STATE OF WISCONSIN PERSONNEL BOARD

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ROGER N. MAEGLI,

Appellant,

v.

WILBUR J. SCHMIDT, Secretary, Department of Health and Social Services,

Respondent.

Case No. 74-6

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ROGER N. MAEGLI,

Appellant,

v.

WILBUR J. SCHMIDT, Secretary, Department of Health and Social Services,

Respondent.

Case No. 74-13

* *

OFFICIAL

OPINION

AND

ORDER

Before AHRENS, Chairman, JULIAN, STEININGER and WILSON.

OPINION

Background Facts

Appellant, Roger N. Maegli, was employed as a Rehabilitation Counselor in the Milwaukee District Office of the Division of Vocational Rehabilitation, Department of Health and Social Services, from October 17, 1966, until December 21, 1973. On December 14, 1973, Mr. Frank Broder, Appellant's immediate supervisor in the Milwaukee Office received a telephone call from a Mrs. L. Brown who identified herself as the mother of Barbara Simonson whom she said had been dating the Appellant for the previous three years. Mrs. Brown made certain allegations to Mr. Broder concerning Appellant's behavior on and off his job. Among these were the charge that on the night of

December 13, 1973, Appellant beat her daughter severely enough to require the daughter's hospitalization, that she had witnessed Appellant drinking and often drunk during working hours, that Appellant would take her daughter on house calls during his regular working hours and introduce her to clients as a new worker he was training, and that Appellant had sold a typewriter which was state property and had pocketed the money. Mr. Broder set out these allegations in a handwritten memorandum which he forwarded to Mr. William R. Newberry, the District Supervisor.

On December 17, 1973, Mr. Newberry confronted the Appellant with Mrs. Brown's allegations. Appellant denied them, but Mr. Newberry believed that they were of sufficient seriousness to warrant investigation. Mr. Newberry determined to suspend Appellant with pay pending the outcome of the investigation. A statement of suspension was drafted and typed, but was never signed by the Appellant. Shortly thereafter, Appellant drafted a memo which he entitled "Resignation." It read in material part as follows:

> "I am ~~requesting~~ submitting my resignation from the State of Wisconsin--Div. of Vocational Rehabilitation--as of 12/21/73 for other employment.
>
> (signed) Roger N. Maegli
> 12-17-73."

Appellant subsequently retained counsel to contest what he has vigorously contended was a forced resignation amounting to a constructive discharge. Appellant attempted to revoke his resignation in a letter to Mr. Newberry, dated December 19, 1973. Appellant's attempts to return to work proved futile; he was informed that he was no longer on the payroll.

On January 17, 1974, Appellant wrote a letter to the Board wherein he stated his desire to appeal his "forced resignation" from state service to this Board. This appeal became Case No. 74-6.

On February 20, 1974, Appellant wrote a letter to the Board appealing Mr. Newberry's alleged refusal of February 18, 1974, to allow Appellant to return to work though Appellant represented that he was "ready, willing and able" to perform

in his former capacity. This appeal became case No. 74-13.

We find the foregoing facts to be true and to be material to a determination of the issues in this case.

The Appeals Are Untimely and the Board Is Therefore Without Jurisdiction to Consider Them

On February 14, 1974, Respondent moved to dismiss the appeal in No. 74-6 for lack of timeliness. A motion to dismiss for a similar lack of subject-matter jurisdiction was interposed by the Respondent in No. 74-13 on March 1, 1974. Both motions were denied by the Board pending a hearing on the merits. Both motions were in effect renewed at the hearing held on May 8, 1974. Both motions have merit for the reasons set forth below.

Appellant contends that his resignation was given under duress and was in fact if not in name a discharge from state service. Appellant, of course, must pursue this line of reasoning because this Board is without jurisdiction to consider appeals from resignation actions. See, e.g., Lee v. Estkowski, Wis. Pers. Bd. Case No. 341 (May 15, 1970), at p. 1. But the more arduous jurisdictional hurdle to Appellant's case is the untimeliness of his appeal. Appellant's resignation by its terms was to become effective on December 21, 1973. Assuming without deciding that Appellant's resignation was the product of duress amounting to a constructive discharge, Appellant nevertheless did not write his appeal letter raising the issue and contesting the action until January 17, 1974. His appeal letter was not received by the Board until the following day, January 18, 1974. Sec. 16.05(2), Wis. Stats., provides in material part as follows:

> "The /personnel/ board shall not grant an appeal under sub. (1)(e)... unless a written request therefor is received by the Board within 15 days after the effective date of the decision..."

It is manifestly clear from what has been said above that the Board did not receive Appellant's appeal within the time limitation statutorily prescribed. We have continually construed the requirements of Sec. 16.05(2), Stats., to be jurisdictional

in nature and have held that in the face of untimely appeals, this Board is without power to proceed to a determination of the issues raised thereby, however compelling they may be. See Van Laanen v. Wettengel, Wis. Pers. Bd. Case No. 74-17 (January 2, 1975), and cases cited therein. See generally, 2 Am. Jur. 2d, Administrative Law, Sec. 321, p. 146; 73 C.J.S., Public Administrative Bodies and Procedure, Sec. 59, pp. 383-384.

