STATE OF WISCONSIN STATE PERSONNEL BOARD

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RHONDA BRODBECK,

Appellant,

v.

ROBERT W. WARREN, Attorney General, and C. K. WETTENGEL, Director, State Bureau of Personnel,

Respondents.

Case No. 74-114

* *

OPINION AND ORDER

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

NATURE OF THE CASE

This matter was filed as "a grievance, under S. 16.05(4), Wis. Stats." Appellant's grievance dated October 2, 1974, p. 1. It involves the termination of a limited term employe who had approximately two years of employment prior to termination and who alleges that this conferred some form of vested interest in the position in question. She further alleges a connection between the termination and some communications she made to her supervisors concerning her status. At the prehearing conference the Respondents moved to dismiss on a number of grounds:

1. An LTE has no rights by statutes or under the Administrative Code.

2. If an LTE has any rights at all, the right involved in this case would be covered by Section 16.05(2) which has within it an expressed 15-day time limit which was not met.

3. This proceeding was commenced more than 14 months after the Appellant was given notice of termination and counsel for the Respondent would like to invoke the doctrine of estoppel by laches.

4. Section 16.05(4) should not be invoked in this case because if it is, 16.05(2) has no meaning.

5. Relative to subsection 4, if the Board has the discretion to hear a case such as this, counsel for the Respondent does not feel the Board should honor it because there is no remedy available. Nowhere in the law do we find the authority for the Board to

reinstate a person to a permanent position when the person was never a permanent employee, nor for the Board to order back pay wages to an LTE employee who has no rights to such.

FACTS

The following facts were alleged in the Appellant's grievance. For the purpose only of deciding this motion, we assume as true all of the facts set forth in that grievance, as follows:

Ms. Rhonda Brodbeck was hired as a Limited Term Employee (LTE) by the Department of Justice on or about August 1, 1971. Her position was classified as Typist II. On or about August 16, 1971, Ms. Brodbeck began her duties which, at the time, were to have consisted of collection work on defaulted student loan accounts for the Board of Regents of the Wisconsin State Universities. At this time she was classified as a Typist III. She began work on a full-time basis, i.e. forty hours per week, and continued to work full time for the duration of her employment. When Ms. Brodbeck began her work, no termination date was placed on her position.

Despite the verbal limitations placed on the scope of her employment, described above, Ms. Brodbeck also handled collection work for the Department of Transportation, the Higher Educational Aids Board, and the Board of Regents of the University of Wisconsin, as well as condemnation work for the Division of Highways. In January, 1972, Ms. Brodbeck further handled collections of delinquent accounts for the University of Wisconsin Hospitals, but this work was soon transferred to another individual.

The funds which paid Ms. Brodbeck for her work came from the Board of Regents of the Wisconsin State Universities. However, her pay checks were issued by the Department of Justice of the State of Wisconsin.

On February 3, 1972, Mr. Donald Smith, Assistant Attorney General, verbally requested of Mr. Peter Vallone, Personnel Director of the Department of Justice, an evaluation as to Ms. Brodbeck's LTE status with consideration to be given to an upgrading of her status to Administrative Secretary. On February 23, 1972, this request was made in writing. In a written reply on March 8, 1972, Mr. Vallone delayed making any decision for several months, contingent upon the upgrading of another employee.

Ms. Brodbeck's duties were finally cut back to handling, exclusively, collection matters for the Board of Regents, in December of 1972.

In a memorandum from Mr. John Murphy to Mr. Wilker on December 7, 1972, Ms. Brodbeck's employment status was discussed. Mr. Murphy indicated that the work done by Ms. Brodbeck would continue

indefinitely into the future, and that it was unrealistic and unfair to consider Ms. Brodbeck's position to be of a temporary nature, given the fact that Ms. Brodbeck had been working, at that time, for sixteen months.

While there was some effort by co-workers to gain a permanent position for Ms. Brodbeck during the first half of 1973, this effort was to no avail and such a position was not offered to Ms. Brodbeck.

