STATE OF WISCONSIN STATE PERSONNEL BOARD

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JACK K. JALLINGS,

Appellant,

v.

JAMES MORTON SMITH, Director,
State Historical Society of WI, and
VERNE H. KNOLL, Deputy Director,
State Bureau of Personnel,

Respondents.

Case No. 75-44

* *

ELEANOR MCKAY,

Appellant,

v.

JAMES MORTON SMITH, Director,
State Historical Society of WI, and
VERNE H. KNOLL, Deputy Director,
State Bureau of Personnel,

Respondents.

Case No. 75-45

* *

INTERIM

OPINION AND ORDER

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

NATURE OF THE CASE

These consolidated cases are appeals of denials of reclassification requests. At the prehearing conference counsel disagreed as to the definition of the issues presented by the appeal, and were requested to and have submitted briefs.

FINDINGS OF FACT

These findings are limited to matter appearing on the record to date and are made solely for the purpose of making a preliminary determination, prior to the hearing on the merits, of the issues involved in this appeal.

Both Appellants at all relevant times hereto have been employed by the State Historical Society as Archivists III. Both submitted requests for reclassification. The Society determined that their reclassification would be inappropriate. Both Appellants sought review of this determination by the Director of the State Bureau of Personnel, Jallings through the Director of the Society and McKay directly. Both received letters from the Director dated October 2, 1975, which were identical in substance and which contained the following language:

> "Your request for a re-review of the Reclassification Request to move your position from the Archivist 3 level to the Archivist 4 level was received . . . and is currently being reviewed by my staff along with the pertinent materials furnished by the State Historical Society. In keeping with the administrative procedures established to deal with this type of situation, your request will be processed as a formal Reclassification Request rather than as an appeal to the Director of the State Bureau of Personnel. Consequently, no formal appeal hearing will be required but rather, your position will be reviewed in the normal manner."

These were non-delegated classification actions. Subsequently the Bureau denied the reclassification requests and the Appellants appealed to this Board.

At the prehearing conference the Appellants agreed with Respondent Knoll (Deputy Director, Bureau of Personnel) to the following statement of issues raised by the appeals:

> 1.) Should Appellants' positions be classified as Archivists 3 or Archivists 4?
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> 2.) If it should be determined that they should be classified as Archivists 4, what should be the effective date of the classification for pay and benefit purposes?

Respondent Smith (Director, State Historical Society), disagreed with the foregoing statement of the issues and set forth the following as a substitute issue:

"Was it an illegal act or an abuse of discretion by the appointing authority, not to recommend reclassification of the Appellants to Archivists 4?"

The Appellants took the position that this proposal was an acceptable issue as a third issue but not as a substitute issue for the foregoing two issues. Respondent Knoll took no position on this proposal.

CONCLUSIONS OF LAW

The question framed by the parties' disagreement over the issues concerns the legal standard by which the personnel transactions involved in these appeals are to be measured by this Board. At the risk of oversimplifying the parties' positions on this question, we may paraphrase Respondent Smith's position as being that the Board should only rule in favor of the Appellants if we determine that the denial of reclassification was illegal or an abuse of discretion. The Appellants take the position that they are entitled to a broader review and a determination in their favor if it is found after a de novo hearing that their duties entitle them to reclassification.

The Respondent correctly states that the resolution of this dispute turns on the statutory framework provided by the legislature. He notes that the administrative rules promulgated pursuant to that authority give the employe the right to petition his employer for reclassification, and to appeal the denial of the request to the Director, Section Pers. 3.03(4), W.A.C.:

"When a nondelegated reclassification request submitted in writing by an employe is denied by the appointing authority, the employe shall be so notified in writing by the appointing authority. If the incumbent feels that the decision of the appointing authority is incorrect, he or she may submit to the appointing authority a request for further review by the director. Such request shall be forwarded to the director by the appointing authority along with a copy of the agency denial letter and any other pertinent materials."

Respondent Smith goes on to argue in his brief that:

"The only possible statutory authority to support such procedure is sec. 16.03(4)(a), which reads:

> 'The director or his designated representative shall hear appeals of employes from personnel decisions made by appointing authorities when such decisions are alleged to be illegal or an abuse of discretion and such decisions are not subjects for consideration under the grievance procedure, collective bargaining, or hearing by the board.'"

Thus in Respondent Smith's view when the Appellants invoked the director's "further review" pursuant to S. Pers. 3.03(4), the jurisdictional basis was provided by S. 16.03(4)(a), Stats., which provides for appeals of decisions of appointing authorities when such decisions are alleged to be illegal or an abuse of discretion. Respondent Smith then submits that if the Director's review is limited by statute to the standard encompassed by the terminology "illegal or an abuse of discretion," then this Board cannot utilize a broader legal standard on review of the Director's determination.

