STATE OF WISCONSIN

STATE PERSONNEL BOARD

Appellant,

v.

JOHN C. WEAVER, President, University of Wisconsin,

Respondent.

Case No. 75-14

OFFICIAL

OPINION AND ORDER

Before: JULIAN, Chairperson, SERPE and STEININGER, Board Members.

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At the prehearing conference held in this matter the Respondent presented a number of objections to the proceedings. These will be discussed separately.

Respondent first contends that the Appellant's letter of appeal did not provide sufficient notice to prepare a defense and thus violated his (the Respondent's) due process rights. A copy of the appeal letter is attached as Appendix A to this opinion. The subject of this letter is set forth as "Stock Clerk 2 position now vacant at U.W. Parkside in the shipping and mailing department." The next to the last paragraph states "I would like to be returned to the shift and pay range for which I competed and was hired. I feel I should have this position as Stock Clerk 2."

Taken as a whole, with due regard to the fact that the letter was not drafted by an attorney, the letter indicates that the Appellant was demoted in lieu of layoff, that prior to the demotion his duties included the duties of Stock Clerk 2, even though there were no such positions at the campus at that time, that he has not been allowed to compete for other jobs in his old pay range since the demotion, and that he is entitled to a then vacant Stock Clerk 2 position.

We conclude that this letter, when coupled with the Respondent's ability to request clarification and amplification of Appellant's appeal, provides adequate notice to Respondent. The state is required to provide more detailed notice of disciplinary changes against an employe because

of the consequences to the employe and the disparate positions of the parties, considerations not present in an appeal of this nature.

Respondent further objects that the Appellant has not pursued his administrative remedies under the unilateral grievance procedures. The Appellant alleges not only that he has exhausted the unilateral grievance procedure but also that the matter is grievable pursuant to a collective bargaining agreement between AFSCME Council 24 and the state. There are disputed factual questions here which will require an evidentiary hearing or other proceeding to resolve.

Respondent urges that the appeal is untimely. Insofar as the appeal concerns Appellant's rights to a position that was open at the time the appeal was filed, it would not appear to be untimely. This question may also turn on the questions of if and how a grievance procedure was pursued.

Finally, Respondent objects to the representation of the Appellant at the prehearing conference by a person not licensed to practice law. In <u>Laub v. Schmidt</u>, Wis. Pers. Bd., 73-154, November 25, 1975, we sustained an objection to the representation of an Appellant at a hearing of a contested case by a person not licensed to practice law. We also noted that the decision did not apply to prehearing conferences. In that case we relied on certain language in <u>State ex rel State Bar v.</u>

<u>Keller</u>, 16 Wis. 2d 377, 384 (1962), to determine what was the unauthorized practice of law before an administrative agency:

. . . respondent has examined witnesses and taken such steps as necessary to make a record upon which formal action may be taken by the commission adjudicating the rights of the parties.

A prehearing conference before the Personnel Board is an informal proceeding where settlement is discussed, the formulation of the issues is attempted, and exhibits and lists of witnesses are exchanged. These conferences are usually chaired by counsel for the Board and are not usually recorded. It is possible that a person who assists a party at such a proceeding might engage in the practice of law. On the other hand, when a person actually presents a party's case during a hearing of a contested case, it is very difficult to imagine circumstances in which this would not amount to the practice of law.

As we further noted in <u>Laub</u>, control of the practice of law, including the definition of what is the practice of law, is vested in the judiciary. See State ex rel Bar v. Keller, supra, at 387:

The legislature's creation of the public service commission with its rule-making powers does not in any way supersede the exclusive power of the judiciary, ultimately residing in the supreme court, to determine what is or is not the practice of law and to restrict such practice to persons licensed by the court to engage in it.

It is one thing, as we did in <u>Laub</u>, to act in aid of the judiciary's power of regulation by prohibiting practice before the Personnel Board that clearly constitutes the unauthorized practice of law, such as at hearings of contested cases. We believe, however, that it would be impinging on the exclusive power of the judiciary to define what is the practice of law for us to rule on objections to representation of parties at prehearing conferences. In light of the informal and flexible nature of the proceedings at prehearing conferences, we are not at all inclined to forbid all representation by persons not licensed to practice law at such conferences, as that would undoubtedly prevent a greal deal of assistance that does not constitute the practice of law.

Therefore, in light of the exclusive power of the judiciary to define and regulate the practice of law, we conclude we should not rule on this objection. This is a matter for resolution by the judiciary.

ORDER

IT IS HEREBY ORDERED that Respondent's objections set forth above are overruled. The Appellant is ordered to serve and file within ten working days of the date of this Order copies of the steps of the grievance he states that he pursued. It is further ordered that the Respondent may at any time prior to the hearing request of the Appellant clarification or amplification of any aspect of this appeal.

Dated December 22 , 1975. STATE PERSONNEL BOARD

L. Julian, Jr., Chairperson

FERS OF VISCOUSIN

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Dear Sir:

RE: Stock Clerk 2 position now vacant at U.W. Parkside in the shipping and mailing department.

I was forced to accept a demotion in lieu of layoff from my M.V.O.1 position. I am at the present time destined to work my remaining time for the State as a B.M.H 2 on the third shift with no hope whatsoever of returning to my original day shift and pay range.

I was as stated an M.V.O 1 assigned to shipping and railing department at Perkside. In this area my duties were very broad, every day for 4.5 years I picked up U.S. mail and inter-camous sorted, bundled, and then delivered it to its destination. I also performed Stock Clerk 2 duties for approximately two years before its inception here at Parkside.

There have been several openings here at Parkside in the pay range from which I was denoted, since none of these jobs were skilled I feel that I should have at least been allowed a chance at these rositions if I didn't work out I would have returned to my present position.

Plese note that the vacancy I am concerned with is in the same department from which I was laid off from, and the Stock Clerk 2 duties I have performed numerous times.

It is interesting to note how broad your classification is when you are working in it and how narrow it becomes when you have served your purpose.

I would like to be returned to the shift and pay range for which I correted and was hired. I feel I should have this position as Stock Clerk 2.

I am therefore requesting a hearing officer in the enclosed matter

Sincerely

Joseph M. O'Hara

Kenosha. WI 53140