
DIANE RENNE,

Appellant,

v.

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

Respondents.

Case No. 75-5

OFFICIAL

OPINION
AND
ORDER

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

NATURE OF THE CASE

This case concerns an appeal of the denial of moving expenses following appellant's lateral transfer from a Wisconsin Rapids work place to a Fond du Lac work place.

FINDINGS OF FACT

Prior to September, 1974, appellant was a permanent state employe with status in class as a Social Worker 3, assigned to the Department of Health and Social Services, Division of Family Services in Wisconsin Rapids. On September 4, 1974, appellant was offered and accepted a voluntary transfer from the Wisconsin Rapids, Division of Family Services office to the Fond du Lac office. Her classification and status was to remain the same in the new work place as it was in the old office. Appellant's transfer to the Fond du Lac office necessitated her moving her residence. On October 18, 1974, appellant moved from Wisconsin Rapids to Fond du Lac, incurring moving expenses of \$652.72. She began work at the Fond du Lac office on October 28, 1974.

On September 12, 1974, prior to her move, appellant requested that she be reimbursed for the expenses of moving. The request was denied by the Personnel

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Manager of the Division of Family Services, for the reason that the move was voluntary, and not mandatory. On September 24, 1974, appellant again requested that she be reimbursed for the moving expenses she was to incur, and again the request was denied.

Appellant then appealed the denial through the three steps of the Department Grievance Procedure. At the last step, the Secretary of the Department of Health and Social Services denied the grievance. The appellant then appealed the third step grievance to the board.

The board requested that the Director of the Bureau of Personnel investigate the grievance, pursuant to Departmental procedure. The Director affirmed the Department of Health and Social Services action in denying the moving expense reimbursement, and the appellant appealed.

At the prehearing conference, respondent Knoll moved that he be stricken as a party. Respondent Carballo subsequently moved that the appeal be dismissed on the grounds that the board lack subject matter jurisdiction.

In an interim order issued May 25, 1976, the board determined that the motion of respondents would be denied, and that the jurisdictional issue would be resolved after the hearing in this opinion. Accordingly, a hearing was held to resolve the following issue:

"Whether or not the denial of appellant's request for reimbursement of moving expenses was in conformity with the applicable statutes, administrative rules, departmental policy, and practice or was arbitrary and capricious."¹

CONCLUSIONS OF LAW

Jurisdiction

The relevant departmental unilateral grievance procedure (Board's Exhibit 5) provides in part:


¹This is the issue suggested by the appellant at the prehearing conference.

"The decision of the Secretary will be final and binding on all grievances filed under the departmental procedure, except those which allege a violation, incorrect interpretation or unfair application of:

1. A rule of the Personnel Board or a civil service statutes (Section 16.01 - 16.32).
2. A function which the Director of Personnel has affirmatively delegated his authority to the department."

The procedure further provides that such grievances following their appeal to the board, shall be referred to the director for investigation and that "if he finds that the grievance covers a delegated responsibility of the Director of Personnel, he shall, within 15 days, issue an order affirming or overruling the agency's decision."

In this case the director affirmed the agency's decision on the merits. The appellant appealed that decision, but the respondent did not cross appeal on the issue presented by the director's assumption of jurisdiction. While statutory provisions concerning the subject matter of appeals such as Section 16.05(1)(e) and (f), and limiting the time for filing appeals, such as Section 16.05(2), have been held to be jurisdictional, the same cannot be said of the terms of departmental grievance procedures such as Board's Exhibit 5, which are not statutory and which do not have the force and effect of law. While such grievance procedures in some instances may limit appeal rights to the board, since such procedures are not jurisdictional in nature, such as are the statutes above cited, they are not nonwaivable. Thus, while the question of the timeliness of an appeal pursuant to Section 16.05(2) is not waivable and may be raised at any stage of the proceeding, the provisions of the grievance procedure here involved are waivable. It is concluded that in-as-much as the director ruled on this grievance on its merits and the respondent failed to cross-appeal, that he may not now object to the board's jurisdiction over the appeal.



MERITS

The authorization for the payment of moving expenses for State employes is found in Section 20.917 stats. The relevant portion of that statute provides:

Section 20.917(1)(b):

"Reimbursement in an intra-agency transfer or demotion at the person's request (shall be) at the discretion of the appointing authority at such agency."