However, we do not believe it is correct to analyze the statutory basis for these appeals in this manner. In addition to his quasi-judicial authority provided by S. 16.03(4)(a), Stats., cited by the Respondents, the Director has many other statutory powers, including specific authority for the classification process generally and the reclassification of specific positions, see S. 16.07(2), Stats.:

> "After consultation with the appointing authorities, the director shall allocate each position in the classified services to an appropriate class on the basis of its duties, authority, responsibilities or other factors recognized in the job evaluation process. He shall likewise reclassify or reallocate positions on the same basis whenever he finds such action warranted."

The rules which the Director has established for processing reclassification requests provide that in situations such as are present in these appeals the appointing authority must review each request and recommend a specific action, S. Pers. 3.03(3), W.A.C., and that in the event of denial the employe may request "further review" by the Director. Section Pers. 3.05, W.A.C., provides for appeal of the Director's determination. Both

S. Pers. 3.03(4) and S. Pers. 3.05 use the same standard:

> S. Pers. 3.03(4): "If the incumbent feels the decision of the appointing authority is incorrect, he or she may submit a written request for further review by the director."
>
> S. Pers. 3.05: "If the employe believes the classification action of the director or his designated representative to be incorrect, or if the appointing authority believes the classification action of the director to be incorrect on the basis of the class specifications, the employe/appointing authority shall, upon written request, be entitled to appeal such action as provided in Wisconsin Administrative Code chapter Pers. 26." (emphasis supplied)

Since the classification statute specifically requires the Director to consult with the appointing authority prior to the reclassification of a position, see S. 16.07(2), Stats., it is not surprising that the Director has provided by rule for a procedure which requires the appointing authority to review the request and make a recommendation prior to action by the Director. However, the final action of the Director is not an appeal from a "personnel decision," S. 16.03(4)(a), Stats., made by an appointing authority which the employe alleges to be illegal or an abuse of discretion. Rather, it is the exercise by the Director of his authority to reclassify pursuant to S. 16.07(2), Stats. The Director is not limited to a review of the appointing authority's recommendation for illegality or an abuse of discretion when the Director discharges his statutory function. This is consistent with the term "incorrect" found in S. Pers. 3.03(4), W.A.C. In a nondelegated reclassification situation such as this, the employes are entitled to a decision from the Director, who has the sole authority to reclassify, if they disagree with the appointing authority's recommendation.[1]

On appeal from the Director's denial of reclassification to the Personnel

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1. We do not reach the question of whether Respondent Smith is a necessary party to this proceeding.

Board, S. Pers. 3.05 clearly sets forth the legal standard for review by use of the term "incorrect." The question presented for this Board on such an appeal is whether the Director's action is correct or incorrect, not whether the Director acted illegally or abused his discretion.

This code provision, S. Pers. 3.05, and the standard of review which it provides, are consistent with the statutory provisions relating to the hearing of these appeals by this Board and with basic principles of administrative law, as well as with the past decisions of this Board. See, Ryczek v. Wettengel, Wisconsin Personnel Board No. 73-26, 7/3/74.

The jurisdictional basis for these appeals is S. 16.05(1)(f), Stats.:

> "Hear appeals of interested parties and of appointing authorities from actions and decisions of the director. After such hearing, the Board shall either affirm or reject the action of the director and . . . remand . . . for action in accordance with the board's decisions."

Other subsections of S. 16.05 provide for hearings, the administration of oaths, and the taking of testimony. These provisions are consistent with the concept of de novo hearings before the Board.[2] See 73 C.J.S. Public Administrative Bodies and Procedure, S. 159(b), pp. 499-500:

> ". . . the statutes generally contemplate a full administrative appeal, in which there is a hearing de novo, and not merely a review of the previous hearing. It includes all issues originally referred to the subordinate body, and comprehends all rulings and decisions made by the lower administrative body by which appellant claims to be aggrieved, and the reviewing agency is a fact-finding body, and may reverse the original determination, even though there is some evidence to support the findings on which it is based, and may substitute its findings for those originally made, with or without taking additional testimony."

While there appears to be a dearth of Wisconsin authority directly on point, this general statement is consistent with the holding of the Wisconsin Supreme Court in Reinke v. Personnel Board, 53 Wis. 2d 123, 191 N.W. 2d 833 (1971).

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2. This is not to say that a de novo hearing is required in all cases. In appeals from decisions of the director in his quasi-judicial capacity following a trial-type hearing at the director's level, a new hearing might not be required. C.f. Voigt v. Wisconsin State Personnel Board, Dane County Circuit Court, #145-300, May 8, 1975.

There, in an appeal of a discharge the Board "looked upon its role as merely to find substantial evidence to support the action of the employer," 53 Wis. 2d at 133-134. The court held:

> "The substantial evidence test is applicable only on judicial review; and, therefore, the board misinterpreted its function, when it found that there was substantial evidence to support the appointing authority.
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> * * *
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> The Personnel Board is required by law to find ultimate facts and there is no authority for the board to determine if there is substantial evidence to support the action of the appointing authority. The function of the board is to make findings of fact which it believes are proven to a reasonable certainty by the greater weight of the evidence." 53 Wis. 2d at 134, 137-138.

