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WALTER B. BURKHOLDER, \*

Appellant, \*

v. \*

C. K. WETTENGEL, Director, State \*

Bureau of Personnel and \*

BARBARA THOMPSON, State \*

Superintendent, Department of \*

Public Instruction, \*

Respondents. \*

Case No. 74-106 \*

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OFFICIAL

OPINION AND ORDER

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

NATURE OF THE CASE

This is an appeal from the denial of a reclassification from Education Consultant 1 to Education Consultant 2. The parties stipulated that this appeal presents the following issues:

1. Is the exclusion of the function of Pupil Transportation from the class specification of Education Consultant 2 appropriate?
2. Does the State Personnel Board have the authority to change a class specification which has previously been approved by the State Personnel Board?
3. Was the basic review procedure properly applied in rejecting the request of the Appellant to be reclassified to an Educational Consultant 2?
4. Was the State Superintendent correct in concluding that Mr. Burkholder was properly classified as an Education Consultant 1 and denying his reclassification to an Education Consultant 2?

FINDINGS OF FACT

The Appellant was appointed to the position of Public Instruction Supervisor, Department of Public Instruction, in the area of Public Pupil Transportation, salary range 16, on December 19, 1970. Prior to accepting

this appointment, Appellant had had approximately twenty-two years experience as a teacher and administrator and immediately prior to this time had been a school district administrator. He had discussed with personnel administrators at the Department of Public Instruction two other positions with D.P.I. besides transportation specialist, in finance and school organization. The Appellant was offered and decided to accept the position in pupil transportation. The Appellant worked part-time for D.P.I. until July 1, 1971, when he began full-time employment. He accepted a substantial decrease from his salary at the school district when he accepted the position with D.P.I.

Prior to the date of Appellant's appointment on December 19, 1970, the Bureau of Personnel had under consideration a revision of the Public Instruction Supervisors and related series. Consequently, and in February, 1971, the Appellant's position was reallocated to Education Consultant 1. The Appellant was not notified of the reallocation prior to the commencement of full-time employment with D.P.I. The revised series included a new classification of Education Consultant 2 which was in the line of progression from the Education Consultant 1. The class specifications for Education Consultant 2 under "Areas of Specialization" excluded pupil transportation:

Similar to those for the Education Consultant 1 with the exception of pupil transportation.

This exclusion effectively precluded the Appellant or anyone else in that classification specializing in pupil transportation from advancing to the 2 level, or, for that matter, receiving any promotion in the classified service while remaining an Education Consultant 1 specializing in pupil transportation.<sup>1</sup> Appellant was never advised of this restriction in the class specifications until, in the course of this appeal, he became aware of this at the prehearing conference held in February, 1975.

The rationale for the exclusion of the pupil transportation specialists, Education Consultant 1 (there was and is only one other besides Appellant) is as follows,<sup>2</sup> and the Board adopts these as findings. Compared to the

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<sup>1</sup>Prior to this reallocation there was no opportunity for promotion for persons who remained in a consultant classification.

<sup>2</sup>The Appellant has not challenged other aspects of the new class specifications.

other areas of specialization, pupil transportation involves recommendations which have less impact, requires less technical expertise to perform the duties, and produces materials which affects persons at lower professional levels and which are educationally less complex. The Education Consultant 2 classification, as such, was designed to permit recognition of and increased remuneration for, a small percentage of, educational consultants, who were recognized as performing outstanding work and as leaders in their fields.

The Department of Public Instruction developed a system of processing reclassifications to the Education Consultant 2 level, which was contained in the D.P.I. Policy and Procedure Manual, Bulletin Number 53.76, effective February 1, 1971, revised April 1, 1973. On April 15, 1974, all D.P.I. employes classified as Education Consultants 1 received a management information bulletin informing them that applications for reclassification to Education Consultant 2 were being accepted. Neither bulletin mentioned that pupil transportation specialists were ineligible for such reclassification.