Ms. Brodbeck, personally, had talked with numerous people concerning her desire to gain permanent status, as well as her feeling that her classification as an LTE was an abuse of that classification. These talks took place between February, 1972, and her termination date in September, 1973. Her frustration with her job status led her, on August 9, 1973, to send letters to Mr. William Grenier, Chief of Operations, Bureau of Personnel for the State of Wisconsin, and to Mr. Robert W. Warren, Attorney General for the State of Wisconsin, protesting the misuse of the LTE classification and requesting permanent status.

On August 20, 1973, Ms. Brodbeck received a termination notice, effective September 7, 1973, from Mr. William H. Wilker, Administrator in the Department of Justice. This notice praised her prior work over the two year period during which Ms. Brodbeck had been an LTE. Another LTE was hired to take over her position.

Ms. Brodbeck's termination was a result of her discussions concerning her LTE status and her desire to have that status changed to permanent status, and, specifically, was a reaction to the letter she sent to the Attorney General on August 9, 1973.

The power to investigate confered by S. 16.05(4) is wholly discretionary:

> The Board <u>may</u> make investigations and hold hearings on its own motion or at the request of interested persons and issue recommendations concerning all matters touching the enforcement and effect of this subchapter and rules prescribed thereunder. (Emphasis supplied.)

Therefore, while we will take up each of Respondents' grounds for their motion to dismiss, we should emphasize that this is not equivalent to evaluating a motion to dismiss an appeal brought under S. 16.05(2), for example, where there are more specific statutory boundaries on an Appellant's right to a hearing. Inasmuch as we feel the grounds for the motion are interrelated, but nonsequentially, we will take them up in a nonsequential order.

LACHES

Laches is a common law doctrine that prevents a party from asserting a claim if the party has delayed unreasonably in commencing the proceeding, if the party has had knowledge of the course of events constituting the claim and acquiesced therein, and if there is prejudice to the other party who is invoking the doctrine. See <u>Estate of Korleski</u>, 22 Wis. 2d 617, 622-623 (1964). Laying to one side the question of whether this doctrine applies to proceedings other than equitable common law actions,

see Estate of Schultz, 252 Wis. 126, 131 (1948), Respondents have made no representation of prejudice by the delay in filing this grievance, and thus there is lacking an essential element of estoppel by laches. See Estate of Korleski, 22 Wis. 2d 617, 622-623 (1967).

THE NATURE OF APPELLANT'S PROPERTY INTEREST

Respondents point to the fact that there are no provisions of the statutes or the Administrative Code which provide a basis for a claim by Appellant to a property interest in continued employment by the state by virtue of her long tenure as a limited term employe. This is essentially conceded by the Appellant, who does not cite any such statutory or code provision.

Appellant's position primarily rests on a substantive due process theory under the Fourteenth Amendment to the United States Constitution. Although there is no statutory or contractual provision that provides a direct property interest, the theory is that the relationship of the parties and the actions and policies of the Respondents have created an expectancy of and a property interest in continued employment. This type of theory was explored by the Supreme Court in Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972); and Perry v. Sinderman, 408 U.S. 593, 92 S. Ct. 2694 (1972).

In Board of Regents of State Colleges v. Roth, supra, the court discussed the theory involved in the concept of property:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead, have a legitimate claim of entitlement to it.
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> * * *
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> Property interests, of course, are not created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. 408 U.S. at 577-578, 92 S. Ct. at 2709.

Roth was terminated at the end of his probation at U.W.-Oshkosh. There was no provision in his contract for renewal or extension, nor was there such a provision in the statutes or Administrative Code. Although most teachers

hired on a year-to-year basis are rehired, the court, in finding that he had no property interest in retention, held:

> But the District Court has not found that there is anything approaching a 'common law' of reemployment, see Perry v. Sinderman, 408 U.S. 593, at 602, 92 S. Ct. 2694, at 2705, 33 L. Ed. 2d 570, so strong as to require University officials to give the respondent a statement of reasons and a hearing on their decision not to rehire him. 408 U.S. at 578, 92 S. Ct. at 2710, note 16.

