STATE OF WISCONSIN STATE PERSONNEL BOARD ÷ NORBERT RICH, * OFFICIAL × ź Appellant, * v. ×. * MANUEL CARBALLO, Secretary, ÷ ORDER Department of Health & Social Services, * * ÷. Respondent. 4 Case No. 75-10 12 Ŷ.

Before: DEWITT, Chairperson, MORGAN and HESSERT, Board Members. (Dana Warren abstained from voting on the final disposition of this matter.)

The board adopts and incorporates the "findings of fact" contained in the attached "Proposed Opinion and Order." Because the board concludes that it lacks jurisdiction over the subject matter of this grievance it rejects the proposed "conclusions of law" and "order" and substitutes the following:

"CONCLUSIONS OF LAW"

The subject matter of this appeal involves the assignment of duties to certain employes employed as Institutional Aides. Jurisdiction was based on Article X, Section 1 of the contract and Section 111.91(3), Wis. Stats. The assignment of these duties does not fall within the enumeration of matters set forth as subject to the hearing officer procedure contained in Art. X, Sec. 1, and S. 111.91(3), and therefore we conclude that the board has no jurisdiction over this appeal.

ORDER

This appeal is dismissed for lack of subject matter jurisdiction. Dated __________, 1977. STATE PERSONNEL BOARD

Laurene DeWitt, Chairperson

STATE OF WISCONSIN STATE PERSONNEL BOARD * Å NORBERT RICH. * ż Appellant, PROPOSED × OPINION AND ORDER \$ v. MANUEL CARBALLO, Secretary, * Department of Health & Social Services, ż * * Respondent. * \dot{x} Case No. 75-10 *

Before:

NATURE OF THE CASE

This is an appeal of a grievance pursuant to the provisions of Section 11191(3), stats., and Article 10, Section 1 of the collective bargaining agreement between the State of Wisconsin and American Federation of State, County and Municipal Employes, Council 24, dated July 1, 1973. A copy of the order appointing a hearing examiner is attached hereto.

FINDINGS OF FACT

During the period of January through April, 1975, the appellant and a number of fellow state employes and union members covered by the above contract classified as Institution Aids 2 working in the Alcoholic Treatment Unit at the Winnebago Mental Health Institute, were required by their supervisors to devote somewhere between 12½% to 25% of their time on general cleaning tasks, including mopping floors. This work was done on a daily, ongoing, repetitive basis. It was only on rare occasions that patients assisted the appellant or his colleagues in this work. A copy of the Institution Aid 2 class specifications (Appellant's Exhibit 5) is attached to this opinion and is incorporated by reference as if fully set forth.

CONCLUSIONS OF LAW

The class specifications for Institution Aid 2 contains the following language: "This is advanced therapeutic aid or specialized non-professional nursing care work performed under direct supervision at a state hospital or institution." There is no language in the specifications, either in the definition section or under the examples of work performed that would support a conclusion that routine, repetitive housecleaning chores consuming a substantial percentage of an employe's time and not performed on an emergency basis or as a nonrecurring adjunct to a patient work-therapy type of program would be included within the parameters of these specifications. We conclude that these housekeeping duties are not included within the class specifications.

We also conclude that the provisions of Subchapter II of Chapter 16 of the statutes require that appointing authorities assign duties that are included within the class specifications for a position. Section 16.04(1)(b), stats., provides:

"Each appointing authority shall:

Appoint persons to the classified service, designate their titles, assign their duties and fix their compensation, all subject to this subchapter and the rules of the director." (emphasis supplied)

Section 16.07, stats., provides:

"(1)The director shall ascertain and record the duties, responsibilities and authorities of, and establish grade levels and classifications for, all positions in the classified service subject to the approval of the board. . . Each classification so established shall include positions which are <u>sub-</u> <u>stantially similar in respect to authority, responsibility and nature of</u> work required.

