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BEN L. MARTIN,

Appellant,

v.

Secretary, DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS,

Respondent.

Case No. 74-132

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DECISION

This appeal originally was filed with the personnel board under §16.05, stats., (1973). On July 1, 1978, the matter was transferred for decision to this Commission as the successor agency to the board, see chapter 196, Laws of 1977, §127(1)(c). The Commission entered its final decision on December 28, 1978. This decision was reviewed by the Dane County Circuit Court, Reserve Circuit Judge Currie presiding, pursuant to §227.16, stats., and it amended in part and affirmed the decision on June 30, 1980. An appeal was attempted to the Court of Appeals, but this was rejected as untimely filed. Following remand of the record to the Commission, a prehearing conference was held and the parties submitted briefs on the question of what remedy the Commission should provide, consistent with the circuit court decision.

This case involves the appellant's application for a promotion to a position in the classified civil service. Following examination, he was certified for the position, but not appointed.

In its decision, the Commission concluded that the civil service law had been violated in two particulars:

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3.A. The respondent added veterans points to an applicant who was not eligible for them, in violation of 16.12(7), Wis. Stats. (1975)

B. The respondent caused the use of a trainee designation when the same was not appropriate, in violation of § Pers 23.03(1) [20.03(1)], Wisconsin Administrative Code.

The Commission further concluded with respect to a possible remedy that it lacked the authority to award back pay that might have resulted from the denial of the appointment. The Commission went on to state its opinion that with the exception of back pay, the appellant should be "made whole" to the extent possible for the denial. It directed the parties to consult in an attempt to reach agreement on an appropriate remedy. The §227.16, stats., petition ensued.

In its memorandum decision entered in the Chapter 227 proceeding, the court upheld the Commission's decision of the matter. With respect to the question of a remedy, the court affirmed the Commission's conclusion that no back pay was available, and added:

There is a further reason why no back pay should not be awarded. The Court is in disagreement with this statement made by the Commission at pages 10-11 of its decision: "With respect to other possible relief, it is the opinion of the Commission that the appellant should be 'made whole' to the extent possible for the denial of the appointment; if this means that DILHR was required to appoint Martin to the EOC position. Therefore, it would be inappropriate to now order any back pay to him." p. 13

The court also stated at p. 12: "The court, however, cannot approve the Commission's conclusion stated at page 9 of its decision that these [civil service code] violations 'had a direct causal effect on the non-appointment to this position' if this is to be

interpreted as requiring the Commission to have appointed Martin."

The court directed that upon remand, the parties were to attempt to reach agreement on a remedy, and the Commission was to order a remedy consistent with the court's memorandum decision. Inasmuch as the parties have failed to reach agreement on a remedy, the Commission must determine the remedy, consistent with the court's decision.

It seems clear to the Commission that Judge Currie's decision constitutes the "law of the case" and the Commission is not free to order any remedy inconsistent with that decision. Therefore, the Commission cannot "reconsider" its authority under Chapter 16, stats. (1975), to award back pay as urged by the appellant. The appellant further argues:

If the commission maintains its lack of power as regards back pay awards, then the appellant respectfully urges the Commission to certify its decision to Circuit Court. Such certification should indicate that although the Commission has found a violation of the civil service statutes and that Mr. Martin has been aggrieved by those violators, the Commission, is nevertheless, without power to provide a remedy to Mr. Martin, and, therefore the Commission requests the Circuit Court to exercise its discretion and its powers to provide Mr. Martin with a remedy.

No statutory provision for such a certification has been cited, and the Commission is aware of none. In the absence of statutory authority, there is no basis for the Commission to proceed in this manner.

Furthermore, the Commission disagrees with the appellant's argument that the lack of authority to award back pay constitutes a violation of Art. I, Sec. 9, of the Wisconsin Constitution,

which provides in part that "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive...." As the Supreme Court stated in Neuhaus v. Clark County, 74 Wis. 2d 222,229, 111 N.W. 2d 180(1961), this guarantees "...every suitor his day in a court of competent jurisdiction; it does not guarantee a remedy accompanied by certainty of recovery."

With respect to other possible remedies, the Court made it clear that DILHR cannot be required to appoint the appellant to the position in question. The parties appear to be in agreement that it would not be appropriate for the Commission to require that the appellant's position be reclassified as a remedy in this case. The respondent indicates, however, that it offered a reclassification as a settlement of this case, and that the offer remains open. The appellant has declined and continues to decline to accept the offer.

In the absence of a stipulation between the parties as to reclassification, the Commission does not believe it would be appropriate to require reclassification as a remedy. This case involves a failure to appoint. The question of the appropriate classification of the appellant's position was not in issue and there are no findings thereon. A reclassification would only be appropriate if it had been found that there had been a logical and gradual change in the duties and responsibilities of the appellant's position to the point where the majority of the duties and responsibilities were identified at a higher level than

the existing classification. See § Pers 3.02(4)(a), Wisconsin Administrative Code (1975); §16.07, stats. (1975).

The court determined that the Commission had jurisdiction over this appeal pursuant to §16.05(7), stats. (1975). This section provides no guidance as to the nature or extent of the remedy that may be required as part of the final disposition of a case. Clearly, however, any remedy must not contravene other statutory provisions, and "...must have a reasonable relation to what has been found and it has been held that orders should go no further than is reasonably necessary to correct the evil against which they are directed and to preserve public and private rights." 2 Am Jur 2d Administrative Law §464. Inasmuch as the decision of the circuit court precludes awarding back pay or directing the appellant's appointment to the position in question, that reclassification was not in issue and would bear no relationship to the civil service code violations found, and that there is no authority for the certification of this case to circuit court, the only remedy remaining is to order the respondent to cease and desist from similar violations of the civil service code in the event that the appellant hereafter applies for any position in the classified service.

ORDER

The respondent is ordered to cease and desist from violating the civil service codes in the manner set forth in the Conclusions of Law entered by this Commission on December 28, 1978, in connection with any application for employment in the classified civil service that may henceforth be made by the appellant.

Dated: Dec-16, 1981 STATE PERSONNEL COMMISSION

AJT:jmf


DONALD R. MURPHY, Chairperson

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