STATE OF WISCONSIN STATE PERSONNEL BOARD

DEBORAH STRICKLAND,

Appellant,

v.

MANUEL CARBALLO, Secretary,
Department of Health & Social Services,
and VERNE KNOLL, Deputy Director,
State Bureau of Personnel,

Respondents.

Case No. 75-132

INTERIM
OPINION AND ORDER

DEBORAH STRICKLAND,

Appellant,

v.

BARBARA THOMPSON, State Superintendent,
Department of Public Instruction and
VERNE KNOLL, Deputy Director,
State Bureau of Personnel,

Respondent.

Case No. 75-228

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

OPINION

These appeals have been consolidated for preliminary purposes. The Appellant challenges training and experience requirements for two positions. The agencies have taken the position that these cases are moot or that the Appellant lacks standing to pursue these matters inasmuch as the Appellant was admitted to both exams following a re-review of her credentials after an initial denial. At the prehearing conference the parties stipulated to certain facts as a basis for a determination of the mootness issue:

> The Appellant was an applicant for the positions of Social Services Specialist 1-Staff Development Specialist in the Department of Health and Social

> Services and Administrative Assistant 5-Affirmative Action Consultant in the Department of Public Instruction. In connection with both job vacancies in both job announcements the Appellant made application within the deadline indicated in the job announcements. The Appellant's initial applications were not accepted by the Departments. Subsequently, the Appellant was found to have the necessary training and experience by the Departments and was admitted and will be allowed to participate in the examinations for these positions, after she had provided additional information to the Bureau of Personnel, acting on behalf of the Department of Health and Social Services, and the Department of Public Instruction. At this time, neither examination has been held or is scheduled.

This issue is somewhat complicated by the fact that although in her appeal letters Appellant's concern runs only to the training and education requirements for entry to the examination processes, she now characterizes her appeal more broadly:

> Let me clarify at the outset that my grievance is concerned with the validity of the selection process, inclusive of the examination process, and not with my eligibility to participate in that process.
> Letter -- brief filed January 15, 1976

However, regardless of whatever else the Appellant may be appealing, the questions of mootness and standing with regard to her challenge to the training and education requirements for these positions are still ripe for decision, and we can attempt to make a determination with regard to at least those preliminary issues.

The question of standing turns on an interpretation of the statutory language that provides the basis for our subject matter jurisdiction of this appeal, S. 16.05(1)(f), Wis. stats.: "Hear appeals of interested parties and of appointing authorities from actions and decisions of the director." (Emphasis supplied.) In this case the action appealed is that of the director, who has statutory responsibility for the selection process and the determination of the training and experience requirements. See S. 16.12(5), Wis. stats. The question is whether the Appellant is an "interested party."

The Wisconsin Supreme Court has never interpreted this phrase in the context of construing S. 16.05(1)(f). However in Goodland v. Zimmerman, 243 Wis. 459 (1943), the court addressed the general question of nature of the legal "interest" in a controversy that is required to bestow standing. The court held that some injury in fact was required. Although the court has adopted a more liberal posture with regards to standing requirements in the intervening years, injury in fact is still required.

In Wisconsin's Environmental Decade, Inc. v. Public Service Commission, 69 Wis. 2d 1 (1975), the court construed the standing provisions of SS. 227.15 and 227.16(1), Wis. stats. These provide in pertinent part:

> Administrative decisions, which directly affect the legal rights, duties or privileges of any person ... shall be subject to judicial review as provided in this chapter ... .
> S. 227.15.

> Except as otherwise specifically provided by law, any person aggrieved by a decision specified in S. 227.15 and directly affected thereby shall be entitled to judicial review thereof as provided in this chapter ... .

While specifically construing these provisions, the court cited other cases on standing dealing with other jurisdictional bases, both in Wisconsin and federal courts. The court also referred to "the Wisconsin rule of standing," 69 Wis. 2d at 10, and generally used broad language that made it clear that the holding is of much broader import than an interpretation of the above-cited statutory provisions:

> The Wisconsin rule of standing envisions a two-step analysis conceptually similar to the analysis required by the federal rule. The first step under the Wisconsin rule is to ascertain whether the decision of the agency directly causes injury to the interest of the petitioner. The second step is to determine whether the interest asserted is recognized by law. [1]
> 69 Wis. 2d at 10.

The court analyzed the injury requirement as follows, 69 Wis. 2d at 13-14:

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[1] With regard to the second step in this case, see S. 16.11(1) and S. 16.14, Wis. stats.

