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WILLIAM RICHEY,

Appellant,

v.

SECRETARY, Department of Industry,
Labor and Human Relations,

Respondent.

Case No. 77-10

* * * * *

OFFICIAL

OPINION AND ORDER

Before: James R. Morgan, Calvin Hessert and Dana Warren, Board Members.

NATURE OF THE CASE

This is an appeal, pursuant to the Wis. Stats., §16.05(1)(f), of an action of the Director.

FINDINGS OF FACT

1. The appellant was employed as a Job Service Specialist IV in the Madison office of the Department of Industry, Labor, and Human Relations (DILHR), Job Service Division.

2. In July of 1976, the appellant received a promotion to Job Service Supervisor III in the Sheboygan office. This promotion involved a one step pay raise of forty-five dollars per month. It also involved a six month probationary period.

3. The appellant wanted to move back to Madison for personal reasons.

4. On November 1, 1976, he met with Mr. Hooker—his former supervisor in the Madison office—and discussed the possibility of his coming back to a Job Service Specialist IV position in that office. At this time, the appellant asked what effect this move would have on his pay rate. Mr. Hooker responded that he would have to check with Donald Weinkauff, a personnel manager for DILHR.

5. Shortly thereafter Mr. Hooker asked Mr. Weinkauff if the appellant could retain his current pay rate upon moving back to a Specialist IV position. Weinkauff replied that he could retain that rate. Mr. Hooker made no reference to the appellant's probationary status in this initial question. He did, however, refer to it in his next question which concerned the appellant's forthcoming end of probation pay increase. Weinkauff did not alter his answer to the initial question after this reference to the appellant's probationary status.

6. Mr. Hooker then phoned the appellant on November 3 and informed him that he would be allowed to keep his forty-five dollar per month promotional pay increase upon reinstatement to the Specialist IV position.

7. The appellant decided to return to the position in the Madison office. The decision was made after careful consideration of his great personal need and desire to live in the Madison area, of the decrease in job status involved in the move, of the possible negative affect of the move on his career, and of the effect of the move on his salary.

8. The appellant began work in the Specialist IV position on November 22, 1976. He had not completed his promotional probation in the Supervisor III position before vacating it.

9. The rate of pay the appellant actually received after returning to Madison did not include the forty-five dollar per month promotional increase that he had initially received upon assuming the Sheboygan position.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this appeal. Wis. Stats., §16.05(1)(f).

2. The burden of proof is on the appellant to show to a reasonable certainty, by the greater weight of the credible evidence, that he should be paid at the rate he alleges.

Reinke v. Personnel Board, 53 Wis. 2d. 123 (1971).
Lyons v. Wettengel, 73-36, 11/20/74.

3. According to the provisions of Wis. Adm. Code, §Pers. 14.03(1), an employe such as the appellant who returns to his former position before completing probation in a promotional position is not entitled to retain any pay increases granted upon that promotion.

4. To establish that the respondent should be estopped from applying the provisions of Pers. 14.03(1), the appellant must show that the respondent conducted himself in a manner that constitutes fraud or a manifest abuse of discretion, that he relied on this conduct, that the reliance was honest and in good faith, and that he suffered an irreparable injury because of this reliance.

See Pulliam and Rose v. Wettengel, 75-51, 11/25/75 in which the Board cites Jefferson v. Eiffler, 16 Wis. 2d. 123 (1962) and Surety Savings and Loan Assoc. v. State, 54 Wis. 2d. 438 (1972).

5. The appellant has failed to establish that equitable estoppel applies here.

6. The appellant has failed to carry the burden of showing that he should receive the promotional pay increase.

OPINION

The appellant has failed to show either that applicable statutes and administrative rules allow him to retain his probationary pay increase or that the respondent should be equitably estopped from withholding that increase.

In Landaal v. Schmidt, 536, 1/2/73,¹ the Board stated that the provisions of Wis. Adm. Code §Pers. 14.03(1) apply to situations such as the appellant's where an employe serving his promotional probation in a new position requests reinstatement to his former position for personal reasons. These provisions of Pers. 14.03(1) require that reinstatement to the former position be accompanied by reinstatement to the former pay rate. Thus, the Board ruled in Landaal that a probationary employe who is voluntarily restored to a position in a lower salary range in which he or she previously had permanent status in class is not entitled to retain any probationary salary increases. Following this approach in the present case, the Board must conclude that the appellant is not entitled to receive the forty-five dollar per month increase that was given to him upon his promotion to the Supervisor III level.

The Board must also conclude that equitable estoppel does not prevent the respondent from complying with Pers. 14.03(1). The burden of proving equitable estoppel rests with the appellant. He must show that the respondent conducted himself in a manner that constitutes fraud or a manifest abuse of discretion, that he relied on this conduct, that this reliance was reasonable and in good faith, and that he suffered an irreparable injury from this reliance. His failure to prove any one of these elements constitutes a failure to prove that estoppel should lie. Furthermore, this proof of estoppel must be clear and convincing—it cannot rest on mere inference and conjecture. Gabriel v. Gabriel, 57 Wis. 2d. 424 (1972).

Consequently, the appellant must establish a reliance resulting in irreparable injury for estoppel to lie and he must establish it in a clear and convincing manner. He must also show, for example, more than a mere hope that the situation

1. Affirmed on this point in Landaal v. State of Wisconsin Personnel Board, 138-392 (Dane Cty. Cir. Ct. 1973).

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would be a certain way. Sandstrom v. Schmidt, 73-158, 1/2/75. He must show a reliance which induced him to change his position in some way. State ex. rel. Home Ins. Co. v. Burt, 23 Wis. 2d. 231 (1963), Active Coal Co. v. State, 10 Wis. 2d 340 (1960). The appellant in this case must clearly and convincingly show that he relied on retention of the forty-five dollar per month promotional raise and that he changed his position by accepting the Specialist IV position in Madison because of this reliance.

The appellant, however, has not succeeded in showing this. He has not shown that a reliance on the pay rate was the deciding factor in his coming to Madison: that he would not have come back to the Specialist IV position were it not for such a reliance. To the contrary, he testified that his decision to take the position in Madison was arrived at only after considering his great desire and need to move to the Madison area, his concern about assuming a position of lower status, his concern for the effect of the reinstatement on his whole career, and his concern for the possible effects of the change on his salary. In fact, he stated that notwithstanding any possible decrease in salary, he was very concerned about these other aspects.

The Board cannot accept this as a clear, convincing showing of a reliance on the pay rate by the appellant which induced him to change his position to his detriment. The most the record shows is that the retention of the promotional pay increase was one factor among several that the appellant considered in deciding to move to Madison. Any conclusion that the pay differential between \$1163 per month and \$1208 per month was sufficiently important to be the determinative consideration in this decision to change positions would have to be based on mere inference or conjecture. The Board cannot make determinations on this basis.

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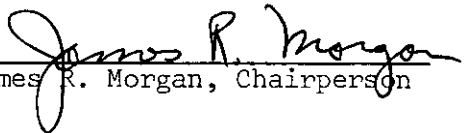
Thus, the appellant has failed to show a reliance resulting in an irreparable injury. Having not shown this one element of estoppel, the appellant has also failed to establish that any application of equitable estoppel would be proper here. What the appellant has shown is that he received erroneous information concerning the pay rate. This is an unfortunate occurrence but by itself is not sufficient to prove equitable estoppel.

ORDER

IT IS HEREBY ORDERED that respondent's decision is affirmed and that this appeal is dismissed.

Dated: May 18, 1978

STATE PERSONNEL BOARD


James R. Morgan, Chairperson