In Perry v. Sinderman, supra, the discharged teacher had no contractual or statutory claim to continued employment but he could point to a de facto tenure program under the college's Faculty Guide and statewide guielines. The Court held:

> A person's interests in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit . . . .
> 408 U.S. at 601, 92 S. Ct. at 2699.

In the case at bar, Appellant has not pointed to any such "rules or mutually explicit understandings." In fact, Appellant's employment as an LTE for the period involved is in contravention of state law. See S. Pers. 10.03, Wisconsin Administrative Code. On the facts alleged, there appears to be an awareness of Appellant's relatively insecure status and an attempt to secure a more stable situation. We are unable to discern how the extension of her employment beyond that permitted for an LTE, in itself, creates any property interest in continued employment. This does not constititue a "common law of re-employment."

On the other hand, there is no question on these facts, and Respondents acknowledge in their brief, that Appellant's employment was in violation of civil service requirements set out in the statutes and the Administrative Code. The Appellant may not have achieved permanent status via the statutorily prescribed route, and she may not have established a Fourteenth Amendment interest in her position via the path of unwritten rules and understandings, but she was more than an LTE and in some ways might be considered a "de facto" permanent employe. The fact that she was replaced by another LTE raises even further questions, both with regard to the status of her position and the possible motivation for her termination.

FIRST AMENDMENT

Appellant alleged that her termination "was a result of her discussions concerning her LTE status and her desire to have that status changed to

permanent status, and, specifically, was a reaction to the letter she sent to the Attorney General on August 9, 1973." In Perry v. Sinderman, supra, the court held that regardless of whether a person had a property interest in a government benefit, such a benefit could not be terminated for a constitutionally impermissible reason, such as because of statements made by the recipient that are protected by the First Amendment.

Appellant's allegation concerning the reasons for her termination, if proven and depending on related facts proven by Respondents, constitute a colorable First Amendment claim, and the basis for a conclusion that her termination was improper.

RELIEF

The Respondents argue that we do not have the authority to grant the various forms of relief requested by Appellant. Our power under S. 16.05(4), Wis. Stats., is rather broad:

> If the results of an investigation disclose that the director, appointing authority or any other person acted illegally or to circumvent the intent or spirit of the law the Board may issue an enforceable order to remand the action to the director or appointing authority for appropriate action within the law.

In any event, if all or some of the relief requested is beyond our power to grant, we can still entertain the proceeding and enter such order as is appropriate and within our power.

DECISION ON EXERCISE OF DISCRETION

In Schwartz v. Schmidt, 74-18, January 17, 1975, we held that the purpose of S. 16.05(4) "seems to be directed to broad policy matters related to the 'enforcement and effect' of the civil service law." There we declined to investigate the discharge of a probationary employe where an appeal to the director was not filed within fifteen days because "Such exercise of jurisidction would emasculate the statutory requirement that appeals must be filed promptly, and if they are not they are barred totally, even when meritorious." At the same time we held:

> That is not to say that the Board would not in other instances exercise its jurisdiction, even though the subject matter might have been the basis of a timely civil service appeal, where the record raises important questions the Board deems appropriate to resolve.

In the instant case we would be inclined to reach the same result were it not for the claim that Appellant was discharged for speaking out about her status, and that after approximately two years employment as an LTE she was terminated for no apparent reason, only to be replaced by another LTE.

However, the allegations in the grievance are in some respects rather vague and conclusory. We have discretion not only in deciding whether or not to conduct an investigation but also in deciding on the nature of the investigation. Therefore, before we conduct a plenary hearing on the merits we will provide the Respondents an opportunity to submit a written explanation of Appellant's dismissal and the department's use of LTE's, accompanied by any documentary evidence they wish to submit. After reviewing this material and any response the Appellant might desire to make, we will decide whether or not the matter should be set for a hearing.

ORDER

IT IS HEREBY ORDERED that Respondents' motion to dismiss is denied. Respondents may serve and file a written submission as aforesaid within fifteen working days of the date of this Order. Appellant may serve and file a response within ten working days thereafter, and Respondents may serve and file a reply, if any, within five working days.

Dated November 25, 1975. STATE PERSONNEL BOARD

Percy L. Julian, Jr., Chairperson