The Department of Health and Social Services had regulations concerning the payment of moving expenses, set forth in the Department's Employee Manual, Chapter XV, p. 11. The regulations provide that a represented employe who laterally transfers to a new location voluntarily shall not be reimbursed for moving expenses unless specifically authorized in the collective bargaining agreement. The regulations also provide that a non-represented employe may be reimbursed for moving expenses incurred by a voluntary lateral transfer. The approval of reimbursement is to be based upon the employe work record, and an evaluation of the circumstances necessitating the transfer.

We conclude that appellant's request for reimbursement was handled in accordance with all existing statutes, regulations, policy and practices, and was not an arbitrary and capricious act.

Appellant's request was processed initially by Jeanne Neesvig, a department Personnel Management. After considering the factors surrounding the transfer and relocation, Ms. Neesvig determined that the transfer was apparently more for appellant's personal desires than for the best interest of the department and denied the request. In a memorandum dated September 19, 1974, she stated to appellant:

"It appears from the information we have that you requested this move because of the opportunity to return to your home area and a desire to acquire additional full time experience in the Adoption Program. Approval is granted (for reimbursement) in cases where the employe is

ordered to relocate or transfers in lieu of layoff or when the labor market is very limited..."

Appellant failed to demonstrate that the actions of respondent were arbitrary or capricious, as set forth in appellant's proposed statement of issue, which was accepted as the statement of issue for resolution in this case.'

"Arbitrary and capricious action...occurs when it can be said that said action is unreasonable or does not have a rational basis...and is not the result of the winnowing and sifting process."

Olson v. Rothwell, 28 Wisconsin 2d 233, 239, 137 NW 2d 86 (1965).

It cannot be said that the action in denying appellant's request for moving expenses was unreasonable, or without a rational basis. The request was considered and evaluated according to department standards. Appellant did not demonstrate that she was singled out for the denial, as opposed to all other employes similarly situated.

Rather, it appears that after due consideration of appellant's request, the department determined not to reimburse her, as was within respondent's discretion.

The decision to deny appellant's moving expense was ratified at higher levels of the grievance procedure on the additional ground that the appellant was a represented employe and that the Department of Health and Social Services policy on travel regulations (Respondent's Exhibit 5) provides: "Represented employes cannot be reimbursed for moving expenses when relocating as a result of a voluntary transfer or demotion unless so specified in the applicable collective bargaining agreement." In-as-much as at the time of the appellant's move the union and the state had not yet reached agreement on a contract, there was no contract in existence and no provision for moving expenses.

This rationale at first appears somewhat questionable, since the quoted

provision's intention seems to anticipate that represented employes would in fact be covered by a collective bargaining agreement, i.e., "unless so specified in the applicable collective bargaining agreement."

It does seem anomalous to deny voluntary transfer moving expenses across the board, with respect to all employes in a certified collective bargaining unit between the period of certification and execution of a contract. However, the statutes do appear to permit such an approach and Section 111.93 provides in part:

"Effect of labor organization: status of existing benefits and rights. (1) If no labor agreement exists between the state and a union representing a certified bargaining unit, employes in the unit shall retain the right to appeal under Section 16.05(1)(e).

(2) All civil service and other applicable statutes concerning wages, hours, and conditions of employment shall apply to employes not included in certified bargaining units."

The fact that Section 111.93(1) specifies retention only of the right to appeal disciplinary actions pursuant to Section 16.05(1)(e) for employes in a certified bargaining unit without a contract is a strong indication that the sub-section should be read to exclude other rights, consistent with the canon of statutory construction of express mention, implied exception. This interpretation is supported further by Section 111.93(2), which makes it clear that employes not in certified bargaining units are covered by all civil service and other statutes concerning wages, hours, and conditions of employment. In this context Section 111.93(3) which provides:

"If a labor agreement exists between the state and a union representing a certified or recognized bargaining unit, the provisions of such agreement shall supersede such provisions of civil service and other applicable statutes related to wages, hours, and conditions of employment whether or not the matters contained in such statutes are set forth in such labor agreement."

appears to be directed to a clarification of the situation that may exist where a contract is in force that does not specifically cover all of

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the subject matter covered by the civil service and other applicable statutes.

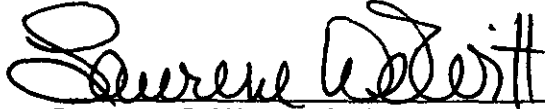
Based on these provisions of the statutes and the entire record in this matter, it cannot be concluded that the respondent's interpretation and application of Respondent's Exhibit 5 in this case was not in conformity with law, departmental policy and procedure or arbitrary and capricious.

ORDER

The respondent's position on this grievance is sustained and this appeal is dismissed.

Dated August 25, 1977.

STATE PERSONNEL BOARD


Laurene DeWitt, Chairperson