We find that the appeal in No. 74-6 was untimely and that we are without jurisdiction to consider it. Because of the result reached herein, we make no findings and draw no conclusions as to whether Appellant's resignation was forced and, if so, whether a forced resignation may be deemed a constructive discharge. For the purpose of our discussion only, we have indulged an assumption and not reached a definitive conclusion.

In No. 74-13, Appellant attempts to appeal from the refusal of Mr. Newberry, as agent of the Respondent, to restore Appellant to his former position. This appeal arises from the same transaction or occurrence presented in No. 74-6, i.e., the events of December 17, 1973. Under Sec. 16.05(1)(e), Stats., this Board is endowed with power to hear appeals only "of employees with permanent status in class from decisions of appointing authorities when such decisions relate to demotions, layoffs, suspensions or discharges but only when it is alleged that such decision was not based on just cause."

It is at once apparent that this route, too, confronts Appellant with insurmountable jurisdictional obstacles. Assuming without deciding that Appellant on December 17, 1973, resigned effective December 21, 1973, and was not in fact "constructively discharged," then it is clear beyond cavil that on February 20, 1974, when he appealed the employer's refusal to reemploy him, Appellant did not have permanent status in class. Appellant thus did not have appeal rights and this Board did not have jurisdiction to adjudicate the controversy.

Moreover, it is doubtful that an appointing authority's refusal to reemploy is a decision relating to discharge within the meaning of Sec. 16.05(1)(e), Stats.

There is no language in said section which grants this Board the power to hear appeals from refusals to rehire or reemploy. It is far more likely that the Legislature, in conferring jurisdiction on this Board to hear appeals from "decisions /which/ relate to...discharges," meant to confer jurisdiction only over the appointing authority's decision to discharge itself and not over refusals to rehire or reemploy.

But even were we to assume that the Legislature had so intended, and that Appellant's resignation was given under circumstances which constituted a discharge, we would nevertheless conclude that we are without power to hear the appeal in No. 74-13. To grant an appeal from such refusal in the circumstances of the instant case would be to largely eviscerate the very timeliness requirement we have found determinative of the appeal in No. 74-6. It would enable Appellants in every case wherein their discharge appeal was untimely filed to circumvent as they chose the time limit contained in Sec. 16.05(2), Stats., which, as we have hereinbefore indicated, is jurisdictional in nature. An appellant discharged from state service who failed to timely appeal need only present himself to his appointing authority, declare himself to be "ready, willing and able" to work and promptly appeal the appointing authority's refusal to reemploy to this Board. In granting an appeal in these circumstances, the Board would effectively be assuming jurisdiction it does not have and thereby defining for itself the reach of its power to adjudicate. As we have recently held, "The only body that can confer jurisdiction on this Board is the Legislature, and where...it has seen fit to deny it, we are powerless to act." Minor v. Nusbaum, Wis. Pers. Bd. Case No. 73-173 (January 3, 1975), at p. 6.

We find that the appeal in No. 74-13 arises out of the same occurrence as that in No. 74-6; we further find that the appeal in No. 74-13 was not received by this Board within 15 days of the effective date on December 21, 1973, of Appellant's resignation statement. We therefore conclude that, for the reasons set forth above, we are without jurisdiction to consider the appeal in No. 74-13.

The Power of This Board to Conduct Investigations Pursuant to Sec. 16.05(4), Stats., is Discretionary and, in the Absence of More Compelling Circumstances than are Presented in the Instant Appeal, the Board Will Decline to Exercise Its Investigatory Power.

The Power of the Board to conduct investigations is predicated on Sec. 16.05(4), Stats., which provides in material part as follows:

> "The Board may 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. If the results of an investigation disclose that the director, appointing authority or any other person acted illegally or to circumvent the intent and 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..." (emphasis supplied.)

It is clear from the use of the word "may" in the above-quoted statute that the Legislature intended the investigatory jurisdiction therein granted to be exercised at the discretion of the Board. The Board may investigate an alleged irregularity at the behest of an interested party, but it may also decline to do so.

Here, while the Appellant didn't in precise terms request an investigation by the Board of alleged irregularities surrounding the submission of his resignation, he nevertheless asserted that the Board has jurisdiction to do so under Sec. 16.05(4). (See Transcript at pp. 75-76; Brief of Appellant at pp. 19-20.) We interpret Appellant's assertion as a request for an investigation, for it is apparent that Appellant would be an "interested person" within the meaning of the statute and that his allegations, if true, could at least be seen as a circumvention of the "spirit of the /civil service/ law." For the reasons which follow, we decline Appellant's request.

