STATE OF WISCONSIN STATE PERSONNEL BOARD

DENNIS BIDDLE, et al.,

Appellants,

v.

VERNE KNOLL, Deputy Director, State Bureau of Personnel,

Respondent.

Case No. 75-195

OFFICIAL

OPINION
AND
ORDER

Before: DeWitt, Wilson, Morgan, Warren and Hessert, Board Members.

NATURE OF CASE

Pursuant to Section 16.05(1)(f), the appellants contest the State Bureau of Personnel's decision to reallocate their positions to the Job Service Specialist 2 level rather than the Job Service Specialist 3 level.

FINDINGS OF FACT

Appellants are classified employes with the Job Service Division of the Department of Industry, Labor and Human Relations (DILHR). That agency requested the State Bureau of Personnel to conduct a reorganizational survey for approximately 1200 of its positions. The survey resulted in the creation of the new classification of Job Service Specialists to which appellants' Job Developer positions were reallocated at the Job Service Specialist 2 level. In the same survey Employment Service Representative positions, which heretofore had been classified (as were the Job Developer positions) as Manpower Specialist 2 positions, were reallocated to the Job Service Specialist 3 level.

Appellant's primary function as Job Developer consists of finding jobs for registrants of the WIN program. Their duties require them to contact employers to place current registrants, to maintain an employer file of prospective job openings for future registrants, and to provide information

on jobs and job seeking skills to WIN registrants. Appellants also advise employers of other Job Service Programs not associated with the WIN program but this is mainly incidental to their primary function of securing job placements. Officially, the Employment Service Representatives bear the responsibility for contacting employers with information on all Job Service Programs including the WIN program. They plan, coordinate, and supervise the program designed to disseminate all such information for a specific geographic area. They also deal with problems arising from job referrals under the many Job Service Programs.

None of the appellants' positions were given a field audit, i.e., no appellant was consulted concerning the nature of the duties of his position although 10% of the 1200 positions involved in the survey were given a field audit. The appellant's positions were, however, given a desk audit, i.e., each position was reviewed through its position description which details the duties and responsibilities of that position. Reallocation of appellants' positions was based on this desk audit and on discussions with Job Developer supervisors concerning the nature of the duties of a Job Developer.

At the hearing of this matter the appellants were represented by Helen Dicks, a union representative not licensed to practice law. Respondent objected at the outset to her participation in this fashion, and the objection was taken under advisement and the hearing was conducted with Ms. Dicks questioning and cross examining witnesses, and in all respects presenting appellant's case.

CONCLUSIONS OF LAW

The definition section of the position standard for a Job Service Specialist 3 provides the basis by which to distinguish that level from the Job Service Specialist 2 level. (Resp. Ex. 11). According to the section, the "impact and complexity of decision making required" of a Job Service Specialist 3 is greater than that of the lower level. Appellants insist their Job Developer

positions should be reallocated to the Job Service Specialist 3 level because they perform many of the same duties as Employe Services Representative who were reallocated to that level. The respondent's determination is that Employe Service Representative decision making entails greater complexity and has greater impact than the decision making required of Job Developers. We conclude respondent's decision should be sustained.

There is no question that, incidental to their primary function of job placement, appellants inform employers of Job Service Programs other than their own WIN Program. Employe Service Representives, however, are officially responsible for and perform this informational function in a much more comprehensive and organized manner. They must plan, coordinate, and supervise the program through which employers in a specific area are provided with information on the many Job Service Programs. Appellants' roles as Job Developers are much narrower. They deal primarily with the WIN Program and only incidentally with other Job Service Programs. Thus, though their decisions arguably have greater impact on the WIN Program, they have little impact on the majority of Job Service Programs. Further, appellants are responsible only for their own activities. They neither supervise others nor engage in the complicated decision making required to formulate and implement the program through which information on Job Service Programs is disseminated to prospective employers in a given area.

Appellants complain that they were allowed no input into the decision to reallocate their positions because the position description which they drafted was ignored. We do not find such input necessary. A reallocation can be based on a personnel management survey as was done here. Section 16.07(2)(a) Wisconsin stats. Appellants' argument really challenges the accuracy and sufficiency of respondent's information on the duties of their Job Developer positions. As already discussed we conclude there is sufficient evidence in the record to

support the reallocation as made by the respondent. However, we do observe that it is good personnel management to have the maximum possible amount of communication with affected employes concerning these and other personnel transactions.

Appellants have indicated that they possess the knowledge, skills, and abilities required to be hired at the Job Service Specialist 3 level. That qualification does not, however, entitle them to have their positions reallocated. A reallocation is based on the nature of the duties, authority and responsibilities of a position not the qualifications of the person holding the position. Section 16.07(2) Wisconsin Statutes.

We conclude that the appellants have failed to discharge their burden of proving that their Job Developer positions should properly have been reallocated to the Job Service Specialist 3 level.

REPRESENTATION

Respondent objected to the appellants being represented by Ms. Dicks. Respondent's contention is that Ms. Dicks' appearance constitutes the unauthorized practice of law and should be precluded by denying certain motions filed by appellants (see Appellants' Exhibit 6) which would allow union employes to represent union members before this board. Appellants insist that the respondent does not have standing to raise the question of the unauthorized practice of law since the respondent's rights are not affected.

The Personnel Board's own rule on representation requires us to deny appellants' motions. Since our rule on representation regulates the practice of law before this board and since both the appellants and the respondent are, as parties to this appeal, subject to the board's rules, respondent has standing to object to Ms. Dicks' representation of the appellants. The board's rule PB 1.06 provides:

> "Representation. A party is entitled to appear in person or by or with counsel or other person authorized by the Wisconsin Supreme Court to practice law in that context at a hearing on a contested case before the board."

