STATE OF WISCONSIN STATE PERSONNEL BOARD

LUCY VAN LAANEN,

Appellant,

v.

VERNE KNOLL, Deputy Director,
State Bureau of Personnel, and
MANUEL CARBALLO, Secretary,
Department of Health & Social Services,

Respondents.

Case No. 74-17

OFFICIAL

OPINION AND ORDER

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

BACKGROUND

This appeal concerns a denial of a reclassification request. Following a full hearing on the merits we dismissed the appeal on our own motion for lack of subject matter jurisdiction on the basis of untimely filing of the appeal, although we indicated that the denial of reclassification was improper. On petition for review, the circuit court determined that the appeal had been timely and remanded the case for further proceedings. In an interim opinion and order entered December 2, 1975, we reaffirmed our original conclusion that the Appellant had been improperly denied reclassification and requested additional arguments on the back pay question. The parties have filed briefs on this question.

FINDINGS OF FACT

We incorporate by reference as if fully set forth the findings contained in the opinion and order entered herein January 2, 1975, a copy of which is attached.

CONCLUSIONS OF LAW

In our first opinion and order entered January 2, 1975, we did not reach the question of back pay, but did discuss at some length some of the problems involved in interpreting S. 16.38(4), Wis. stats.

This subsection by its terms applies to, and provides for back pay for, persons who have been "removed, demoted, or reclassified" and subsequently reinstated by Board or court order. The Appellant was not reclassified, she was denied reclassification. If this subsection is to serve as a basis for the award of back pay for this Appellant, it must be interpreted to include the words "or denied reclassification" following the above quoted phrase, or given an interpretation that would allow the same result.

As we noted in our original opinion, failure to so interpret the statute yields a seemingly inequitable result. An employe who incorrectly has been denied reclassification is denied compensation for the period during which he or she has been wrongfully misclassified, while an employe who actually has been reclassified, but wrongly, is entitled to compensation for the period during which he or she has been wrongfully misclassified.

We are not aided by precedent in our interpretation of this subsection, as we can find no reported or unreported case on the subject. We need not reach the question of whether it would be proper to utilize legislative history,[1] because we have found none.

Lacking any specific guidance, we must turn to the basic rules of statutory construction. The basic principle of statutory construction involved here is that of express mention, implied exclusion.[2] See Teamsters Union Local 695 v. Waukesha Co., 57 Wis. 2d 62, 67, n. 6 (1973):

> . . . The express mention of one matter excludes other similar matters not mentioned; . . .
> 82 C.J.S. Statutes, p. 668, S. 333. See also 50 Am. Jur. Statutes, p. 238, S. 244.

Thus the express listing of certain personnel transactions in S. 16.38(4) implies the exclusion of all others not listed, according to this maxim. While there is an exception to the general rule, it does not appear to apply in this case. See 82 C.J.S. Statutes S. 333, p. 670:

> The maxim . . . is applicable only where in the natural association of ideas the contrast between a specific subject matter which is expressed and one which is not

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[1] This subsection was created by Laws of 1943, Chapter 541, as then S. 16.24(3).
[2] In the Latin, Expressio ruenius est exclusio alterius.

> mentioned leads to an inference that the latter was not intended to be included within the statute. Accordingly, the maxim is inapplicable if there is some special reason for mentioning one thing and none for mentioning another which is otherwise within the statute, so that the absence of any mention of such other will not exclude it.

Applying this exception to the case before us, there is no apparent special reason for mentioning "reclassifications" as compared to "denial of reclassification" that would bring this exception into play. Compare Brown v. State, 24 Wis. 2d 491, 511d (1964).

Aside from this specific exception, there are more general circumstances in which a statute can be interpreted to supply a legislative omission.

The general law in this area has been expressed as follows, 82 C.J.S. Statutes. S. 344, pp. 689-691:

> While ordinarily a court must construe and give effect to the language of the statute as written, and cannot add to the words used, where it appears from the context that certain words have been inadvertently omitted from a statute, the court may supply such words as are necessary to complete the sense, and to express the legislative intent. The courts should, however, exercise extreme caution with respect to adding words to a statute in the course of its construction, and in the absence of clear necessity, this should not be done. So, where the words of a statute are clear and unambiguous, the courts may not read into the act words which the legislature has omitted; nor can the courts supply words purposely omitted.
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> A court construing a statute may or should supply an omission only when the omission is palpable and the omitted word plainly indicated by the context; and words will not be added except when necessary to make the statute conform to the obvious intent of the legislature or prevent the act from being absurd; and where the legislative intent cannot be accurately determined because of the omission, the courts cannot add words to express what might or might not be intended.

