STATE OF WISCONSIN

STATE PERSONNEL BOARD

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ANDREW BASINAS,

Appellant,

v.

SECRETARY, DEPARTMENT OF HEALTH & SOCIAL SERVICES,

Respondent.

Case No. 77-121

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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 § Pers. 30.10(2), WAC of the reassignment of the appellant from a career executive position as director, bureau of institutions, division of corrections, to superintendent, Oak Hill Correctional Institution. Subsequent to the filing of this appeal on June 9, 1977, the respondent filed a motion to dismiss for failure of prosecution, which was denied by decision dated November 15, 1977. At a subsequent prehearing conference, the respondent objected to the board's subject matter jurisdiction, arguing that the appeal procedures set forth in § Pers. 30.10(2) are in excess of statutory authorization, and raised questions about the adequacy of the allegations made in the appeal letter, the issues proposed by the appellant, and the burden of proof. The board ruled on these matters in a decision dated February 20, 1978. Thereafter the appellant filed a motion for reinstatement on the grounds of interference by the respondent with appellant's prehearing preparation and that he was illegally demoted or transferred. The motion contained a notice that the appellant was challenging the constitution-

ality of the career executive program. In a decision dated May 8, 1978, the hearing examiner entered an order with respect to prehearing discovery, denied a request for the postponement of the hearing that had been made by appellant, and deferred decision of all outstanding motions and objections until after the hearing on the merits.

FINDINGS OF FACT

1. By letter of May 26, 1977, respondent's Exhibit 4, from Allyn Sielaff, administrator, division of corrections, to the appellant, the appellant, a career executive employe, was notified of his reassignment to a position classified as Institution Superintendent 2 as superintendent of the Oak Hill Correctional Institution effective June 5, 1977.

2. The Oak Hill superintendent's position was subject to the career executive program.

3. Prior to this reassignment, the appellant was serving as director, bureau of institutions, division of corrections, a position within the career executive program.

4. The director's position involved line supervision over all institution superintendents (including Oak Hill), and was, and is, one pay range higher than the Oak Hill superintendent's position.

5. Mr. Sielaff's primary reasons for reassigning appellant to Oak Hill were as follows:

a) The appellant was particularly well-qualified to supervise Oak Hill, having had experience in community corrections through work as a parole officer, experience in this particular locality through work at the institution when it was the Oregon School for Girls, and having had administrative institutional experience as director of the bureau of institutions. Due to pressures from over-crowding and from various state officials,

it was necessary to fill the Oak Hill position on an expedited basis.

b) The appellant was experiencing difficulty in the bureau director position with respect to certain managerial skills, more specifically decision-making and delegation.

6. The letter notifying appellant of his reassignment (respondent's exhibit 4) only made reference to the reason set forth in finding 5a, above.

7. In addition to the instant appeal, the appellant filed with the director on December 7, 1977, an appeal of an appointment to the position of director, bureau of institutions, and this appeal had not been decided as of the date of the end of this hearing before the board (June 1, 1978).

8. The hearing of this appeal before this board commenced May 17, 1978.

9. At the time of the effectuation of the reassignment of appellant to Oak Hill on May 26, 1977, Mr. Sielaff had not yet been named personally as a delegee of the appointing authority (respondent), but the respondent had made such a delegation, on file with the director, to the position of administrator, division of corrections.

9. The appellant's last performance evaluation pursuant to § Pers. 30.12, WAC, was for the period ending July 26, 1975.

CONCLUSIONS OF LAW

1. The board affirms and incorporates by reference, as if fully set forth, the previous decisions dated November 15, 1977, February 20, 1978, and May 8, 1978 (hearing examiner), including all findings and conclusions set forth therein. Copies of these decisions are attached.

2. The respondent failed to comply with § Pers. 30.07(2), WAC, by not providing the appellant, in his notice of reassignment, a full statement of the reasons therefore.

3. The requirement of § Pers. 30.07(2), WAC, with respect to notice of reasons for reassignment, is mandatory and not directory in nature.