Ms. Dicks is not, as required by PB 1.06, a party to this appeal or an

attorney or other person authorized by the Wisconsin Supreme Court to practice law before this board. Since other similar union employes presumably likewise fail to meet the requirements of PB 1.06, appellant's motions are denied.

Appellants insist that Section 111.83(1) Wisconsin Statute authorizes union representation and that Section 111.91(3) Wisconsin Statute makes the union a party to this appeal and thus allows the union to represent itself. It is unnecessary to discuss appellants' interpretation of these statutory sections since neither section is relevant to this appeal. Appellants brought their appeal under Section 16.05(1)(f) to contest the Bureau of Personnel's reallocation action. This appeal is not a grievance to which Section 111.83(1) Wisconsin Statute would apply. Nor is it a review on the record of the decision of a impartial hearing examiner pursuant to Section 111.91(3) Wisconsin Statute. Absent a contrary statutory mandate, the board's rule, PB 1.06 must control.

Although Ms. Dicks did in fact represent the appellants, our decision on the representation issue does not require the dismissal of this appeal. Ms. Dicks' acts as counsel for the appellants do not become void. Instead they stand and can provide the basis for a decision on the merits of this appeal, just as acts constituting the unauthorized practice of law can support a judgement in a court case. Littleton v. Langlois, 37 Wisconsin 2d 340 (1967) and Drugsvold v. Small Claims Court, 13 Wisconsin 2d 228 (1961). Laub v. Schmidt, Personnel Board Case No. 73-154 (11/25/75) provides precedent for the dismissal of this appeal under the board's discretionary powers, a dismissal which we believe is unwarranted in this appeal. In the Laub case, dismissal was for lack of prosecution since the appellant did not attend the hearing and appellant's representation was held to be by an improper representative. In the present appeal, no such situation exists. All the appellants appeared and testified on their own behalf.

Despite this decision, we see serious problems with the board rule when the representation of union members by a union is involved. Recent United States and Wisconsin Supreme Court decisions indicate that this rule may impose restrictions more stringent than the courts require and that such restrictions may conflict with the constitutionally protected rights of union members.

Section PB 1.06, W.A.C., was thought by the board to be responsive to the decision in State ex rel. State Bar v. Keller, 16 Wisconsin 2d 377 (1962). That case dealt with the practice of law by the defendant before the Wisconsin Public Service Commission (PSC) under a PSC rule which allowed appearances by non-attorneys. Upon being charged with the unauthorized practice of law, the defendant attempted to interpose the PSC rule as his defense. The court held that the defendant's activities constituted the unauthorized practice of law and rejected his defense stating that no government agency could authorize the practice of law since that area is the exclusive province of the judicial branch and ultimately the Supreme Court. The decision by its terms did not require an administrative agency to prohibit the appearance as a representative of all but attorneys.

The court has countenanced representation by non-attorneys in some proceedings. In State ex rel. Reynolds v. Dinger, 14 Wisconsin 2d 193 (1961), real estate brokers were permitted to select and fill out conveyancing forms despite the court's determination that such activities constituted the unauthorized practice of law. The court simply decided that the benefits to the public of continuing the practice out weighed the dangers. The policies of this approach were further spelled out by the court in dealing with representation before a small claims court. Littleton v. Langlois, 39 Wisconsin 2d at 363-364:

"...The objective of the small claims procedure is speedy

> and inexpensive justice. This aim would not be furthered by insisting that a party to a lawsuit had to appear under all circumstances by attorney only unless appearing in proper person."
>
> "Essentially the statutes and rules that control the unauthorized practice of law are designed primarily ...to assure that the public is not put upon or damaged by inadequate or unethical representation."

Additionally, certain United States Supreme Court decisions raise questions whether the board's rule in question might not infringe on First Amendment rights of union members. See NAACP v. Button, 371 U.S. 415, 83 S. Ct. 328 (1963), Brotherhood of R.R. Trainment v. Virginia State Bar, 377 U.S. 1, 84 S. Ct. 11113 (1964), United Mine Workers v. Illinois State Bar, 389 U.S. 217, 885 S. Ct. 353 (1967). In Button, Virginia by statute, prohibited anyone from soliciting legal business for oneself or others. The NAACP admitted soliciting civil rights cases for its staff attorneys and was enjoined from continuing the solicitations. The Supreme Court admitted Virginia could regulate the practice of law within its borders but nevertheless overturned the statute as applied to the NAACP since it infringed on the constitutionally protected rights of the Association's membership.

The Trainmen and UMW decisions dispelled all thoughts that the Button decision applied only to situtations involving political expression. Both cases resulted from a determination by a state's highest court that the legal assistance provided by a labor association to its members with accident claims constituted the unauthorized practice of law. The Supreme Court reaffirmed each state's broad power to regulate the practice of law but struck down the state court decisions. The court treated the absence of political overtones in the cases as irrelevant.

> "In Trainmen, where the litigation in question was as here, solely designed to compensate the victims of industrial accidents, we rejected the contention made in dissent...that the principles announced in Button were applicable only to litigation for political

purposes." UMW v. Illinois State Bar, 389 US at 223.

Rule PB 1.06 as applied to union representation of its members raises many of the same questions discussed in these decisions, although these cases are not directly on point and the answers to these questions are by no means completely clear. Compare, e.g., Hackin v. Arizona, 389 US 143, 88 Supreme Court 325 (1967).

For all the reaons discussed above, it appears appropriate to re-examine Section PB 1.06, W.A.C., and to allow all interested parties an opportunity to express their views at length. A rule-making proceeding pursuant to Section 227.02, et seq., stats. will be instituted for this purpose.

ORDER

The decision of the director is sustained and this appeal is dismissed.

Dated August 25, 1977.

STATE PERSONNEL BOARD

Laurene DeWitt, Chairperson