STATE OF WISCONSIN PERSONNEL BOARD

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LUCY VAN LAANEN,

Appellant,

v.

C. K. WETTENGEL, Director,
State Bureau of Personnel, and
WILBUR J. SCHMIDT, Secretary,
Department of Health and Social
Services,

Respondents.

Case No. 74-17

* *

OFFICIAL

OPINION

AND

ORDER

Before AHRENS, Chairman, SERPE, JULIAN and STEININGER.

OPINION

Background Facts

Appellant, Lucy Van Laanen, has been employed by the Department of Health and Social Services as an academic teacher at the Pioneer School of the Mendota State Hospital since the beginning of 1972. The record indicates that Appellant was originally classified as a Teacher 2 and has retained that classification to the present. Appellant graduated from the University of Wisconsin-Madison on June 14, 1971, with a Bachelor of Arts degree in mathematics. Prior to her employment with the Department, Appellant obtained 10 post-graduate credits in education courses -- 8 in student teaching and 2 in "independent reading" -- and was certified to teach by the Department of Public Instruction. Appellant thus came to her position with a bachelor's degree, certification to teach and 10 post-graduate credits. Sometime prior to September, 1972, Appellant acquired 2 additional credits, boosting her total to 12, and in that month applied for reclassification to Teacher 3. This request was "disapproved" on September 18, 1972, by Mr. Gilbert Szymanski, Special Education Consultant in the Department whose duties included handling such

reclassification requests. Mr. Szymanski possessed the power to pass on such requests because it appears from the record that the classification of teachers within the Department is a delegated function under Section 16.03(2) of the Wisconsin Statutes.* The request was denied on the ground that credits used to gain teacher certification -- here Appellant's 8 student teaching credits -- could not be used for purposes of reclassification, a view adhered to by the Department in the instant appeal. Appellant did not appeal Mr. Szymanski's 1972 disapproval of her reclassification request.

On February 18, 1974, Appellant renewed her request for reclassification to Teacher 3. On February 28, 1974, her request was again denied by Mr. Szymanski, the latter indicating that the Department's position of a year and half before remained unchanged. By letter dated March 11, 1974, Appellant appealed the Department's action to this Board.

We find the foregoing background facts to be true and to be material to a determination of the issues in this case. Additional facts will be set forth, and further findings will be made in the body of this opinion.

<u>Appellant's Appeal Was Untimely, and, Therefore, This Board is Without Subject Matter Jurisdiction to Consider It</u>

The denial of Appellant's request for reclassification, though a delegated action, was appealable to this Board under Sec. 16.03(2), Stats., which provides as follows:

> "Any delegatory action taken hereunder by any department head may be appealed to the personnel board <u>under s. 16.05.</u>" (emphasis supplied.)

For appeal purposes the delegated action of the Department is deemed to be the action of the Director of the Bureau of Personnel. Sec. 16.05(2), Stats., provides

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*See also, Sec. 15.02(4), Stats., which provides that the head of a department may delegate to any subordinate within the department "any function vested by law in the head of the department."

in pertinent part that the Board shall not grant an appeal from an action of the Director "unless a written request therefor is received by the board within 15 days ...after the Appellant is notified of such decision..." (Emphasis supplied.) We think the appeal is untimely.

The untimeliness of the instant appeal appears from the face of the appeal letter itself. On February 18, 1974, Appellant submitted a copy of her transcript indicating her post-graduate credit total to her supervisor and requested reclassification. On the same day, Appellant's supervisor forwarded the request and the transcript to Mr. Dennis Dokken, Personnel Manager at Mendota State Hospital. In a memo dated February 28, 1974, from Mr. Dokken to Appellant, Appellant was notified of the denial of her reclassification request in the following language:

> "Attached is the copy of the transcript which was sent to me along with a request that you be reclassified to Teacher III. With regard to this request I have contacted Mr. Szymanski of the Division office, who has indicated to me that his position of October 1972, remains unchanged with regard to allowing your eight credits of student teaching to be considered in this reclassification action."

The reference to Mr. Szymanski's position of October, 1972, is clearly a reference to his September, 1972, "disapproval" of Appellant's identical request. It is therefore clear that Appellant's request had been denied by the same person who had denied it a year and a half earlier and that Appellant was informed of this fact on February 28. Appellant acknowledged as much in unmistakeably clear language in the appeal letter itself, wherein Appellant stated: "On February 28, 1974, I received notification from Dennis Dokken, Personnel Manager, that my request [for reclassification] was denied by Gil Szymanski." (Emphasis supplied.) The Appellant's appeal letter thus had to be received by the Board no later than March 15, 1974, in order for the appeal to be timely. It was not. The face of the appeal letter again reveals the defect: The time stamp impressed thereon states that the appeal letter, though dated March 11, 1974, was not received by the Board until March 19, 1974, thus rendering the appeal untimely.

This result is reached not without difficulty. In the appeal letter, Appellant also stated that "on March 8, 1974 I received a letter from Mr. Szymanski stating that my request had been denied." It could be contended that the Szymanski letter was the real notice of denial and that insofar as it was received by Appellant no more than 11 days prior to the receipt of her appeal letter, the appeal is timely.