4. The respondent having failed to comply with a mandatory requirement for career executive reassignment, the reassignment was not reasonable and proper and is void.

5. Since this is not an appeal pursuant to s. 16.05(1)(e) or (f), Stats., the requirement set forth in s. 16.05(2), Stats., that the board hold a hearing within 45 days after the receipt of the appeal, does not apply.

6. The delegation by the respondent to the position of administrator, division of corrections, of the appointing authority function was not in compliance with § Pers. 1.02(1), WAC.

7. Mr. Sielaff's action effectuating appellant's reassignment to Oak Hill was an act of a de facto appointing authority and was valid in that respect.

OPINION

Section 30.07(2), WAC, provides in part: "All such [career executive] *reassignments shall be made in writing to the affected employe with the reasons* stated therein." Here the only reason given in the reassignment letter related to the need for a person with the appellant's qualifications at Oak Hill. There was no mention of the administrator's concern about perceived problems in the appellant's management abilities and the administrator's desire to strengthen the central office. The respondent argued in a post-hearing brief that the latter consideration was "not causal to the decision to place Mr. Basinas at Oak Hill, but rather were secondary considerations of the effects such a reassignment would have on central office."

In the board's opinion, this characterization of the motivation for the transfer is not supported by the record. In addition to Mr. Sielaff's testimony

at the hearing, the respondent offered without objection Mr. Sielaff's deposition (respondent's exhibit 1) for its full probative value. At page 14, the question was asked: "Why did you wish to reassign Mr. Basinas?" Mr. Sielaff proceeded to cover both considerations in his answer, summarizing at pages 16-17 as follows:

> I felt that in terms of managerial skills, decision-making, delegation, some of the basic skills that are necessary in management, those areas could be improved upon through a change. So I felt on the one hand that I could strengthen the management team at Central office, and, on the other hand, bring a person with the breadth of experience that was needed at Oak Hill to take over what I knew to be a top priority . . .
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> Q. Were there any other reasons for his reassignment?
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> A. None that I can think of that are not related to those reasons which I just cited.

As noted above, § Pers. 20.07(2) states that career executive reassignments "shall be made in writing to the affected employe with the reasons stated therein." If this provision is construed as mandatory, as opposed to directory, the failure to comply voids the transaction. See Muskego-Norway C. S. J. S. D. No. 9 v. W.E.R.B., 32 Wis. 2d 478, 483 (1967):

> Generally, a mandatory provision must be strictly complied with and there is no discretion in the agency or public official. Failure to comply with a mandatory statute renders the proceeding void, while noncompliance with a directory provision does not invalidate the proceeding.

See also Laddis v. DHSS, Wis. Pers. Bd. No. 77-129 (5/18/78); 82 C.J.S. Statutes § 374: " a failure to follow a mandatory statutory provision renders the proceeding to which it relates illegal . . . "

The Supreme Court has held that administrative code provisions should be interpreted as mandatory or directory utilizing the same guidelines used in statutory construction. See Will v. DHSS, 44 Wis. 2d 507, 516-517 (1969).

A general statement of statutory interpretation as directory or mandatory if found in State ex rel. Werlein v. Elamore, 33 Wis. 2d 288, 293 (1967):

> "In determining whether a statutory provision is mandatory or directory in character, we have previously said that a number of factors must be examined. These include the objectives sought to be accomplished by the statute, its history, the consequences which would follow from the alternative interpretations, and whether a penalty is imposed for its violation. Marathon County v. Eau Claire County (1958), 3 Wis. (2d) 662, 666, 89 N.W. (2d) 271; Warachek v. Stephenson Town School Dist. (1955), 270 Wis. 116, 70 N.W. (2d) 657. We have also stated that directory statutes are those having requirements 'which are not of the substance of things provided for.' Manninen v. Liss (1953), 265 Wis. 355, 357, 61 N.W. (2d) 336.
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> In 2 Sutherland, Statutory Construction (3d ed.), p. 216, sec. 2802, the author observes that provisions are normally considered directory 'which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute.' The text further (p. 217, sec. 2804) states that a provision is interpreted as directory where the 'manner of performing the action directed by the statute is not essential to the purpose of the statutue.'"

