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 LESTER P. VOIGT, Secretary,
 Department of Natural Resources,
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 Appellant,
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 v.
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 C. K. WETTENGEL, Director,
 State Bureau of Personnel, and
 MAURICE H. VAN SUSTEREN,
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 Respondents.
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 Case No. 74-93
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OFFICIAL

OPINION

AND

ORDER

Before AHRENS, Chairman, SERPE, JULIAN and STEININGER.

Background Facts

In 1948, upon being graduated from law school, Respondent Van Susteren commenced his employment for the State of Wisconsin in the Attorney General's office. In 1952, he became a hearing examiner with the Public Service Commission and served there until 1967. In that year, the Department of Resource Development was created and assumed some of the water regulation functions previously exercised by the Commission. A year later, in 1968, that Department merged with the Conservation Department to form the Department of Natural Resources. DNR is directed and supervised by the Natural Resources Board, a seven member parttime policy making body. The Secretary of DNR is subordinate to that Board. Mr. Van Susteren was assigned to the Bureau of Legal Services within DNR. The Bureau consisted of two sections, the Examiner Section with Mr. Van Susteren as Chief Examiner, and the Solicitor Section with its Chief Solicitor. Mr. Van Susteren's duties involved primarily those of a hearing examiner, conducting hearings, researching the law and drafting proposed decisions for the Natural Resources Board.

On August 28, 1972, John A. Beale, the Deputy Secretary of the DNR, in a memorandum, announced that "a Research Section is established within the Bureau" of

Legal Services for the purpose of writing and cataloging opinions and that such Section was to be headed up by Mr. Van Susteren. The memo further named the other employes who were assigned to head up the other two Sections. Mr. Voigt, by his Deputy, Mr. Beale, created the Research Section, without having first obtained the approval of the Governor. Mr. Voigt did not confer with Respondent Wettengel, who is the Director of the State Bureau of Personnel, in the Department of Administration, regarding the method to be used to fill the newly created position. Mr. Voigt did not give a written notice to the Director and to Mr. Van Susteren of anticipated changes in Mr. Van Susteren's job assignment. Mr. Voigt transferred Mr. Van Susteren from his former position of Chief Examiner to the new position, but did not obtain the authorization of the Director to do so.

In 1972, Mr. Van Susteren appealed his transfer to the Director and then to this Board. Both declined to hear the matter. Subsequently, Mr. Van Susteren appealed to the Court which remanded the matter to this Board. On remand, the Board ordered the Director to hold a hearing which he did, finding for Mr. Van Susteren. From that decision, Mr. Voigt appeals.

We find the foregoing to be the background facts of this matter; other findings of fact will be made in our discussion of the issues.

Creation of a New Research Section
in the Bureau of Legal Services Was Illegal

The creation of a new section within the DNR Bureau of Legal Services was unlawful, since it was not authorized by the Natural Resources Board and was not approved by the Governor. The power to reorganize the internal structure of the Department of state government rests with "the head of each department, ... subject to the approval of the Governor." Section 15.02(4) provides as follows:

"The head of each department...shall, subject to the approval of the governor...establish the internal organization of the department... and allocate and reallocate duties and functions not assigned by law to an officer or any subunit of the department...to promote economic and efficient administration and operation of the department....The head may delegate and redelegate to any officer or employe of the department or independent agency any function vested by law in the head."

The head of DNR is the Natural Resources Board. Section 15.01(3) defines "head of the Department" as the secretary or part-time policy board, in charge of the department. Section 15.34 creates the DNR "under the direction and supervision of the Natural Resources Board," thereby making clear that in law the Natural Resources Board is the head of DNR and not the Secretary of DNR. The evidence shows, and we find, that the Natural Resources Board did not authorize the establishment of a Research Section nor did it delegate to Mr. Voigt the authority to do so. We have previously found herein that the Governor had not approved the action.

The Director in his decision from which this appeal is taken did not conclude that the reorganization of the Bureau of Legal Services was unlawful. We do not agree. The Director, in his decision, does not address himself to the matter of the lack of authorization by the Natural Resources Board at all. We have found that such Board has the statutory authority to reorganize the internal structure of a department and that it did not create a Research Section in the Bureau of Legal Services or authorize Mr. Voigt to do so. The Section was not created in the exercise of statutory authority. Secondly, the Director, in his decision, contends that the Governor and his predecessor delegated to Department heads the power to reorganize departments below the Bureau level. It cites an Administrative Practices Manual on reorganization dated January 1, 1974, which states that reorganization within a bureau need not be approved by the Governor, except in certain circumstances. The policy expressed in the Manual is contrary to the statute, which requires gubernatorial approval of all reorganizations, where the function is "not assigned by law to an officer or subunit of the department" of Natural Resources, and therefore, under the statute must be established by the Natural Resources Board, with

the approval of the Governor, in order to be valid. In this case, the reorganization was unlawful, since it wasn't authorized by the Natural Resources Board or approved by the Governor.

DNR Did Not Consult with or Notify The Director
of the Anticipated Changes in Organization and Position Duties.