In any event, the Appellant filed an application for reclassification on May 30, 1974. The reclassification policy required the Appellant's immediate supervisor and/or division administrator to recommend approval or rejection and to provide a rationale for the recommendation. However, the Appellant's supervisor and division administrator forwarded the application without recommendation or comment.

The application was reviewed by the review board established pursuant to Bulletin No. 53.76. The bulletin calls for a review board consisting of one Education Consultant 1, two Education Consultants 2, one university faculty member in the area of specialization, and the department personnel officer. The review board which initially considered, and denied, Appellant's application, did not contain a faculty member. This was pointed out following an investigation by the Bureau of Personnel after Appellant had appealed this first denial to the Personnel Board. The parties agreed that because of the defect in the membership of the committee, the Personnel Board appeal would be held in abeyance while a reconstituted board considered Appellant's application, and this ensued.

In the course of the second review, the Appellant submitted the names of three university professors who the Appellant stated had competency in the area of pupil transportation services. One of these professors was consulted

regarding Appellant's application, but the professor did not take part in Appellant's interview with the other members of the committee. The other members of the committee consisted of three Education Consultants 2 and the department personnel officer. One of the Education Consultants 2 had been at the one level when he was appointed to the committee but subsequently, before the consideration of Appellant's application, was promoted to the two level.

The committee unanimously recommended disapproval of Appellant's second application to the State Superintendent, and it was disapproved. The committee determined, and we find, that the evidence submitted in support of his application did not meet the criteria for promotion contained in Bulletin No. 53.76. The items that the Appellant submitted with his application were a cover letter and two publications entitled, "The Driver's Role in Safe School Transportation - A Handbook for the School Bus Driver" and "Driving a School Bus - A Training Course for Wisconsin School Bus Drivers."

Appellant's cover letter (Respondent's Exhibit 16) provided certain information which is set forth in part as follows:

The item concerning performance evaluations is not completed because I do not have the information. I have received no evaluations of my work since I completed the probationary period in 1971 excepting from a letter I received from the state superintendent in 1972 granting me a small interim merit salary increase. Having heard nothing to the contrary I assume my job performance level has been rated high.

Most of the work I perform as pupil transportation consultant is with people in the local school districts rather than with committees and organizations at the national level. Thus, opportunities for national recognition are extremely limited - although requests for information and publications from throughout the nation indicates that our work is recognized. I have no doubt that my professional expertise is recognized by the many individuals and agencies within the state with whom I have worked.

I note on the application form that approval for reclassification is based on high levels of competency and performance. It is quite difficult for an applicant to prove either, but it is my judgment that I am recognized as an authority on the many factors involved in pupil transportation services and that I am performing my job responsibilities at a high level of effectiveness.

On the application form itself (Respondent's Exhibit 6) the Appellant listed several workshops or seminars on pupil transportation he had attended and the two previously mentioned publications on school bus driving. He also listed his professional preparation, a master's in school administration with 11 additional graduate credits and 25 years experience.

The university professor was consulted prior to the meeting with the Appellant by the rest of the committee. The professor was asked several questions about the Appellant from a standardized form including the following:

Would you accept this person as a colleague?

As a professional in his/her field of endeavor, is he/she highly visible in the state or nation?

Has this person had a significant effect on the design of teacher education in Wisconsin?

Does this person have potential for professional growth?

Has this person demonstrated scholarly abilities in his/her field of endeavor?

At the interview between the Appellant and the other members of the review committee, the Appellant did not submit additional evidence in support of his application.

#### CONCLUSIONS OF LAW

#### RELATIONSHIP OF THE ISSUES

The issues to which the parties stipulated at the prehearing conference and which are set forth above provide an adequate framework for the decision of this case. However, we conclude that under the facts which were brought out at the hearing the first and fourth issues, concerning the correctness of the exclusion of the pupil transportation specialists from eligibility for reclassification, and the correctness of the denial of Appellant's request for reclassification, tend to merge and cannot be considered in isolation.