In Karow v. Milwaukee County Civil Service Comm., 82 Wis. 2d 565, 570-571 (1978), the court noted:

> The general rule is that the word 'shall' is presumed mandatory when it appears in a statute . . . when the words 'shall' and 'may' are used in the same section of a statute, one can infer that the legislature was aware of the different denotations and intended the words to have their precise meanings.

Section Pers. 30.07(2), WAC, contains both "may" and "shall": "may make such reassignment . . . shall be made in writing . . . with the reasons stated therein." In the board's opinion, failure to comply does have an adverse effect on the private rights of the reassigned employe. See State ex rel. Werlein, supra; 73 Am. Jur. 2d Statutes § 27; 82 C.J.S. Statutes § 376 (p. 874, n. 54).

The career executive program encompasses certain relatively high-level, executive or managerial positions. The program is supposed to provide:

> . . . outstanding administrative employes a broad opportunity for career advancement and to provide for the mobility of such employes among the departments and units of state government for the most advantageous use of their managerial and administrative skills. s. 16.19, Stats.

It is important that a career executive being reassigned have full knowledge of the reasons for that reassignment not only so that he or she can intelligently evaluate whether or not to initiate review by the personnel board pursuant to § Pers. 30.10(2), WAC, but also so that he or she can intelligently evaluate his or her performance and career development. In this case, the appellant was reassigned to a position with a lower pay range than and subordinate to his previous position. The only official reason given for the move was that he was well qualified for a high priority assignment. The fact, there was a second major reason for the reassignment, dissatisfaction with the appellant's performance with respect to certain management skills. This kind of information would appear to have been of significant value to the appellant both in evaluating the wisdom of an appeal and in evaluating his future career pattern as a career executive which of course is subject to further reassignments by Mr. Sielaff.

The respondent has argued that the appellant had actual notice of the reasons for reassignment because these were brought out in Mr. Sielaff's deposition which was taken February 22, 1978. In the board's opinion, this cannot cure the failure of compliance with the administrative code. As discussed above, the purpose of the § Pers. 30.07(2) notice requirement goes beyond providing notice for hearing and literal compliance with mandatory provisions is required.

The appellant also argues that the transaction was defective because it was not effectuated by an "appointing authority." The record reflects that the respondent delegated appointing authority to the division administrator positions.

The question is whether that delegation was sufficient or whether it was necessary to have delegated the authority to the person, Mr. Sielaff, who effectuated the reassignment.

Section 16.02(1), Stats., defines "appointing authority" as follows:

> (1) 'Appointing authority' means any officer, commission, board or body having the power of appointment to or removal from subordinate positions in any department, state agency or institution. (Emphasis supplied.)

Section Pers. 1.02(1), WAC, reads as follows:

> 'Appointing authority' means the officer, commission, board or body having the power of appointment to or removal from, subordinate positions in any office, department, commission, board or institution. An appointing authority may delegate such power to subordinates providing the delegated authority is in writing and a copy is filed with the director. (Emphasis supplied.)

In Moses v. Board of Veterans Affairs, 80 Wis. 2d 411, 416-417 (1977), the court discussed the meaning of the term "officer":

> The removal statute, sec. 17.07, repeatedly refers to state officers, not to state offices, and our court has recognized the distinction in the meaning of the two terms.[10] Reference to an 'officer,' as distinguished from an 'office,' creates no ambiguity, and in the absence of ambiguity, language is to be given its ordinary and accepted meaning.
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> [10] State ex rel. Reuss v. Grissel, 260 Wis. 524, 529, 51 N.W. 2d 547 (1952) defines 'officer' as a term that refers to the individual and not the office held . . .