See also Lorena Ind. School District v. Rosenthal Common School District, 421, S.W. 2d 491, 493 (Texas 1967).

The term "appeal" used in S. 16.05, Stats., and other related provisions comports with the concept of a de novo hearing and the consonant independent determination by this board. See State ex rel Spurck v. Civil Service Board, 32 N.W. 2d 574 (Minn. 1948). There, the statute, M.S.A. S. 43.12(3), provided:

> "The director of the civil service shall allocate each office, position or employment in the classified civil service to one of the grades and classes within the classification, subject to an appeal to the board by an employe immediately affected . . . ." 32 N.W. 2d at 577.

The Minnesota Supreme Court devoted considerable discussion to the meaning of "appeal" in this statute:

> "As in the case of statutes governing judicial proceedings, the word 'appeal' in a statute governing administrative proceedings will be deemed, in the absence of tokens of a contrary legislative intention, to be used with its strict and ordinary meaning."
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> In the instant case, the word "appeal" is, for lack of tokens of a contrary legislative intention, to be deemed to be used in its strict and ordinary meaning. In City of Rockford v. Compton, supra, the question arose whether a removed employe was entitled to a trial de novo upon "appeal" under a statute which did not prescribe how the "appeal" should be tried. In an elaborate and well-considered opinion the court said (115 Ill. App. 411, 414): "* * * The term 'appeal,' in its original, technical and appropriate sense, meant the removal of a suit from an inferior court, after final judgment therein, to a superior court, and placing the case in the latter court to be again tried de novo upon its merits, just as though it had never been tried in the inferior court.
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> * * *

> "* * * We are of opinion that when this statute granted an appeal without requiring the evidence to be preserved and transmitted some greater remedy was intended, and that must have been a retrial of the charges."
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> In Babcock v. City of Grand Rapids, supra, it was held that on appeal to a city civil service board by a discharged employe he was entitled to a trial de novo. There the court reviewed many authorities and said (308 Mich. at page 415, 14 N.W.2d at page 49): "We believe that when the word 'appeal' is used without any limitations as to the nature or method of review, in a statute or charter, it means a trial de novo."" 32 N.W. 2d at 579.

See also J. C. McCrory Co. v. Commissioner of Corporations, 182 N.E. 481, 483 (Mass. 1932); which involved an appeal by a taxpayer of a decision of the Commissioner of Corporations and Taxation to the Board of Tax Appeals. The commissioner contended that the power of the board was limited to a review of his action and the board could not hold a de novo hearing. The Massachussetts Supreme Court held that:

> "The word 'appeal' in our statutes usually has been interpreted to mean a full new trial or an entire rehearing upon all matters of fact and questions of law. It is used in contrast to the word 'review' which signifies a re-examination of proceedings already had . . . It ought to be construed and interpreted according to the common and approved usage of the language. It follows that the board was authorized to retry every issue raised by the petition and answer filed with it."

There appears to be considerable support for this interpretation of "appeal" in an administrative setting, see, e.g., Block v. Glander, 86 N.E. 2d 318, 321 (Ohio 1949); Newport News Shipbuilding Co. v. United States, 374F. 2d 516, 530 (U.S. Court of Claims 1967). There are also holdings of the Wisconsin Supreme Court which support this line of cases inferentially. For example, School District v. Callahan, 237 Wis. 560, 578-581 (1941); involved an appeal of a decision of the superintendent of state public instruction to circuit court pursuant to S. 40.30(6), Stats. (1939). The Supreme Court refused to interpret the statutory right of appeal to require a trial de novo in circuit court of the matters involved in the administrative decision since to do so would result in the impermissible exercise of legis-

lative, executive, or administrative functions by the courts. Clearly, this consideration is not present in the case of an administrative review of an administrative decision such as is presented by the instant case, and there is no such impediment to a statutory interpretation consistent with accepted usage.

For all of the foregoing reasons, we conclude that the legal standard we must apply on review of these personnel transactions is whether the Director's actions were correct or incorrect based on statutory guidelines for classification. We further conclude that the issues presented for decision by these appeals are as agreed to by the Appellants and Respondent Knoll at the prehearing.

We further conclude that Respondent Smith's proposal for a substitute issue must be denied and his objection to the foregoing two issues must be overruled.

ORDER

IT IS HEREBY ORDERED that this matter be set for hearing on the basis of the issues agreed to at the prehearing by Appellants and Respondent Knoll, as follows:

> "1.) Should Appellants' positions be classified as Archivists 3 or Archivists 4?
>
> 2.) If it should be determined that they should be classified as Archivists 4, what should be the effective date of the classification for pay and benefit purposes?"

It is further ordered that Respondent Smith's objections to this formulation of the issues are overruled and his proposal for a substitute issue ("Was it an illegal act or an abuse of discretion by the appointing authority,

Mr. Smith, not to recommend reclassification of the Appellants to Archivists 4?") is denied.

Dated August 23, 1976. STATE PERSONNEL BOARD

Percy L. Julian, Jr., Chairperson