There are only two Education Consultants 1 specializing in pupil transportation in state service, of which the Appellant is one. Regardless of whether or not the Appellant prevails in a dispute over the correctness of the exclusion as a general question, it cannot be gainsaid that if he could show that he in fact met the criteria for Education Consultant 2, except

for the exclusion, then it would be difficult to uphold the exclusion, particularly since the Respondents' rationale for the exclusion relates to the criteria for the two level position.

We assume that there may be cases where the state could successfully defend a categorical exclusion of a certain sub-specialty from promotion within a series, despite the fact that a given employe in that sub-specialty could demonstrate that he or she could meet the other criteria for promotion. We conclude that on the record in this case, where there are only two employes affected, that the Appellant is not required to demonstrate the incorrectness of the exclusion before he may be allowed to attempt to demonstrate that he meets the other criteria for promotion.

PERSONNEL BOARD'S AUTHORITY TO  
REVIEW CLASS SPECIFICATIONS IT HAS  
PREVIOUSLY APPROVED

The class specifications for Education Consultant 2 exclude pupil transportation as an authorized specialization. Respondents contend that since the Personnel Board was required to approve these specifications before they could become law, pursuant to S. 16.07 (2), Wis. Stats., that we do not have the authority at this point to review these specifications on appeal.

In Ryczek v. Wettengel, Wisconsin Personnel Board 73-26, July 3, 1974, we held that the fact that the Board approved a reallocation does not prevent it from acting on an appeal of the reallocation by the affected employe. See pages 3-4 of that decision. For the reasons there expressed we conclude that we may properly rule on the correctness of the class specifications involved in this appeal.

CORRECTNESS OF THE PUPIL  
TRANSPORTATION EXCLUSION

Determination of the substantive correctness of that part of the Education Consultant 2 specifications which excludes pupil transportation requires that we determine whether the ensuing classification meets the broad general criteria found in S. 16.07 (1), Wis. Stats.:

Each classification so established shall include positions which are substantially similar in respect to authority, responsibility, and nature of work performed. (Emphasis supplied.)

The Respondents presented a colorable case that there were significant inherent differences between the subject matter connected with pupil transportation and that connected with the other consultant areas to justify the difference in classification. The Appellant did not introduce evidence comparing the duties and responsibilities of his position and those of other consultants, or otherwise come to grips with the question of the general correctness of the exclusion. However, we concluded that Appellant will not be restricted to proof relating to the abstract correctness of the exclusion on its face. Inasmuch as we also conclude that Respondents failed to follow the correct procedure in effectuating the reallocation within this series, we limit our conclusion at this point to the conclusion that the class specifications for Education Consultant 2 insofar as they exclude the area of pupil transportation are on their face substantively correct.

There is another factor present concerning the procedure utilized in effectuating the reallocation. No one advised the Appellant of the reallocation which occurred in February, 1971, essentially creating the Education Consultant series from the public instruction supervisor and consultant series. S. Pers. 3.04, Wisconsin Administrative Code, provides: "Whenever a position is reclassified or reallocated, the appointing authority and the incumbent shall be notified in writing." The Respondents' position is that although the Appellant had been appointed to the position and was employed in the position on a part-time basis pending his availability on a full-time basis, that he should not be considered an "incumbent" for the purposes of this section of the administrative code because he had not yet started on a full-time basis.

We conclude that in the context of S. Pers. 3.04, "incumbent" must be interpreted to include a person in Appellant's circumstances. At least one of the major functions of this requirement of notice to incumbents is to ensure that persons whose positions are affected by important personnel decisions are made aware of these decisions. Given the Appellant's commitment to the then Public Instruction Supervisor position in February, 1971, his interests in being made aware of the reallocation were as strong as if he were employed full-time. Given the potential flexibility of his position in February when he conceivably might have changed his mind about accepting the

position if he had been made aware of the details of the reallocation, his interests in notice might even have been greater at that point.

