
 ELIZABETH M. SHEDA,
 Appellant,
 v.
 MANUEL CARBALLO, Secretary,
 Department, of Health & Social Services,
 Respondent.
 Case Nos. 76-91 and 76-114

OFFICIAL

ORDER

Before: DEWITT, Chairperson, MORGAN, WARREN and HESSERT, Board Members.

ORDER

The board adopts and incorporates by reference the attached "proposed decision" except that it amends the conclusions of law by the substitution of the following language for the last two sentences contained in the second paragraph on page 5. The reasons for the change is explained by the substituted language:

"Section 15.02(4), stats., does not apply because the director is neither the head of a department nor an independent agency. Pursuant to Steele v. Gray, 64 Wis. 2d 422, 430, 219 N.W. 2d 312 (1974), ' . . . an officer in whom discretionary power is vested cannot delegate that power without statutory authority to do so.' Based on this record, however, we can find no basis for a conclusion that the approval by the director required by S. 16.23, stats., involves the exercise of discretionary power."

Dated June 13, 1977.

STATE PERSONNEL BOARD

Laurene DeWitt
 Laurene DeWitt, Chairperson

FINDINGS OF FACT

Prior to July 1, 1976, appellant was employed in the classified service at the Black River Falls State Camp as an Account Examiner 2. This position was funded completely by federal (Elementary Secondary Education Act - Title I) funds. The duties and responsibilities of that position were primarily to administer the bookkeeping or accounting aspects of the camp's "token economy," a behavior modification program whereby inmates received tokens or credits for certain kinds of behavior which could be redeemed for goods. This program was administered for all of the camp inmates under the age of twenty-one. Sometime prior to July 1, 1976, the state Department of Public Instruction and the U.S. Office of Education determined that it was in violation of ESEA guidelines to use federal money to service all of the under twenty-one population at Black River Falls, but that the services must be restricted to the "most needy" portion of that population. Therefore, it was determined Ms. Sheda's position and another position which were involved in the provision of services to the entire under twenty-one population would have to be eliminated due to the removal of federal funds effective June, 30, 1976, and the unavailability of general purpose revenue funds.

The respondent then determined to reassign the appellant to a vacant Account Examiner 2 position at the Oakwood State Camp, Oregon, Wisconsin, which is part of the same employing unit as is the Black River Falls Camp. She was advised that if she did not accept reassignment it would be considered as a voluntary termination on her part. The appellant accepted the reassignment under protest but filed an appeal with the board prior to the July 1, 1976, reassignment.

The respondent processed this transaction through a certification request/report form, Respondent's Exhibit 9, which was signed in the space entitled

"32 - approved by or for Director, State Bureau of Personnel," by Ann Frodl, on July 1, 1976. Ms. Frodl's working title at the time was certification supervisor, operations section, bureau of personnel. Part of her regularly assigned duties and responsibilities included the review and approval of departmental requests for transfers.

Sometime prior to her transfer, the furniture in appellant's office at Black River Falls was rearranged without her knowledge, consent or approval while she was on vacation. Also some time prior to her transfer and beginning in late 1972, the appellant pursued more than six grievances concerning her conditions of employment at Black River Falls State Camp. These were all the grievances save one that were filed by the employes of that camp during that period. The appellant failed to sustain her burden of proof that the pursuit of these appeals by the appellants contributed to respondent's decision to transfer her, and therefore we find that they did not.

The prehearing conference in this matter was held on June 24, 1976, in Madison. The appellant requested reimbursement for her mileage from Black River Falls to Madison and return, \$29.90, and for one meal, \$4.46, which was denied by the agency. She also submitted requests for reimbursement for mileage (\$2.80) and parking (\$1.00) for the first day of hearing on December 13, 1976, in Madison, and for mileage (\$44.24) for the second day of hearing in Black River Falls. These requests were denied by the agency.

CONCLUSIONS OF LAW

GRIEVANCE CONCERNING FURNITURE REARRANGEMENT

At the prehearing conference the respondent raised an issue concerning the subject matter jurisdiction of the board but the parties requested that the jurisdictional issues in these cases be reserved until after a hearing on the merits. We now conclude that this board has no subject matter jurisdiction.

A recent Case, Shew v. Weaver, Wis. Pers. Bd. 76-213 (3/21/77), held as follows:

"The provisions of Sections Pers 26.02(8) and 26.03(1), W.A.C., and 16.03(4)(a), stats., providing for appeals of personnel actions which are alleged to be illegal or an abuse of discretion are procedural but also create substantive rights. The right to appeal actions which allegedly involve an abuse of discretion necessarily implies that if the reviewing body finds that the appointing authority abused its discretion, the action must be rejected. Thus, while neither the legislature by statute nor the director by rule has promulgated an admonition to agencies not to abuse their discretion in the administration of personnel matters, the provision to employees of a right to appeal actions alleged to be an abuse of discretion provides for the functional equivalent. Accordingly, such an allegation in a grievance invokes paragraph I.D.1.b.1) [Administrative Practices Manual, DOA, Personnel Administration, effective 8/24/66, revised 10/1/74] and is appealable to this board" p.3

As was noted in this decision, the cited statutory and administrative code provisions refer to personnel actions or decisions. We conclude that the rearrangement of furniture in an office is not a personnel action or decision and that the personnel board has no jurisdiction over this appeal of the denial of a grievance concerning this subject.