Before an agency reorganizes and changes the duties assigned to various positions, it is required by statute to notify and, whenever practicable, confer with the Director, since it is the Director's responsibility to allocate the new position to the appropriate civil service class. Sec. 16.07(2)(c), Wis. Stats., 1971, provides:

"When anticipated changes in program or organization will significantly affect the assignment of duties or responsibilities to positions, the appointing authority shall, whenever practicable, confer with the director within a reasonable time prior to the reorganization or changes in program to formulate methods to fill positions which are newly established or modified to the extent that reclassification of the position is appropriate. In all cases, appointing authorities shall give written notice to the director and employe of changes in the assignment of duties or responsibilities to a position when such changes in assignment may affect the classification of the position. (Emphasis added.)"

Mr. Beale in his August 28, 1972 memorandum said that the need for a system of issuing opinions had existed for several years. Andrew C. Damon, the Assistant Director of the Bureau, in his August 29, 1972 memorandum, stated that the volume of opinion writing had increased three times in the preceding six months. This would indicate, as might be expected, that these changes in the quantity of work came about over a period of time that would permit the need for some structural change in the organization to be anticipated and, at the same time, would permit ample time for conferences with and notice to the Director. In normal practice, the agency would furnish information concerning the newly created position to the Director, so the latter could allocate it to a class and certify a list of eligible candidates to DNR to fill the position. In the instant case, none of these preliminary steps

relating to the classification process for new positions was taken by DNR. The Director first learned of this matter after the appeal was filed. We have found that DNR did not confer with and notify the Director in the manner required by statute. In addition, we find that Mr. Voigt did not notify Mr. Van Susteren of the change in duties as required by the above-cited section of the statutes. We conclude that Mr. Voigt's transfer of Mr. Van Susteren to such new position is in violation of such provision of the law.

Mr. Van Susteren's Transfer Was Illegal
Since Unauthorized by the Director

An employe may not be transferred from his position to a newly created position without specific authorization of the Director. Section 16.23, Wis. Stats., 1971, provides:

"A transfer may be made from one position to another only if specifically authorized by the director."

We have previously found herein that Mr. Voigt did in fact transfer Mr. Van Susteren from his old position to the newly created position, but that the Director had not authorized such transfer.

Mr. Voigt takes issue with the Director's finding that a transfer occurred. He contends that Mr. Van Susteren was transferred only in an acting capacity and, therefore, no change in assigned duties had been made at all. The facts of the matter are to the contrary. Mr. Beale in his memorandum of August 28, 1972, established a Research Section and assigned Van Susteren to it. Subsequently, Andrew C. Damon, Assistant Director of the Bureau of Legal Services, in a memorandum dated August 29, 1972, assigned the professional employes of the Bureau to the respective sections, including the Research Section. The latter memorandum dealt at length with the functions of the Research Section. While such memorandum did refer to the assignment as only acting, all of the facts relating to it reveal it to be a permanent change. The opinions expressed by two personnel analysts from the Bureau of Personnel that

this was a temporary transfer were not concurred in by the Director. We do not agree with their view either. One personnel analyst gave the opinion that under the Wisconsin Administrative Code a transfer was a movement from a position in one class to a position in a class having the same pay range and since the new position had not been classified by the Director, "there can be no transfer." Perhaps a more accurate interpretation of the facts would be, as we have found in our discussion of the two preceding issues, that since DNR had not followed legal procedures related to reorganization and classification, there could be no lawful transfer. The other personnel analyst testified that agencies frequently fill positions on an acting basis because of delays in the budget or examining process, "until such a time as they can be filled permanently." Webster's 3rd International Dictionary defines "acting" as "holding a temporary rank or position; performing services temporarily." Such assignment might describe a job assignment in other instances, but it does not describe what took place in the instant case. Mr. Van Susteren was not assigned the position of Chief of the Research Section for a temporary period, say for instance, for two months or until somebody else could be hired. He was assigned it permanently, but it was called temporary or "acting" for no apparent reason, except perhaps because statutory procedures had not been followed. Nothing in the record indicates that Mr. Van Susteren was going to return to the Chief Examiner position. No basis existed to call his assignment as "serving in an acting capacity." To the contrary, the evidence shows that on August 28, 1974, he was permanently transferred from one position to the other, without the Director having specifically authorized such transfer and we have so found. We conclude that the transfer was in violation of Sec. 16.23, requiring the Director's authorization of transfers.

Conclusion

We conclude that Mr. Van Susteren's transfer was illegal for three reasons. First, it was made pursuant to a reorganization that was initiated without authorization

by the head of the department, the Natural Resources Board, and lacked gubernatorial approval. Secondly, it was in violation of Section 16.07(2) relative to consultation and notice to the Director, and notice to the employe involved, concerning changes in duties incident to reorganization. Thirdly, it was in violation of Section 16.23 requiring specific authorization by the Director for all transfers. We conclude that each of the foregoing reasons independently requires the conclusion that Mr. Voigt's action in changing Mr. Van Susteren's duty assignment was unlawful.

The Director, in his Decision in the last paragraph thereof orders Mr. Voigt to return Mr. Van Susteren to "his former position as Hearing Examiner." We find that Mr. Van Susteren formerly held the position of Chief Examiner and, therefore, we order that he be reinstated to that position.


ORDER

IT IS ORDERED that the action of the Director is affirmed, except that it is modified with respect to the legal basis therefor and with respect to the Director's Order, in the manner expressed in the accompanying Opinion.

Dated DECEMBER 24, 1974

STATE PERSONNEL BOARD

BY



William Ahrens, Chairman