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NEAL E. SCHMIDT,

Appellant,

v.

DAVID W. ADAMANY, Secretary,
Department of Revenue,

Respondent.

Case No. 74-51

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NEAL E. SCHMIDT,

Appellant,

v.

DAVID W. ADAMANY, Secretary,
Department of Revenue,

Respondent.

Case No. 74-52

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NEAL E. SCHMIDT,

Appellant,

v.

C. K. WETTENGEL, Director,
State Bureau of Personnel,

Respondent.

Case No. 74-62

* * * * *

Before AHRENS, Chairman, SERPE and JULIAN.
JULIAN, writing for himself, AHRENS and SERPE.

OFFICIAL

OPINION

AND

ORDER

Facts

On December 24, 1972, following application and examination, the Appellant was promoted from Attorney 12 to the position of Inheritance Tax Counsel-Attorney 14, in the Wisconsin Department of Revenue. The notice and description of this position were reviewed and approved by the Bureau of Personnel prior to circulation and provided that "The person promoted to this position will be required to serve a 12-month probationary period."

Upon promotion, the Appellant received a promotional salary increase of \$65 monthly pursuant to Wisconsin Administrative Code Pers 14.04. On June 24, 1973, six months later, Appellant received an additional salary increase of \$65, as provided by Wisconsin Administrative Code Pers 5.03(1) at the pay period "closest to the completion date of the first six months of the probationary period,..." Then, on July 8, 1973, under the Agreement between the State and the Wisconsin State Attorneys' Association, the Appellant received a cost-of-living allowance of \$84 and a merit increase of \$60. On December 23, 1973, the Appellant received an additional \$65 salary increase at the termination of his 12-month probationary period.

On May 29, 1974, the Appellant was notified by the Department of Revenue, and specifically by Larry Tainter, Director of Personnel and Employment Relations for the Department, that the salary increase given to him on December 23, 1973 was erroneous and that his base salary rate would be adjusted to \$1,820 per month beginning with the pay period May 27, 1974 (Payroll Period No. 13). The Department of Revenue intended and does intend to recoup the overpayment from the Appellant.

We find the facts recited above constitute the material facts in this case. Other facts, as necessary, will be stated and found below. The issue is whether the Appellant is entitled to the \$65 salary increase which he received on December 23, 1973.

The Appellant Was Not Entitled a Salary
Increase Upon Completing Probation.

The Respondents contend that the Appellant was not entitled to this \$65 monthly salary increase and, further, that the State is entitled to recoup the moneys incorrectly paid to the Appellant.

The Appellant resists these contentions and argues, in addition, that his 12-month probationary period was unlawful.

Neither the Appellant nor the Respondents have cited any authority for the granting of a salary increase at the completion of Appellant's 12-month probationary period where a promotional employee is involved. We can find no such authority.

It is true that original appointees receive a salary increase at the end of the 6th and 12th months of probation. They do not, of course, receive a salary increase upon appointment, as do promotional employees. We find that the Appellant was a promotional employee. Further, an original appointee is not entitled to a merit increase during his probationary period, while a promotional appointee may receive such increases, as did the Appellant on July 8, 1973. Appellant conceded at the hearing on his grievance conducted by the Department of Revenue that he was a promotional employee, and we have so found. The 12-month salary increase authorized for original appointees does not, therefore, apply to the Appellant.

Appellant argues, as he did in his grievance hearing in the Department of Revenue, that the 1972-73 Classification and Compensation Plan (hereafter referred to as the Pay Plan) provides that promotional appointments shall be for 6 months and a 12-month probation is improper. This Plan provides as follows:

"V. Probationary Periods.

Original Appointments

There shall be a one year original appointment probationary period. A \$50 step increase shall be granted effective the beginning of the pay period closest to the completion date of the 6th and 12th month of the probationary period.

Promotional Appointments

There shall be a six month promotional probationary period. The size of the step increase granted at time of appointment and upon completion of the 6th month shall be the same as the merit step assigned to the classification to which the appointment is made."

Appellant argues that the Pay Plan's omission of any salary increase at the end of a 12-month probationary period is not to be taken as precluding such a pay increase because the 12-month probationary period is impermissible and, further, that the Plan cannot preclude a pay increase at that time.

Appellant seems to rely on Wis. Stats. 16.22(1)(a), setting forth a general rule that probationary periods shall be for six months and upon the Pay Plan explanation and application issued by the Director of the Bureau of Personnel. Appellant concedes that Section 16.22(1)(b), Wis. Stats., provides authority for the Director of the Bureau of Personnel to authorize a longer probationary period, not to exceed 2 years, for any administrative, technical, or professional position. The Respondents contend that it was under this provision of the Statutes that the 12-month probationary period was fixed for the position of Inheritance Tax Counsel.

Appellant argues, however, that nowhere did the Director of the Bureau of Personnel in fact authorize a longer probationary period pursuant to Section 16.22(1)(b), Wis. Stats. We find that, by its approval of the promotional announcement for the job of Inheritance Tax Counsel, the Bureau of Personnel, administered by the Director thereof, who is responsible for its decisions, approved a longer probationary period. The Bureau of Personnel is responsible for approving the promotional announcement, printing it, and distributing it. This they did. It is improbable that all of this was accomplished without any approval by appropriately-delegated individuals within the Bureau of Personnel of the contents of the promotional announcement, including the authorization of a longer probationary period as provided for by Section 16.22(1)(b), Wis. Stats.