APPEAL OF TRANSFER

The respondent also raised a question about the subject matter jurisdiction of this transaction. Since we conclude that this transaction was a transfer which was approved by the director pursuant to Section 16.23, stats.: "A transfer may be made from one position to another only if specifically authorized by the director," we construe the appeal as from an action or decision of the director and conclude there is subject matter jurisdiction pursuant to Section 16.05(1)(f), stats.

The parties stipulated that this transaction was not handled by the agency as a layoff. Appellant argues that this was error. Section 16.28(2), stats., sets forth when employees may be laid off, and the procedures for determining order of layoff and authorizing the director to promulgate rules governing

layoff procedures and alternatives in lieu of layoff. Chapter Pers 22, W.A.C. contains the rules of the director relative to layoff. Nowhere in these provisions is there any requirement that an agency faced with the situation confronting the respondent here, i.e., loss of federal funds and consequently required reduction in workforce, pursue layoff procedures before resorting to the alternative actually utilized. We conclude that the respondent did not err in failing to follow layoff procedures.

We further conclude that the personnel transaction in which the appellant was involved was a transfer pursuant to Section Pers 15.01, W.A.C. Appellant further argues that if the transaction was a transfer the respondent erred by failing to obtain the approval of the director pursuant to Section 16.23, stats. As set forth in the findings, the transfer was approved by an agent of the director, an employe of the bureau of personnel acting pursuant to a delegation of authority. We conclude that this delegation of authority was appropriate and the director was not required to personally participate in the approval to comply with the requirements of Section 16.23. Section 15.02(4), stats., specifically provides for such delegation: "The head may delegate or redelegate to any officer or employe of the department or independent agency any function vested by law in the head." See also Steele v. Gray, 64 Wis. 2d 422, 219 NW 2d 312 (1974).

Finally, the appellant argues that her transfer was improper because it was motivated by respondent's displeasure with her because she filed a number of grievances. The record does not support a finding that appellant's grievance activity was a contributing factor to the decision to transfer her, and we conclude that the transfer was not erroneous on this score.

REIMBURSEMENT FOR EXPENSES AT
THE HEARING AND PREHEARING CONFERENCES

With regard to the appellant's expenses, we are guided by an opinion of the attorney general. See 36 OAG, 90, 91-92 (1947). In that opinion, the attorney general was responding to a question from the personnel director concerning the pay status of certain employes who attended a personnel board appeal hearing.

The opinion stated:

". . . we are of the opinion that this matter is controlled by our prior opinion, XXX OAG 24, at pp. 217-218:

'. . . the administration of justice being a course of mutual benefit to everyone in the state, each is under obligation to aid in furthering it as a matter of public duty, including the state itself as an employer, and . . . the state should not, therefore, penalize its own employes by withholding their compensation when they are compelled to be absent from their duties to testify in court matters relating to such duties.'

The employes in question in the present case were present before an administrative tribunal of the state and engaged in a successful defense of their rights as civil service employes of the state. We are of the opinion that in so defending their civil service rights they were engaged in matters relating to their employment and hence are employed within the meaning of sec. 16.27 and are entitled to be certified on the pay roll as being so employed." [Section 16.27 is now 16.37].

Prehearing conferences are provided for both by the personnel board rules, Section P.B. 1.05 W.A.C., and the state's administrative procedure act, Section 227.07(4), stats., and are an integral part of the appeal hearing process. We conclude that the appellant's attendance at the prehearing conference falls within the reasoning set forth in the cited opinion.

With respect to appellant's attendant expenses, Section 20.916(1), stats., provides:

"State officers and employes shall be reimbursed for actual, reasonable and necessary traveling expenses incurred in the discharge of their duties in accordance with Section 16.535."

As was indicated in the foregoing attorney general's opinion, employees involved in personnel board appeals are "engaged in matters relating to their employment and hence are employed" In this sense their traveling expenses may be said to be "incurred in the discharge of their duties" and hence, we conclude, appellant's expenses are reimbursable.

ORDER

The respondent is sustained and these appeals are dismissed as to all issues except reimbursement for expenses for appellant's attendance at the hearing and prehearing conference. The respondent's denial of appellant's request for reimbursement for her attendance at the prehearing conference and the two days of hearing is reversed and the respondent is directed to determine whether the submitted expenses were actual, reasonable, and necessary, and if so, to reimburse the appellant.

Dated _____, 1977. STATE PERSONNEL BOARD

Laurene DeWitt, Chairperson