

thirty days after the final disposition by operation of law of any such application for rehearing to timely seek a petition for review in circuit court. This interpretation as giving 'authority' to apply for or request a rehearing is evidenced by the language in sec. 227.15, which states the agency's orders 'shall be subject to judicial review as provided in this chapter . . . ' and in sec. 227.16(1), where it provides 'any person aggrieved by a decision specified in sec. 227.15 . . . shall be entitled to judicial review thereof as provided in this chapter.'" 58 Wis. 2d at 187-188.

In Baken v. Vanderwall, 245 Wis. 147 (1944), the court held that the Personnel Board had neither express statutory nor implied power to grant rehearings. However, in that case the Personnel Board determined to reconsider its decision on August 18, 1942. Section 227.16(1), which formed the basis for the Claflin holding, did not become effective until July 2, 1943. See Laws, 1943, c. 375. Baken is clearly distinguishable.

Turning to the merits of the instant motion, Appellant argues that it was improper to decide the appeal without an evidentiary hearing. At the prehearing conference held in this matter the parties stipulated:

"to submit this matter for decision on simultaneous position papers or briefs, reserving the right to request an evidentiary hearing. . . ." Prehearing Conference Report dated November 26, 1975, p. 1.

The Respondent's statement of position was dated December 11, 1975, and service was admitted by Appellant's counsel on December 17, 1975. His reply was dated and filed December 30, 1975. This reply did not contain a request for an evidentiary hearing, nor was one filed prior to the entry of the opinion and order on January 27, 1976. We perceive no possible error in not holding an evidentiary hearing under these circumstances.

The Appellant further argues that the January 27, 1976, opinion and order left unresolved certain issues as follows:

- "(1) Did the Department of Revenue comply with the applicable Statutory Subsections relating to demotions in lieu of layoffs?
- (2) Did the Department of Revenue comply with the applicable Rules of the Director of the Bureau of Personnel then in effect regarding demotions in lieu of layoffs?

(3) If the answer to the foregoing questions is 'yes,' was the action of the Department arbitrary and capricious?" Appellant's memorandum in support of motion dated February 11, 1976, p. 2.

In this regard, we observe that the parties at the prehearing conference stipulated that "the issue presented by this appeal is whether or not the Respondent complied with the Board's opinion and order in case no. 73-36." Prehearing Conference Report dated November 26, 1975, p. 1. The opinion and order entered January 27, 1976, is responsive to that issue. However, on motion for rehearing we conclude that that opinion and order was erroneous and must be modified. That opinion and order contained the following conclusions of law:

"The position papers and replies filed by the parties make it clear that this dispute centers on the question of whether Appellant's demotion should be retroactive to February 18, 1973, the date of his original reallocation.

Our original decision in 73-36 determined that the appealed reallocation was improper and was not an actual reallocation but a demotion in lieu of layoff. In the brief he submitted in 73-36, Appellant requested the following alternative remedy:

' . . . it is respectfully requested that the Board enter a remedial order whose terms (a) return Appellant to the position of Revenue Administrator III at the salary range of 1-18, together with any and all lost fringe benefits as a result of the illegal action of the Respondents, or alternatively, (b) direct the Bureau of Personnel and its Director to categorize and handle this particular personnel transaction as a demotion in lieu of layoff pursuant to Pers. 17.04(2), together with the reinstatement and recognition of all rights attendant thereto.'

While our Opinion and Order may not have been entirely clear, we conclude that we intended in essence to adopt the second of the suggested remedies. We ordered that the Respondent 'initiate the appropriate demotion in lieu of layoff action, pursuant to Wisconsin Administrative Code Pers. 22.' In discussing the appropriate remedy we stated:

'We are, therefore, entering an Order that the Appellant's demotion be treated as such, while at the same time Appellant retains additional compensation, if any, he would not normally have received under such circumstances.' (Opinion and Order p. 4 - Emphasis added.)

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In other words, the Respondent was ordered to provide de jure status to a de facto demotion, not to restore the Appellant to Revenue Administrator III effective February 18, 1973."

The foregoing decision alludes to the lack of clarity in the original opinion and order, entered in No. 73-36. On rehearing we conclude that this original decision should not be interpreted in a manner that would be consistent with a retroactive demotion.

Such an interpretation would be inconsistent with the controlling case law on the subject. See State ex rel. Tracy v. Henry, 219 Wis. 53 (1935). That case concerned the attempted discharge of a number of state employees in the classified service. Following judicial decisions that these transactions were improper because of failure to comply with the statute governing discharge, then §16.24, the defendant attempted to make the discharges retroactive to the original dates. The court held:

"Under that provision [§16.24], all of the petitioners were entitled to continue in their positions as deputy oil inspectors in the state civil service, unaffected by any attempted discharge by the defendant, as their appointing officer, until he had taken the action to effect their discharge, and there had elapsed the time which is prescribed in sec. 16.24(1), Stats., before a discharge can become legally effective.

* * *

. . . in view of those [statutory] requirements, an attempted compliance by furnishing such reasons subsequent to the original illegal discharge could not become effective as a discharge until after such reasons and explanation had been filed; and in view of those consequences, it is manifest that a subsequently effective discharge, pursuant to subsequently furnished and filed legal reasons, could not possibly operate retroactively so as to be deemed effective as of the date of the original illegal discharge." 219 Wis. at 60-61.

In the instant case the board held in 73-36 that the personnel transaction under scrutiny, which had been handled as a reallocation, was not an actual reallocation but was a demotion in lieu of layoff. Following this decision, the Respondent attempted to effectuate the demotion retroactively.

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Such action was inappropriate under the authority of the foregoing supreme court decision and the original decision in 73-36 as interpreted.

As was discussed above, the nature of the stipulated issue precludes consideration of other questions raised by appellant in addition to retroactivity. Therefore it is concluded that Respondent's action as set forth in the letter of January 21, 1975 (Appellant's Exhibit 1), is erroneous to the extent that it purports to make the demotion retroactive. Appellant is entitled to the difference in salary and benefits between the Revenue Administrator III level and the Revenue Administrator II level from February 18, 1973, to January 21, 1975.

ORDER

It is the final order of this board that the motion for rehearing is granted and the action of Respondent reflected in the letter of January 21, 1975 (Appellant's Exhibit 1), demoting Appellant retroactive to February 18, 1973, is rejected with respect to its retrospective operation and Appellant is to be fully reinstated at the Revenue Administrator III level for the period February 18, 1973, to January 21, 1975, and this matter is remanded to Respondent for action consistent with this decision.

Dated: 10-12, 1977. STATE PERSONNEL BOARD


James R. Morgan, Chairperson