The contention, however, suffers from weaknesses which render it unpersuasive. For example, the Szymanski letter referred to by the Appellant and dated March 7, 1974, was by its own terms merely a response to a letter from the Appellant dated March 5, 1974. The Appellant's March 5 letter is not a part of the record in this case, and we therefore do not know what it said. But the response by Szymanski is clearly not a notice of denial but rather an explanation of a decision already taken of which Appellant had notice on February 28. Moreover, in a case involving a denial of a reclassification request, the rights of the Appellant are narrow to say the least. It does not appear that one in Appellant's situation is entitled as a matter of right to a statement of reasons for the denial of a reclassification request, or, for that matter, to a written notice of such a denial. Cf. Sec. 16.28(1)(b), Stats.; Wis. Adm. Code section Pers. 3.04. When Appellant was notified in writing by Mr. Dokken of Mr. Szymanski's action, she was entitled to no further notice; the time for filing an appeal had begun to run. Indeed it seems clear that she would have received no communication concerning her denial from Mr. Szymanski had she not inquired of him. Appellant's characterization of his response is merely a conclusion. The response cannot be said to have been the starting point for the running of the statute. The decision had already been taken and Appellant informed thereof on February 28. We therefore find that the appeal was untimely.

Such considerations as we have herein undertaken, while perhaps technical, are by no means frivolous. They go to the Board's subject-matter jurisdiction, i.e., to its very power to decide on the merits the appeal before it. The Board is a creation of the legislature and must adhere strictly to the statutes which both give

it its power and circumscribe its authority. "Every administrative agency must conform precisely to the statutes from which it derives power." Mid-Plains Tel., Inc. v. Public Serv. Comm., 56 Wis. 2d 780, 786. (Emphasis supplied.) See also, Rosenthal v. State Employees' Retirement System, 30 N.J. Super. 136, 141-143, 103 A. 2d 896 (App. Div. 1954). A statute such as Sec. 16.05(2) limiting the time for commencing a proceeding before an administrative body is jurisdictional in nature, and failure to take timely action deprives that body of the power to proceed any further. See, e.g., Edgerton v. International Co., 89 So. 2d 488, 489-490 (Fla., 1956); Iowa Civil Rights Commission v. Massey-Ferguson, Inc., 207 N.W. 2d 5, 9-10 (Iowa, 1973); Rosenthal, supra; see also, 2 Am. Jur. 2d, Administrative Law, Sec. 321, p. 146. Cf. Kohnke v. ILHR Department, 52 Wis. 2d 687, 690-691; Brachtl v. Department of Revenue, 48 Wis. 2d 183, 187.* Nor may an administrative agency enlarge its jurisdiction by waiving a time requirement which is jurisdictional or a prerequisite to further action. United States v. Garbutt Oil Co., 302 U.S. 528, 534-535, 58 S. Ct. 320, 82 L. Ed. 405 (1938); Iowa Civil Rights Commission, supra; Rosenthal, supra; 2 Am. Jur. 2d, Administrative Law, Sec. 323, p. 147.

It should be noted, moreover, that subject-matter jurisdiction must affirmatively appear from the record; it is not to be exercised where there is reasonable doubt as to its existence. See Estate of Tomczak, 50 Wis. 2d 315; Edgerton, supra; Rosenthal, supra. And the party seeking relief bears the burden of demonstrating that jurisdiction is present. Estate of Daniels, 53 Wis. 2d 611. In the instant case jurisdiction is manifestly absent.

The Board has taken note of the jurisdictional defect the record reveals on its own motion. It has done so because jurisdiction of the subject matter is never waived and is always a proper question for the Board to consider even when raised on its own motion. See Milwaukee County v. Caldwell, 31 Wis. 2d 286, 288-289; Yaeger v. Fenske, 15 Wis. 2d 572, 573. Indeed, where the statutes condition the exercise of power in particular situations, it could be said that the Board has a

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*Cf. also Choate v. Caterpillar Tractor Co., 402 F. 2d 357, 359, (7th Cir. 1968); Genovese, III v. Shell Oil Co., 488 F. 2d 84, 85 (5th Cir. 1973).

duty to determine whether there has been compliance with the statutory condition. See Leedom v. International Union of M., M. & S. Workers, 352 U.S. 145, 77 S. Ct. 154, 1 L. Ed. 2d 201, 204 (1956).

The position taken by the Board in this appeal is not a departure from past practice but a reaffirmation of it. Scott v. Estkowski, Wis. Pers. Bd. Case No. 379 (January 29, 1971), is illustrative of the consistently adhered to view that the untimeliness of an appeal constitutes a fatal jurisdictional defect. Therein we stated:

> "This Board for many years and in several similar instances has held that if ... a s. 16.05 appeal was not taken within the time prescribed by the statute that the Board had no jurisdiction. This Board has never felt that there could be anything less than literal compliance, that the parties could not stipulate jurisdiction or that the Respondent could waive it.
>
> "There is much authority that the right of appeal to a reviewing administrative agency is purely statutory and all applicable statutory requirements must be complied with to sustain such appeal; that the time for taking an administrative appeal is generally prescribed by statute or regulation and timely application has been held necessary, delay beyond the statutory time being fatal.
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> "This Board proposes to adhere to the position that it has always taken; this is, that the matter of time within which an appeal may be taken is a jurisdictional matter, and if the appeal be not taken within the prescribed time that the Board has no authority to pass on the merits of the appeal."