The Wisconsin Supreme Court has indicated that even where a statute is relatively unambiguous on its face, if the result of its application is unreasonable or absurd, the statute may be interpreted in light of the overall legislative intent. See Pfingsten v. Pfingsten, 164 Wis. 308, 313 (1916):

> A statute may be plain and unambiguous in its letter, and yet, giving it the meaning thus suggested, it may be so unreasonable or absurd as to involve the legislative purpose in obscurity. . . . In such case, or when obscurity otherwise exists, the court may look to the history of the statute, to all the circumstances intended to be dealt with, to the evils to be remedied, to its reason and spirit, to every part of the enactment, and may reject words, or read words in place which seem to be there by necessary or reasonable inference, and substitute the right word for one clearly wrong, and so find the real legislative intent, though it be out of harmony with, or even contradict, the letter of the enactment.

We cannot conclude that S. 16.38(4) is so "unreasonable or absurd as to involve the legislative purpose in obscurity." While we may and do disagree with the wisdom and fairness of limiting the recovery of back pay to persons who have been reclassified improperly and excluding persons who have been denied reclassification improperly, our ideas of what is wise or fair do not provide a basis for remedying the legislative omission. These ideas do not lead to a conclusion that this statutory interpretation is absurd, as we understand the word. With regard to the term "unreasonable," we look to the judicial interpretation of that word in somewhat analogous contexts.

In Minneapolis, St. Paul R. Co. v. Railroad Commn., 136 Wis. 146, 165 (1908), the court interpreted statutory language empowering the judiciary to review orders of the commission to determine if they were unreasonable as follows:

> Whether or not the order is within the field of reasonableness, or outside of its boundaries, is the question for the court. It is quite a different question from that which was before the commission in this respect. The order being found by the court to be such that reasonable men might well differ with respect to its correctness cannot be said to be unreasonable. From this aspect it is within the domain of reason, not outside its boundaries.

See also Wisconsin Telephone Co. v. Public Service Commission, 232 Wis. 274, 288 (1939): " 'Unreasonable' means not based upon reason, arbitrary, capricious, absurd, immoderate or extortionate . . . ;" Thurman v. Meridian Mutual Insurance Co., 345 SW 2d 635, 639 (Ky. 1961): "By 'unreasonable' is meant that under the evidence presented there is no room for difference of opinion among reasonable minds."

If a court is subject to such restraints in reviewing the actions of an administrative agency for reasonableness, we are under at least as much constraint in determining whether a legislative enactment is so unreasonable as to require its interpretation by the addition of omitted language or matter. Utilizing the foregoing approach we conclude that reasonable persons could differ as to the correctness or incorrectness of the approach toward back pay taken by the legislature in S. 16.38(4). We further conclude that we may not interpret or construe this provision to encompass employes denied reclassification on the theory that the statute would otherwise lead to an unreasonable or absurd result.

The statute on its face authorizes back pay awards to employes who have been "removed, demoted, or reclassified." Other persons who have been adversely affected and who have suffered lost wages are not covered. This includes, for example, employes who have been denied promotion as well as employes who have been denied reclassification. In so limiting recovery of back pay, the legislature may have intended to limit the financial liability of the state. The legislature may have determined that personnel transactions that involve removal, demotion, or reclassification are more serious impairments of employe rights than denials of requests for reclassifcation. One may debate the wisdom and fairness of such intents or determinations, but such debates are appropriately carried on in the legislature. We believe that reasonable people could differ as to the correctness of the results of this legislation, and that this prevents a conclusion that it is unreasonable as that term has been characterized above.

In our initial opinion we discussed the potential effect of S. 16.05(1)(f) which provides that in the event of rejection of the director's action the board ". . . may issue an enforceable order to remand the matter to the director for action in accordance with the board's decision." It is arguable that this section provides a basis for granting rather broad ancillary relief in a case such as this. However, where the legislature has dealt specifically with the question of back pay in one statute (S. 16.38(4)), this normally controls over a more general provision (S. 16.05(1)(f)). See Schlosser v. Allis-Chalmers Corp., 65 Wis. 2d 153, 161 (1974): ". . . the familiar rule of statutory

construction that where two statutes deal with the same subject matter, the more specific controls."

In addition to this general rule of statutory construction, we are faced with the pronouncement by the Wisconsin Supreme Court on the general question of the scope of an administrative agency's implied power under a statute. See State ex rel Farrell v. Schubert, 52 Wis. 2d 351, 358 (1971):

> This court has not had the occasion to determine the scope of an administrative agency's implied power under a statute. The rule in other jurisdictions is that '. . . a power which is not expressed must be reasonably implied from the express terms of the statute; or, as otherwise stated, it must be such as is by fair implication and intendment incident to and included in the authority expressly conferred.' Consistent with this rule is the proposition that any reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority.
> (Emphasis supplied.)