While it might have been preferable for the Director to place or file a formal letter exercising his authority under Section 16.22(1)(b), we do not think it is required by the Statutes or rules. We take notice that the Bureau of Personnel handles hundreds of promotional announcements and examinations for Civil Service jobs each year. To require that the Director personally review each and every promotional announcement would be unreasonable.

Appellant's reliance upon Section 16.22(1)(a), setting forth the general rule that probationary periods shall be for 6 months, as well as his reliance upon the Pay Plan, is misplaced. It is established canon of Statutory construction that where two provisions of the Statutes are apparently in conflict (Wis. Stats. Section 16.22(1)(a) and Section 16.22(1)(b)), the more precise or specific section prevails. Moran v. Quality Aluminum Casting Company, 34 Wis 2d, 542; 553 (1967). Therefore, even if there were a conflict, as Appellant seems to suggest, between the two Statutory provisions cited, we must resolve it in favor of the Director's specific authority to establish longer probationary periods for certain classes of employees rather than in favor of the general rule for a 6-month probationary period.

This construction is also consistent with the purposes of probation. The public has an interest in protecting the Classified Service by granting tenure to its members. The public also has an interest in assuring that those who are granted tenure are competent. To evaluate such competence in professional, technical, and certain other positions, the Director may find it necessary to provide an extended probationary period. We take notice that few persons acquainted with the work of attorneys believe that competence can always be judged in a 6-month period of time. We conclude that the 12-month probationary period for the position of Inheritance Tax Counsel was authorized by the Director of the Bureau of Personnel under Wis. Stats. Section 16.22(1)(b) and was an extension of the usual 6-month probationary period fixed by Section 16.22(1)(a).

Appellant was granted a salary increase at the time of his promotion under Pers Section 14.04. He was granted a 6-month probationary increase pursuant to Pers 5.03(1). No authority is cited by the Appellant or the Respondents nor found by us for the granting of a further pay increase at the end of the 12-month probationary period. Even if Appellant had attained permanent status after a 6-month probationary period, we find no authority which would entitle him to receive a pay increase on December 23, 1973. Since we have found the 12-month probationary period valid and no authority for a pay increase at the completion of that period, we must conclude that the \$65 pay increase granted on December 23, 1973 was erroneous and that the appointing authority may correct its error.

The State May Recoup the Overpayment

We turn now to the question of how the error which occurred on December 23, 1973, resulting in a \$65 pay increase to Appellant, can be corrected.

Respondents argue that they may recoup the money erroneously paid to the Appellant. Appellant, on the other hand, argues that he has relied upon the increase in wages erroneously paid and that the Respondent is estopped from collecting the wages erroneously paid. Landaal v. Personnel Board (Circuit Court, Dane County, 1973), Case No. 138-392.

We find that the present case is, on its facts, different from Landaal. Moreover, decisions of the Circuit Court are to be accorded respect, but they are not controlling beyond the controversy they decide.

In Landaal the State was held equitably estopped from recovering wages erroneously paid. The Court adopted the doctrine of equitable estoppel established in Gabriel v. Gabriel, 57 Wis. 2d, 424-429 (1972).

The elements of equitable estoppel established by Gabriel and found in Landaal are not present here. First, the Appellant has failed to demonstrate that the State took any action upon which he relied. In Landaal, the Plaintiff

sought a determination of his wages and was informed by the State that they would be at the higher level. Here, the Appellant sought no such determination and the State has given none.

Second, Appellant has failed to demonstrate and the record fails to reflect his reliance upon the State's erroneous salary payment. Such a demonstration is a required element of the doctrine of equitable estoppel. In Landaal, the Plaintiff accepted a lower classification in reliance upon the State's advice that this would not cause a pay decrease, and he gave up in reliance upon that advice the opportunity to remain in a higher-salaried position. Here the record fails to reflect that the Appellant acted to his detriment in reliance upon the State's payments to him. He made no plans to take a position or change positions because of those erroneous payments. He did not give up a better position in order to receive such payments.

Accordingly, we conclude that in the circumstances of this case the Respondent may recoup the money erroneously paid to the Appellant by requiring him to repay it.

Because of the conclusions reached here with respect to the issues discussed above, we find it unnecessary to reach the other issues raised by the Appellant in this case.

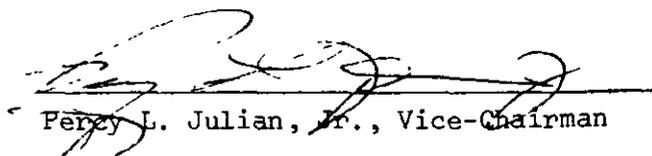
ORDER

On the basis of the foregoing Opinion and upon the entire record herein,
IT IS HEREWITH ORDERED that the decision of the appointing authority is sustained.

Dated November 22, 1974

STATE PERSONNEL BOARD

BY


Percy L. Julian, Jr., Vice-Chairman