5.03(6).

3. The parties agree that this matter shall be held in abeyance while the Director investigates this allegation and files with the Board, with a copy to Mr. Kaufmann, a written statement of his findings and conclusions with regard to whether any illegal acts have taken place in that respect, and what, if any, remedial order or directives he will put into effect to remedy any violations he might find.

The investigation shall include but not be limited to the question of determining whether or not the Department of Natural Resources has filed a merit increase plan pursuant to Pers 5.03(6)(b) and whether or not there has been any violation of that part of Section 16.086(5)(a) paragraph 1 which says: "Increases shall be granted only on the basis of meritorious service." The Director also agrees that during the course of the investigation that the investigator will in addition to consulting with the appropriate personnel from DNR, also consult with Mr. Kaufmann before a final determination is made.

It is further agreed that upon the Director completing his report, the Appellant may ask the Board to schedule a full evidentiary hearing on the merits of the controversy in the same manner as if the Director had conducted a hearing under 16.03(4) and that his report constituted action or decision after such hearing, and that the Appellant had taken a timely appeal from such action. It is understood that this report will not be part of the record before the Personnel Board unless and until it is admitted into evidence at any evidentiary hearing.

5. It is agreed that the Department of Natural Resources is a necessary party to this proceeding and that they shall be sent an informational copy of the stipulations and the conference report and invited to state their position as regards any of the specific stipulations in the matter and participate in all further proceedings, but that all parties executing this stipulation will be bound by it.

6. The parties stipulate and agree that the Director's report shall be completed within 20 working days of the execution of this stipulation.

7. The report shall contain a statement indicating the persons contacted in the investigation and the documentary evidence reviewed in the process of making the report.

Dated this 27th day of December, 1974, at Madison, Wisconsin.

C. K. Wettengel
C. K. Wettengel

Maurice Van Susteren
Maurice Van Susteren