It may be that the Appellant has a remedy for her back pay in some other forum, perhaps circuit court or the claims board.. However, we conclude that we do not have the power to require such a result. We do have the power to remedy the results of our erroneous determination in our first opinion and order entered January 2, 1975, that we did not have jurisdiction of this appeal. Had we accepted jurisdiction at that time it would have resulted in a reclassification at that time, or shortly thereafter. Inasmuch as we then erroneously refused jurisdiction the Appellant was required to pursue a petition for review in circuit court and further proceedings before this Board.

We conclude that it is not an abuse of our implied powers under S. 16.05(1)(f) to require that the effective date of Appellant's reclassification for salary and benefit purposes be considered January 2, 1975, the date of our improper decision on jurisdiction. We conclude that our power to compel this result is inherent in the power of an administrative agency on remand following reversal by the circuit court. This power is comparable to the right of restitution following the reversal and remand of a judgment or decree. See 5B C.J.S. Appeal and Error, S. 1983, pp. 626-627:

> An appellant obtaining the reversal of a judgment or decree is generally entitled either to specific restitution of

> everything he has lost by reason of the enforcement of the judgment or to be compensated or made whole for any resulting loss.

This approach does not run afoul of the more specific language of S. 16.38(4). It does not require the Respondent to pay back wages to the date of the improper denial of reclassification; rather, this approach makes the Appellant whole as of the date of the Board's erroneous ruling on jurisdiction. The remedial effects of this disposition run to this Board's action, not to the Respondent's action. The result is what the Appellant would have received, without an award of back pay, had we not erred and had we accepted jurisdiction and required reclassification on January 2, 1975.

ORDER

The action of the Respondent is hereby rejected and this matter is remanded for further proceedings not inconsistent with this opinion.

Dated March 19, 1976. STATE PERSONNEL BOARD

Percy L. Julian, Jr., Chairperson

STATE OF WISCONSIN STATE PERSONNEL BOARD

LUCY VAN LAANEN,

Appellant,

v.

VERNE KNOLL, Deputy Director,
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Respondents.

Case No. 74-17

AMENDMENT
TO
OPINION AND ORDER

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

We have reconsidered, on our own motion, the opinion and order entered on March 19, 1976. We believe that it was incorrect to conclude that the correct effective date of Appellant's reclassification for salary and benefit purposes was the date of our first decision, January 2, 1975. Section 16.05(2), Wis. stats., requires that we hold a hearing within 45 days of receipt of an appeal. We have held that this provision is directory, not mandatory. See Weber v. Adamany, Wis. Pers. Bd. No. 75-235, March 22, 1976; Will v. H & SS Department, 44 Wis 2d 507, 517-518 (1969). Nonetheless, this provision should be followed.

This appeal was received on March 19, 1974. The Board heard the case July 22, 1974. An initial decision was rendered January 2, 1975. In our opinion and order entered March 19, 1976, we held that we could, in essence, correct the erroneous decision of January 2, 1975, and require reclassification effective that date for salary and benefit purposes. We now conclude that we can and should correct our failure to hold a hearing within 45 days of the receipt of the appeal, as is required by S. 16.05(2), by requiring that the effective date of the Appellant's reclassification for salary and benefit purposes be 45 days after the date of receipt of Appellant's appeal, or May 3, 1974. This

result is consistent with our March 19, 1976, decision, and the legislative intent expressed in Subchapter II of Chapter 16 of the statutes. The legislative requirement that hearings be held within 45 days evinces a legislative intent that appeals be disposed of promptly. An employe wrongfully denied reclassification is not entitled under S. 16.38(4) to salary and benefits retroactive to the date of the denial, but he or she is entitled to a prompt disposition of his or her appeal and the resultant appropriate reclassification.[1]

ORDER

Our opinion and order entered March 19, 1976 is amended by addition of the foregoing language. The action of the Respondent is hereby rejected and this matter is remanded for further proceedings not inconsistent with this opinion.

Dated March 23, , 1976. STATE PERSONNEL BOARD

Percy L. Julian, Jr., Chairperson

[1]Now that we have enunciated this principle, we note that in future cases it may be appropriate to consider what effect an employe's delay in prosecuting an appeal pending before this Board might have on a determination of the effective date of reclassification for salary and benefit purposes.