Consistent with this authority, the term "officer" in § Pers. 1.02(1) and s. 16.02(1) should be interpreted as a reference to the individual and not to the office or position. Section Pers. 1.02(1) utilizes the term "officer" followed by the term " subordinate positions." In delineating the delegation procedure, the code then uses the term "subordinates." In this context, it would be inappropriate to interpret the term "subordinates" as meaning "subordinate positions."

Although the board concludes that the delegation of appointing authority powers to Mr. Sielaff was technically inadequate at the time of the effectuation of appellant's reassignment, it agrees with the respondent that Mr. Sielaff was a de facto appointing authority whose act in reassigning appellant is valid. See Moses v. Board of Veterans Affairs, supra, at 418; 25 Opinions of the Attorney General 750, 751 (1936). Further, to the extent that the procedure for delegating to persons versus to positions set forth in § Pers. 1.02(1) is susceptible to analysis as mandatory or directory, the board holds that it is directory based on the reasoning set forth in the discussion of § Pers. 30.07(2), above.

The appellant has made a number of other arguments. He contends that a career executive "reassignment" pursuant to § Pers. 30.07, WAC, is not authorized by s. 16.19, Stats., which uses the term "transfer." In the board's opinion, part of the legislative intent of s. 16.19 is to provide a flexible means of interchange of career executives which will not be subject to the same rules as obtain in regular classified civil service transactions. In this context, the § Pers. 30.07 "reassignment" may be viewed as a form of career executive "transfer." It also was not a "demotion," as argued by appellant since again the career executive program is not subject to the rules and statutes relating to the regular classified civil service.

The respondent has challenged the jurisdiction of the personnel board on the grounds that a hearing was not held within 45 days of receipt of the appeal. The 45-day hearing requirement is contained in s. 16.05(2), Stats., which by its terms applies only to appeals pursuant to s. 16.05(1)(e) or (f), and this is not an appeal under either of those subsections.

Inasmuch as it has been concluded that the transaction reassigning appellant to Oak Hill was void, the board does not reach the substantive questions that have been raised. With respect to the remedy § Pers. 30.10(2), WAC, states in part:

> *Career executive reassignment . . . is authorized without limitation, unless upon appeal . . . to the personnel board, the personnel board finds that . . . the appointing authority fails to demonstrate that the appointing authority's action was reasonable and proper.*

The board has held that the statutory basis for this appeal is found at s. 16.05 (4), Stats., which states in part:

> If the result of an investigation discloses that the director, appointing authority or any other person acted illegally or to circumvent the intent and spirit of the law, the board may issue an enforceable order to remand the action to the director or appointing authority for appropriate action within the law.

In the board's opinion, it has wide latitude under this provision with respect to an appropriate remedy. The illegality associated with this transaction was the failure to follow the procedure set forth in § Pers. 30.07(2), WAC, with respect to notice of reasons for the reassignment. Since this voided the transaction, the appellant is entitled to reinstatement.* However, the appointing authority can determine to attempt to remedy the defect and provide a statement of reasons and re-effectuate the reassignment. Any such action cannot be done on a retroactive basis. See State ex rel. Tracy v. Henry, 219 Wis. 53, 60-61 (1935). The appointing authority could determine to reinstate the appellant and take no further action. The question of the status of the incumbent in appellant's old position is clouded by the fact that the appellant appealed that appointment to the director in a proceeding that is still pending. *In light of these factors, to permit time for the determination of a course of* action by respondent, he will not be required to take action for 30 days following the service of this decision.

ORDER

The action of the appointing authority effectuating the appellant's reassignment to Oak Hill is rejected. The appellant shall be reinstated to

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* The appellant would be entitled to back pay as an incident of reinstatement. See s. 16.38(4), Stats.

the position of director, bureau of institutions not later than 30 days after the date of service of this decision. This matter is remanded to the respondent for appropriate action not inconsistent with this opinion and order.*

Dated: June 16, 1978. STATE PERSONNEL BOARD

James R. Morgan, Chairperson

* This sentence is added to the proposed opinion and order pursuant to s.16.05(4), Stats.