First, as we have stated in Schwartz v. Schmidt, Wis. Pers. Bd. Case No. 74-18, decided on January 17, 1975, in discussing the Board's power of investigation (at pp. 3-4):

> "The Board will exercise its jurisdiction in instances where the facts of a particular case reflect a need to do so. In the instant case, the Appellant would appear to have had a right of appeal to the Director, provided that such had been filed within 15 days of the effective date of the discharge. A similar 15-day time limitation applies to discharge appeals by permanent employees. Assuming for the moment that a right of

> appeal to the Director exists, Board exercise of its jurisdiction would be to grant an appeal to an employee who did not file a timely appeal with the Director. Such exercise of jurisdiction would emasculate the statutory requirement that appeals must be filed promptly, and that if they are not they are barred totally, even when meritorious. This 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."

Moreover, Appellant had retained legal counsel within two days of the date of his resignation and at least two days before its effective date. A mere reading of the statutes would have revealed that Appellant could not afford the luxury of hesitating too long before filing his appeal. Yet he did not act until a full month had elapsed from the date of his signing of the resignation statement. By no stretch of the imagination may his letter to Mr. Newberry of December 19, 1973, "revoking"[1] his resignation or Appellant's attorney's letter of the same date be considered effective, written appeal letters within the meaning of the Statutes, and this for the compelling reason that the letters were not sent to this Board.

Second, although Sec. 16.05(4), Stats., by its terms contemplates the investigation of those illegal or questionable actions which circumvent the intent and spirit of the civil service law, we are of the opinion that the Legislature intended that such illegal or questionable action bear a potentially broader, more deleterious impact for the administration of the law than anything alleged by this Appellant. Appellant's assertions center on the alleged actions of one man -- Mr. Newberry -- in causing the Appellant to resign. There is no allegation that this is a constant or pervasive influence in the administration of the Civil Service law, nor, for that matter, is there any allegation that Mr. Newberry had ever engaged in such coercive threats with any other employees. Appellant's case is a classic confrontation between one employee and his District Supervisor. Yet the Legislature's use in Sec. 16.05(4),

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[1] By Wis. Adm. Code Section Pers. 21.03, no withdrawal or stopping of a resignation, whether verbal or in writing, may be effected "except by mutual agreement." There was no mutual agreement in the instant case. Pers. Ch. 21 regulates entirely the question of resignations pursuant to Sec. 16.28(4), Stats., which provides: "Resignations shall be regulated by the rules of the director." Additionally, the director is given power by Sec. 16.03(6), Stats., to "promulgate rules for the effective operation of this sub-chapter."

Stats., of such phrases as "touching the enforcement and effect of this subchpater and rules prescribed thereunder" and "to circumvent the intent and spirit of the law" indicates a Legislative concern that the statute be the jurisdictional foundation for investigations of wider-ranging illegality or corruption than is here discernible, even if we assume to be true everything Appellant alleges. To interpret Sec. 16.05(4), Stats., as a readily available avenue of appeal for parties situated as is the Appellant would render Secs. 16.05(1)(e) and (1)(f), Stats., largely superfluous and Sec. 16.05(2), Stats., largely irrelevant. An Appellant could ignore the provisions of those sections by making general accusations of improper or illicit activity and invoke the Board's jurisdiction by requesting an investigation. It is the task of statutory construction to avoid such a result. "The general rule of statutory construction is that where two provisions are susceptible of a construction which will give operation to both, without doing violence to either, it is incumbent on the court to search for a reasonable theory under which to reconcile them so that both may be given force and effect." State ex rel. Thompson v. Gibson, 22 Wis. 2d 275, 292 (1964). See State v. Franklin, 49 Wis. 2d 484, 487 (1971). Statutes dealing with the same subject matter "must be read together and harmonized if possible." Weiss v. Holman, 58 Wis. 2d 608, 619 (1973). Needless to say, the duty to so interpret the statutes under which it operates falls in the first instance to this Board.

Third, Appellant contends that under the rules of the Director pertaining to resignations, Wis. Adm. Code Chapter Pers 21, "only an 'appointing authority'... can obtain, record and process 'letters of resignation.'" As Mr. Newberry testified he was not an appointing authority, Appellant appears to maintain that the acceptance by Mr. Newberry of Appellant's resignation statement was illegal and therefore the fitting subject for an investigation by the Board under Sec. 16.05(4), Stats. (See Brief of Appellant, at pp. 13-14.)

As indicated above, we do not believe that such action is sufficiently serious or sufficiently pervasive to warrant an investigation.

Moreover, this point, like all the others, could have been preserved had timely action been taken. It was not. We see no compelling reason to investigate this facet of the case, even assuming that our investigatory power reaches that far.

We conclude that this is not a proper case for the Board's power of investigation, and we therefore decline the Appellant's request.

ORDER

IT IS THEREFORE ORDERED:

1) that the appeal in case No. 74-6 is dismissed;

2) that the appeal in case No. 74-13 is also dismissed.

IT IS FURTHER ORDERED that the Appellant's request for an investigation, pursuant to Sec. 16.05(4), Stats., is denied.

Dated Jan 20, 1975

STATE PERSONNEL BOARD

By

William Ahrens

William Ahrens, Chairman