> The first question to be determined on this analysis of WED's standing in the instant case is whether the petition alleges injuries that are a direct result of the agency action.
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> The petition, as amended, alleges that the order in question causes harm: (a) By prematurely devouring natural gas reserves preventing future availability, and (b) by inducing lower priority customers to reply on more environmentally damaging sources of fuel. The respondents contend these alleged injuries are speculative and remote and cannot be construed as being directly caused by the order in question. On the other hand WED contends that "directly affected," as used in s. 227.16(1), Stats., includes injuries that are brought about because of a series of events initiated by the agency action in question and that the injuries alleged here qualify. We agree.
>
> This court and the federal courts have taken a similar view of the directness requirement. Injury alleged, which is remote in time or which will only occur as an end result of a sequence of events set in motion by the agency action challenged, can be a sufficiently direct result of the agency's decision to serve as a basis for standing. The question of whether the injury alleged will result from the agency action in fact is a question to be determined on the merits, not on a motion to dismiss for lack of standing.

Thus the court makes it clear that it is not appropriate at this point in the proceeding to engage in something akin to a "proximate cause" inquiry as in tort law. Doubts about whether the injury will occur in fact go to the merits, not to the preliminary determination of standing. All that is needed at this stage is a colorable allegation of direct injury.

In the case before us, the Appellant appealed the denial of her admission to two examinations because of failure to meet the training and experience requirements. Subsequently the agencies changed their positions and admitted her to the exams. Because

of this change in position, because she is not represented by counsel and because formal pleadings are not utilized in these proceedings, we conclude that it is inappropriate to limit our inquiry into the standing question to the allegations of injury contained in Appellant's appeal letters. We also will consider allegations contained in Appellant's brief.

In her letter-brief, Appellant alleges that she was admitted to the exams solely in an attempt to moot her appeals and that she does not in fact possess the required training and experience. In itself, this allegation does not establish injury. However, she also alleges that the training and experience requirements are considerations in the development of the rest of the exam process, or that other aspects of the exam process are geared to the training and experience requirements. She further alleges that this utilization of the allegedly improper training and experience requirements, which she does not possess, will prejudice her in her competition for these positions.

While these allegations are subject to proof, this goes to the merits under the principles applied in the Wisconsin Environmental Decade case. These allegations do present a colorable claim of injury directly resulting from the action of the Director, although the injury alleged is "remote in time or which will only occur as an end result of a sequence of events set in motion by the agency action challenged." 69 Wis. 2d at 14. As the court also held, "The question of whether the injury alleged will result from the agency action in fact is a question to be determined on the merits, not on a motion to dismiss for lack of standing."

Therefore, we conclude that the Appellant has standing to pursue this appeal on her own behalf. While the Appellant argued in her brief that she had standing to represent other persons who may have been denied admission to or discouraged from applying because of the training and experience requirements, it appears that this was more or less of an adjunct to her basic argument on mootness. In any event, neither party has discussed the basic legal question whether, in the absence of statutory authorization,

an administrative agency can entertain a class action of the nature suggested by the Appellant. If the Appellant desires to continue to attempt to pursue this matter in a representative capacity, she should so indicate.

The very recent case of Watkins v. DILHR, 69 Wis. 2d 782 (1975), is the latest supreme court pronouncement on mootness in the context of an administrative proceeding. In that case, Ms. Watkins was denied a transfer from a position as a basic zone caseworker, Milwaukee County Department of Public Welfare, to a position as a service zone caseworker. The latter position differs from the former position in that there is a reduced caseload and more attention given to individual cases in the latter. There is no difference in pay. She eventually filed a complaint with DILHR, alleging racial discrimination, on May 25, 1971. Her complaint was eventually dismissed by the agency, in part, on the grounds of mootness. Inasmuch as she had already been transferred, the agency could not have entered an order requiring her transfer. There was no potential for a back pay award since the two positions had the same pay rate. Despite the facts that she had obtained the relief she originally sought and was not damaged monetarily, the court reviewed the potential effects of an agency order and found that the matter was not moot.

In the case before us, Ms. Strickland has been admitted to the two exams in question. There is no issue with regard to her entry to these exams, just as there was no question about Ms. Watkins' transfer once it was accomplished. The inquiry in Watkins then centered about the future effects of an order, the "declaratory" effects of an order, and the policy considerations involved.

In Watkins, the court determined that the agency could, if discrimination were found, "enter an order which would have the practical, legal effect of requiring that Watkins be considered for all future transfers on the basis of her qualifications and without regard to race." 69 Wis 2d at 793. In the case before us, if we were to find that the training and experience requirements for the two positions in question are discriminatory and not job

related, as is alleged by Appellant, we could enter an order that would have definite practical legal effects with regard to future selection processes. The Personnel Board's remedial powers on this kind of appeal are set forth in, and limited to, the statutory provisions of S. 16.05(1)(f):

> ... After such hearing, the board shall either affirm or reject the action of the director and, in the event of rejection, may issue an enforceable order to remand the matter to the director for action in accordance with the board's decision ... .