This conclusion is reinforced by the Respondents' evaluation of the importance of notice. The failure of notice was candidly acknowledged as a "massive error." T., May 7, 1975, p. 101.

Although the Respondents erred in failing to notify Appellant of the reclassification, through inadvertance they allowed him to apply for Education Consultant 2 and considered his application on the merits without regard to the exclusion of pupil transportation specialists. We conclude that this has essentially cured the error, at least to the extent that these terms are meaningful within the confines of the Board's jurisdiction,<sup>3</sup> and to the extent that Respondents' consideration of Appellant's application was fair and in accordance with applicable standards. If the consideration of Appellant's application was not fair and in accordance with applicable standards, then the denial of Appellant's application for reclassification must be rejected, and he must be given the opportunity to have his application considered properly. In other words, the failure of notice to Appellant does not void the class specifications, but the Appellant should be given the opportunity to compete for the position regardless of the exclusion.<sup>4</sup>

WAS THE STATE SUPERINTENDENT  
CORRECT IN DENYING APPELLANT'S  
REQUEST FOR RECLASSIFICATION

A. COMPLIANCE WITH PROCEDURE

The parties to this appeal stipulated as follows at the prehearing conference:

The parties stipulate that the basic standard procedure of the Department of Public Instruction which is utilized in connection with determinations on whether or not someone should be reclassified to Education Consultant 2 is valid and proper if followed.

Appellant contends that this procedure, contained in Bulletin No. 53.76, was not followed in a number of respects.

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<sup>3</sup>Our remedies on appeal are limited by statute, S. 16.05 (1) (f), Wis. Stats.: ". . . the board shall either affirm or reject the action of the director . . . ." It may be that there is a causal connection between the failure of notice and Appellant's current career status that has damaged him financially. However, on this record this is speculative and in any event related to matters outside our jurisdiction.

<sup>4</sup>Since the issues overlap, if Appellant can demonstrate his suitability for the position but for the exclusion, he will also demonstrate the invalidity of the exclusion.



He contends that there was no Education Consultant 1 on the committee as was required. The Respondents in response contend that there was an initial appointment of an Education Consultant 1 to the committee and the fact that he was subsequently advanced to the two level does not control. The bulletin, paragraph 5, page 3, states:

The State Superintendent shall establish a review board consisting of the following members: two Education Consultants 2, one Education Consultant 1, one university faculty member in the area of specialization, and the Department personnel officer as a presiding officer of the board.

There was no serious argument concerning the reason for having the Education Consultant 1 on the committee, and we conclude that it was to provide a peer evaluation of the applicant. The Respondents argue that this was provided, in effect, because the member who had been promoted had experienced some tenure in the one level. This is unconvincing. The same argument theoretically could be made concerning the other Education Consultants 2 on the committee since all had to have reached that level by reclassification from the one level. Furthermore, the two level was newly created vis-a-vis the date of the bulletin, so that none of those at the two level would have had extensive incumbencies at that level. Finally, only a very small percentage of Education Consultants were to be classified at the two level, so the imbalance on the committee was particularly marked.

The vote of the committee was unanimous against recommending Appellant for reclassification, so that an error in the makeup of the committee might be viewed as harmless in one respect. However, the requirement of a peer member on a review committee implies that that member will provide a point of view and influence that might affect the decisions of the other members. Therefore, we conclude that the omission of an Education Consultant 1 from the committee that reviewed Appellant's application is not a harmless error.

Appellant also objects to the fact that the university professor was not physically present at Appellant's interview. As we noted above, the parties stipulated that the procedures in Bulletin 53.76 are "valid and proper if followed." These procedures nowhere require a personal meeting between the committee members and the applicant. If, as in this case, some of the board members elect to grant an interview with the applicant, we conclude there is nothing in the procedures that would prevent those members from soliciting the views of the absent member, either before or after the interview.