Scott v. Estkowski, at p. 2. See also, O'Neill v. Wettengel, Wis. Pers. Bd. Case No. 359 (October 5, 1970); Olson v. Wettengel, Wis. Pers. Bd. Case No. 327 (December 22, 1969). This may seem a harsh result, but as was stated in Olson: "The hearing body cannot confer jurisdiction upon itself because deciding the matter on the merits may be the just course of conduct." Olson v. Wettengel, supra, at p. 2; see also Iowa Civil Rights Commission, supra, at p. 10.

We find that, as the appeal was untimely, this Board is without jurisdiction to consider it.

Notwithstanding the conclusion reached above, we would point out that there is merit to Appellant's contention that she qualifies for reclassification to

Teacher 3. Pay Schedule No. 1 for academic teachers, as set out on p. 5 of the Classification and Compensation Plan, 1973-1974, reads as follows:

> "ACADEMIC TEACHERS - All academic teachers must be eligible for certification by the Department of Public Instruction. Credits in this schedule are based on semester hours; they must be from an accredited school, relevant and approved by the employing department.
>
> Teacher 1 - Bachelor's degree -
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> Teacher 2 - Bachelor's degree plus one year teaching experience
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> Teacher 3 - Bachelor's degree plus 12 credits
>
> Teacher 4 - Bachelor's degree plus 24 credits
>
> Teacher 5 - Master's degree or bachelor's degree plus 30 credits
>
> Teacher 6 - Master's degree plus 12 credits or bachelor's degree plus 42 credits"
>
> (Emphasis supplied)

Even accepting Respondent's argument that the term "Bachelor's degree" in the above-quoted paragraph must be read in the light of the certification requirement to mean "Bachelor's degree plus certification," it would not defeat Appellant's claim. Appellant has a Bachelor's degree plus certification plus 12 credits. Though it may have been the intent of the Department to deny those credits employed to gain teacher certification, no such intent is discernible from the face of Pay Schedule No. 1. It is not apparent from the Pay Schedule that credits used for certification purposes are under any special disability for reclassification purposes. Appellant was surely entitled to reasonable notice from the Pay Schedule of what the requirements for reclassification to Teacher 3 are. When the Department states that a condition for reclassification is that post-graduate credits used for teacher certification may not be included among the 12 credits necessary for reclassification, Appellant is justified in responding that that isn't what the Pay Schedule says. The construction which the Department seeks to place on the Pay Schedule is not supported by the language found therein.

An additional word is in order on the subject of back pay. Sec. 16.38(4), Stats., provides as follows:

> "(4) RIGHTS OF EMPLOYE. Any employe who has been removed, demoted, or reclassified, from or in any position or employment in contravention or violation of this subchapter, and who has been reinstated to such position or employment by order of the board or any court upon review, shall be entitled to compensation therefor from the date of such unlawful removal, demotion or reclassification at the rate to which he would have been entitled by law but for such unlawful removal, demotion or reclassification, and such employe shall be entitled to an order of mandamus to enforce the payment or other provisions of such order."

A substantial question exists as to whether this section by its terms can be read to include those, like Appellant, who may have been incorrectly denied reclassification to a higher class. The statute would appear to contemplate back pay orders only for those who were reinstated to a position they held formerly. See Berg v. Seaman, 224 Wis. 263; Wis. Adm. Code section Pers. 16.01. Appellant was never classified as a Teacher 3.

But such an interpretation would, seemingly, render the terms "reclassified" and "reclassification" in Sec. 16.38(4) superfluous as they would then mean the same as "demoted" and "demotion." Such a result is of course to be avoided. Moreover, such an interpretation would deprive an employee who had been incorrectly denied a reclassification of any remedy other than belated reclassification, a result the inequity of which is manifest. The thrust of Sec. 16.05(1)(f), Stats., authorizing this Board to reverse and remand the case to the Director for action in conformity with its decision imports a broader impact than merely reclassification. Consistent with the power to order such action would be the power to order that back pay be awarded to one situated as is Appellant.

These are thorny problems of construction which we here suggest but, due to the result reached herein, do not resolve.

For the reasons hereinbefore stated, the appeal from the action of the Director and his delegatee must be dismissed for lack of jurisdiction.

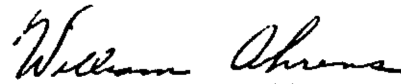
ORDER

IT IS ORDERED that the appeal from the action of the Director and his delegatee, Respondents herein, is dismissed.

Dated January 2, 1975

STATE PERSONNEL BOARD

BY



William Ahrens, Chairman