This case is similar to Watkins in that the Appellant has already been admitted to the exam, and an order is not required to accomplish this. However, a finding that the training and experience requirements are improper would have a precedential effect on other selection processes for similar positions. More directly than this, as discussed above, the Appellant has alleged that the training and experience requirements are related to other parts of the selection processes which she has not yet gone through. Thus a finding with regard to the training and experience requirements would have an effect on the remainder of the selection processes in question.

The court also noted the effect of the denial of the transfer on Ms. Watkins personally, which included "deep personal frustration over an extended period of time," and concluded "She is entitled to know whether or not [her treatment] was due to racial discrimination or to some other cause." 69 Wis. 2d at 794. While this sense of "deep personal frustration" is not apparent on the record before us, the allegations made by the Appellant support a colorable inference of emotional distress, whether it be characterized as frustration, indignation, or resentment, by government action that allegedly is improper. While her situation is not directly comparable with that found in Watkins, "deep personal frustration" is a subjective element, and the Watkins holding cannot be restricted to its facts because of the obvious difficulties in assessing causation of a subjective status.

As to policy considerations, the court cited Wisconsin Employment Relations Board v. Allis-Chalmers Workers' Union, 252 Wis. 436, 443 (1948), where the court had held:

> ... To dismiss enforcement proceedings ... on the grounds that the cessation of the activities which gave rise to the order make it moot would invite circumvention of the established policy of the state. Rather than comply with the entirety of an order of the board, a union or an employer would know that he could wait until enforcement proceedings were begun, then desist from the unfair labor practice in question and move to dismiss the proceedings as moot, thereby evading the authority of the board.
> 69 Wis. 2d at 794.

A similar consideration is present in this case inasmuch as allegedly the Respondents did not admit Appellant until after she filed her appeals. If the cases were found to be mooted thereby, it would ostensibly encourage further evasion of administrative review by similar agency action in the future.[2]

With regard to further proceedings in this matter, we are guided by the Wisconsin Supreme Court's handling of the Wisconsin Environmental Decade case:

> We conclude, therefore, that the petition, as amended, does state facts which, if true, give the petitioner standing to attack the Public Service Commission order. We therefore reverse and remand to the trial court for a preliminary determination of the truth of the facts pertaining to standing alleged in the petition as amended. ... If the established facts support any of the bases for standing alleged in the petition, the trial court should then consider the merits of the appropriate issues in WED's petition.
> 69 Wis. 2d at 20.

This approach seems appropriate here — a preliminary fact-finding proceeding with regard to issues of mootness and standing. There are certain factors peculiar to this case and this forum that bear mention and require special handling.

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[2]This is not to imply that this was done in these cases. The court's analysis requires examination of the potential effect of a mootness finding.

First, if the parties feel that because of the overlap of the preliminary and the substantive issues or for some other reason a single plenary hearing would be desirable, this should be indicated and is of course a possibility to be considered. Second, there are no formal pleadings here and the Appellant proceeds without counsel. This contrasts with a judicial proceeding such as was the basis for the Wisconsin Environmental Decade case, where the plaintiff is required to lay out his or her case in the initial pleading, the defendants are required to lay out their objections and defenses in a responsive pleading, and the court can then determine the nature of future proceedings on the basis of the issues so identified. Here the issues have evolved through prehearing conferences and briefing of the initial issues identified, and may not be completely identified yet. At the same time, the parties are entitled to know the issues that will be the subject of the hearing, see S. 227.09, Wis. stats., and from a purely pragmatic standpoint, it is uneconomic to attempt to deal with preliminary issues in a piecemeal fashion. We will attempt to accommodate these various factors and considerations as follows.

Prior to further proceedings in this matter, the Appellant will be required to set forth in writing a statement of what relief she seeks in these appeals, whether or not she purports to represent anyone other than herself, and what she would intend to prove at a preliminary evidentiary hearing on the questions of standing and mootness. She may at the same time set forth in writing anything she wishes to add to her initial letters of appeal by way of amendment or supplementation. Following this the Respondents will be required to set forth in writing their objections or defenses. The parties should be on notice that new matter along these lines that may be raised after this point may be denied consideration on a waiver theory. The parties also will be required to consult and to attempt to reach agreement concerning the nature of further proceedings. Following this point we will hold another prehearing conference if indicated and determine the nature of further proceedings.

Prior to a preliminary or final factual hearing we will advise the parties of the issues to be heard and determine if these appeals will remain consolidated.

ORDER

IT IS HEREBY ORDERED that Appellant serve and file a written statement consistent with this opinion within ten working days of the date of the entry of this order, and that Respondents serve and file a response within five working days thereafter. It is further ordered that the parties within twenty-five working days of the date of the entry of this order meet together and consult and attempt to reach agreement concerning the nature of further proceedings, and report to the Board in writing within that time the status and results of these consultations.

Dated February 23, 1976. STATE PERSONNEL BOARD

Percy L. Julian, Jr., Chairperson