The Appellant also objected to the questions asked the professor, which related to his academic and professional standing. The Appellant's position is that he understood the role of the professor to be that of providing technical background and expertise to the rest of the committee, that he submitted the professors' names with that in mind, and that it was unfair to ask the questions that were asked. The procedures do not specify the role of the professor, and accordingly we conclude that it was not improper to involve him in the evaluation of the Appellant with regard to any and all criteria.

Finally, Appellant points to his immediate supervisor's failure to comply with paragraph 5 on page 4 of the bulletin:

5. The immediate supervisor shall recommend to the division administrator either approval or rejection of each application. In either application or nomination action, the immediate supervisor shall provide the division administrator with the documented specific references and rationale upon which the recommendation was based.

Respondents acknowledge that this was not done but advance two arguments in support of their position that this omission somehow should be waived.

First, they again propound a type of harmless error theory. One of their witnesses who was a member of the review committee testified in essence that he would have voted the same way even if there had been compliance. This testimony was based on the witness's examination of a memo prepared by Appellant's supervisor after the committee decision and in response to a request made by an agent of Respondent Burkholder that he indicate his rationale for approval or disapproval of Appellant's application.<sup>5</sup> We conclude that the omission was a material variance from the procedures set forth in the bulletin and cannot be excused under a harmless error theory. Even if there were a fair degree of equivalence in the subject matter of the memo the witness looked at and the material that the supervisor might have submitted with Appellant's application, the witness was only one member of the committee, and there was no evidence that the other members would have reacted the same.

Respondents also argue that Appellant had the responsibility for ensuring that his supervisor processed his application in accordance with the procedures contained in the bulletin, and is now in some manner estopped

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<sup>5</sup>This request was made in the course of preparing Respondent's case for Board hearing.

or otherwise prevented from complaining about any inadequacies in that processing. We conclude on this record that Appellant had a right to assume that his superiors would comply with established agency procedures in processing such an application, and was not required to check on each stage of the proceedings for such compliance as a prerequisite for raising non-compliance as error in a later appeal.

B. THE CORRECTNESS OF THE STATE  
SUPERINTENDENT'S SUBSTANTIVE DECISION TO DENY  
THE RECLASSIFICATION

Based on the record before us we must conclude that Respondent Thompson was not substantively incorrect in denying Appellant's application for reclassification to Education Consultant 2. It is unclear whether the Appellant took the position that the criteria set forth in Bulletin No. 53.76 are not in compliance with the criteria contained in the class specifications for Education Consultant 2. In any event, on this record we conclude that the criteria found in the bulletin comply with the criteria found in the class specifications. The main difference between the class specifications for Education Consultant 1 and 2 is not so much in the area of the nature of the duties performed as it is the scope of the position's impact and the level of professional leadership of the person in the position. The criteria contained in the bulletin do provide guidelines for the evaluation of these and other factors.

We further conclude that the committee was not incorrect in its finding that the Appellant's qualifications did not meet the criteria contained in the bulletin and the class specifications. The Appellant submitted little or nothing to document the various areas of consideration. The documents he submitted and the workshops and seminars he listed on his application form are what might be expected from a person with average qualifications for that position discharging his duties as an Education Consultant 1 in a normal manner. We have no basis for concluding that the committee was incorrect in its determination, based on the material submitted, that Appellant did not have the very high level of competence and leadership position required by the specifications.

DISPOSITION OF THIS CASE

We conclude we must reject the actions of the Respondents denying Appellant's reclassification, inasmuch as they failed to observe the


procedures set forth in Bulletin No. 53.76. This does not entitle Appellant to be reclassified to Education Consultant 2; he is entitled, however, to have an application for such reclassification processed in accordance with the procedures set forth in the bulletin. If he then satisfies the criteria for reclassification other than the pupil transportation exclusion, he is entitled to be reclassified.

ORDER

IT IS HEREBY ORDERED that the actions of the Respondents denying Appellant's request for reclassification to Education Consultant 2 be rejected, and this matter is remanded for action in accordance with this decision.

Dated November 25, 1975.

STATE PERSONNEL BOARD

  
Percy L. Julian, Jr., Chairperson