* * *

After consultation with the appointing authorities, the director shall allocate each position in the classified service to an appropriate class on the basis of its <u>duties</u>, <u>authority</u>, <u>responsibilities</u> or other factors recognized in the job evaluation process." (emphasis supplied) Section Pers 2.04(1), W.A.C., provides in part:

"Position standards are descriptive and not restrictive, and they shall not be construed to limit or modify the power of the appointing authority to assign tasks or direct or control the work of employes under his supervision. The use of particular examples of work performed shall not be held to exclude others not mentioned that are of a similar kind or level, nor is it implied that all those mentioned must be performed by all persons whose positions are so classified." (emphasis supplied)

These provisions must be read and interpreted together. The legislative intent behind the statutory provisions relating to the classification system is, at least in part, to group together positions that perform similar work for classification and other purposes. This purpose would be undermined if appointing authorities were permitted to assign ongoing work to positions that are not within the scope of the class specifications for that position. Section Pers 2.04(1), W.A.C., must also be read in the context of the overall statutory scheme. The language:

"Position standards are descriptive and not restrictive, and they shall not be construed to limit or modify the power of the appointing authority to assign tasks or direct or control the work of employes under his supervision."

must be interpreted consistently with Section 16.04(1)(b), stats: "Each appointing authority shall appoint persons to the classified service . . . assign their duties . . . all subject to this subchapter and the rules of the director." Furthermore, the next sentence of Section Pers 2.04(1) clearly indicates that appointing authorities are required to observe the guidelines set forth by the class specifications: "The use of particular examples of work performed shall not be held to exclude others not mentioned <u>that are of a similar kind or</u> . <u>level</u>" (emphasis supplied). This language would have no meaning if it were held that appointing authorities could appropriately assign duties that were not "of a similar kind or level" of the examples in the class specifications. Taken as a whole, we interpret Section Pers 2.04(1), W.A.C., as a directive to avoid an overly restrictive or mechanical application of the class Rich v. Carballo, 75-10 page 4

specifications to interfere with the management perogatives of the appointing authority, such as assigning duties on a temporary or emergency basis or duties that are collateral to those set forth in the class specifications, while generally requiring the appointing authority to comply with the general guidelines set forth in the class specifications.

Section 111.91(3) provides the legal standard for review, or basis of adjudication: "'arbitrary and capricious.'" In Olson v. Rothwell, 28 Wis. 2d 233, 239 (1965), the supreme court held: "Arbitrary or capricious action on the part of an administrative agency occurs when it can be said that such action is unreasonable or does not have a rational basis." In this case we conclude that the agency action assigning routine housekeeping tasks to Institutional Aids 2 on a non-emergency, regular basis, was contrary to the requirements of Section Pers 2.04(1), W.A.C., that assigned work should be similar in kind or level to the examples of work performed, was contrary to the classification system set forth in subchapter II of Chapter 16, and was "arbitrary and capricious" in the sense discussed above. Inasmuch as these assignments were discontinued after the grievance was filed, there does not appear to be any basis for the provision of substantive relief on the substantive issue, but the appellant is entitled to the foregoing determination on his grievance. See Watkins v. DILHR, 69 Wis. 2d 782 (1975); Strickland v. Carballo, Wis. Pers. Bd. No. 75-132, 228 (2/23/76).

Collateral issues raised in this case involve the questions of whether the appellant is entitled to be reimbursed for time traveling to and from the prehearing conference and for attendant expenses, and whether two state employes who testified at the hearing should be allowed to keep witness fees and mileage expenses tendered them by the appellant. The respondent at the hearing objected to consideration of the questions relating to appellant's attendence at the prehearing on the grounds of lack of notice that this would be in issue at the hearing. The hearing examiner permitted the appellant to introduce evidence on this issue subject to the objection. Following the hearing, the appellant's counsel submitted evidentiary documents relating to these issues and indicated that he intended to add these matters to the issues in the case and to brief them, which he did. The respondent did not respond to these communications and informed the examiner that he did not intend to file a brief prior to service of the proposed decision.

While the respondent did not reply to the post-hearing matters raised by appellant, he may have assumed that these matters were covered by the objection he made on the record at the hearing. We question whether notice in advance of the hearing is required for the resolution of questions collateral to the conduct of the hearing such as are presented here. However, to ensure a full airing of these matters, we will by this decision provide notice to the respondent that the board will consider the questions of whether the appellant is entitled to be reimbursed for time traveling to and from the prehearing conference and for attendant expenses, and whether the two state employe witnesses are entitled to keep the aforementioned checks. Respondent may serve and file his brief, including any evidentiary material or request for further hearing, within ten working days of the date of service of this decision.

ORDER

It is ordered that this grievance is decided in favor of the appellant with the questions related to the time and expenses of the appellant and the witnesses held open, all as set forth above.

Dated _____, 1977. STATE PERSONNEL BOARD

Laurene DeWitt, Chairperson