

STATE OF WISCONSIN

STATE PERSONNEL BOARD

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ANDREW BASINAS,

Appellant,

v.

SECRETARY, DEPARTMENT OF HEALTH AND
SOCIAL SERVICES,

Respondent.

Case No. 77-121

* * * * *

OFFICIAL

DECISION AND ORDER

Before: Morgan, Hessert and Warren, Board members.

NATURE OF THE CASE

This is a decision on a motion to dismiss for failure to prosecute which was filed by respondent September 26, 1977. This decision is based on the perusal by the board of the entire file.

FINDINGS OF FACT

The appellant filed an appeal with the board on June 9, 1977, pursuant to § Pers. 30.10(5), W.A.C., of his reassignment by the respondent appointing authority under the aegis of the career executive program. By letter of June 10, 1977, the board scheduled a prehearing conference for June 23, 1977. By letter of June 20, 1977, the appellant requested a postponement of the prehearing on the grounds that he had had insufficient time to prepare. He cited the denial of requested vacation time which he had intended to use to pursue his grievance. He also stated that he had been told by his supervisor that he could only spend a "reasonable" amount of time working on his grievance but that his supervisor had not clarified the meaning of "reasonable" despite appellant's request that he do so. He further stated in his June 20, 1977, letter:

"Until further direction is given me I will limit my activities greatly since I do not wish to in any way violate the work rules of the Department of Health and Social Services or the Division of Corrections.

"As soon as I receive the requested information, my Legal Counsel and I will get in touch with you and plan for the earliest possible date for rescheduling this prehearing."

By letter of June 22, 1977, the board's legal counsel informed the parties as follows:

"This will confirm that at the request of the appellant the prehearing conference scheduled for tomorrow has been postponed. It will be rescheduled when the appellant advises the board that he is ready to proceed."

By letter of August 1, 1977, counsel for respondent requested that an immediate prehearing conference be scheduled:

"Respondent Carballo requests immediate scheduling of a prehearing conference in this matter. If there are problems in preparing Mr. Basinas's case which would justify continued delay in scheduling a hearing, those problems could be discussed at the prehearing. If no such problems exist, and the board is continuing the matter indefinitely solely for the convenience of the Appellant, the Respondent would like an opportunity to apprise the Board of the damage such delay is causing this Department. A prehearing conference would therefore allow the Department and the Appellant to lay before the Board whatever competing equities may be involved in either expediting or delaying further action.

By letter of August 2, 1977, the board requested the appellant's response to respondent's request for an immediate prehearing. At the time the motion to dismiss was filed on September 26, 1977, appellant had not filed a response, although the board's file reflects that on August 17, 1977, the appellant told the board's secretary in response to her inquiry that he would respond in the "next couple days," and he also told her on August 26, 1977, that he would contact the board from his attorney's office to discuss scheduling of a hearing.

In response to the motion to dismiss, the appellant filed a letter dated October 11, 1977, to which respondent's counsel indicated in a letter dated October 14, 1977: "For the sole purpose of providing a factual basis for a

board decision on respondent's motion to dismiss, I am willing to stipulate to the information contained in Mr. Basinas's letter." Therefore, the factual allegations contained in appellant's letter of October 11, 1977, a copy of which is attached, are adopted and incorporated by reference as if fully set forth, for the limited purpose of deciding this motion. Briefly summarized, appellant cites the continuing failure of his supervisor to give him the requested advice concerning the amount of time he could spend on preparations for this appeal, the state employees strike and various problems encountered at the Oakhill institution which appellant supervises, which have required about 60 hours per week by the appellant. Appellant also indicates that his attorneys have been involved in study of the case.

CONCLUSIONS OF LAW

Section 227.07(5), Wis. Stats., provides in part: "Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default." (Emphasis supplied.) This board repeatedly over a number of years has exercised its power to dismiss cases for failure of prosecution, relying on this statute as well as its inherent powers to control the conduct of proceedings before it. See 73 C.J.S. Public Administrative Bodies and Procedure §129. Such determinations are committed to the sound discretion of the board. C.F., Zeis v. Fruehauf Corporation, 56 Wis. 2d 486, 202 N.W. 2d 486, 202 N.W. 2d 225 (1972).

In this case, the period between the delay of the original prehearing and the filing of this motion to dismiss was approximately three months. The prehearing had been scheduled for a date two weeks after the appeal was filed. While the appellant should have filed a substantive response to the board's letter

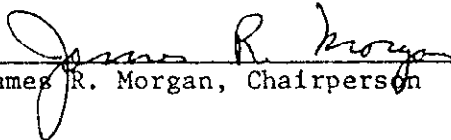
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of August 2, 1977, which requested a response to respondent's request for a prehearing conference, against the background of the problems appellant was facing on the job, the failure of his supervisor to clarify how much time he would be allowed to work on his appeal, and his consultation with various counsel, the delay in advising the board that he was ready to proceed with his appeal and his failure to file a substantive response to the board's letter cannot be concluded to amount to a failure of prosecution.

ORDER

Respondent's motion to dismiss is denied.

Dated: 11-15, 1977. STATE PERSONNEL BOARD


James R. Morgan, Chairperson

ANDREW BASINAS,

Appellant,

v.

SECRETARY, DEPARTMENT OF HEALTH AND
SOCIAL SERVICES,

Respondent.

Case No. 77-121

OFFICIAL

OPINION AND ORDER

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

NATURE OF THE CASE

This case involves an appeal of a career executive reassignment pursuant to §Pers. 30.10(2), W.A.C. The respondent agency has raised preliminary questions concerning the subject matter jurisdiction of the board, the adequacy of the allegations made and issues proposed by appellant at the prehearing conference, and the burden of proof.

OPINION

Jurisdiction

Section Pers. 30.10(2), W.A.C., contains a provision for the appeal to and review by the Personnel Board of certain transactions affecting career executives:

(2) Career executive reassignment by the appointing authority, as referred to in (1) above, is authorized without limitation, unless upon appeal by an employe with career executive status to the personnel board, the personnel board finds that the performance evaluation under Wis. Adm. Code section Pers. 30.12 or other evidence offered by the appointing authority fails to demonstrate that the appointing authority's action was reasonable and proper. The employe is also entitled to an appeal when such reassignment is alleged by the employe to constitute an unreasonable and improper exercise of an appointing authority's discretion or when such reassignment is alleged by the employe to be for a reason which is prohibited by section 16.14, Wis. Stats.

The respondent argues that there is no statutory basis for this review process by the board and hence it is without legislative authority and void. He argues that the board's jurisdiction to hear appeals of employes with permanent status in class is set forth in, and limited by, s. 16.05(1)(e), Stats., which lists five transactions: "demotions, layoffs, suspensions, discharges, or reductions in pay," and which does not include the career executive transactions contained in §Pers, 30.10. It is argued that the maxim of express mention, implied exclusion must be applied to the analysis of whether there is legislative authority for the appeal rights sought to be exercised here, citing State ex rel. Harris v. Larson, 64 Wis. 2d 521, 527 (1973): ". . . if the legislature did not specifically confer a power, it is evidence of the legislative intent not to permit the exercise of the power."

There are no provisions in s. 16.05, Stats., which specifically confer on the board the authority to hear appeals of career executives of this type of transaction. The basic enabling statute for the career executive program is s. 16.19, stats:

16.19 Career executive selection. The director may by rule develop a career executive program that emphasizes excellence in administrative skills in order to provide state departments with a pool of highly qualified executive candidates, 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. To accomplish the purpose of this program, the director may provide policies and standards for recruitment, examination, probation, employment register control, certification, classification, salary administration, transfer, promotion and reemployment separate from procedures established for other employment. The director shall determine the positions which may be filled from career executive employment registers.

This provides the color of authority for the director's promulgation of Chapter Pers, 30, W.A.C. Standing alone it is questionable whether this statute would provide a basis for the director to assign the review powers contained in §Pers.

30.10(2), W.A.C., to the board and so expand its powers beyond those specifically enumerated in s. 16.05, Stats. However, ss. 16.19, Stats., and Pers. 31.10(2), W.A.C., must be read in the context of the broad grant of general power given the board by s. 16.05(4), Stats., which provides in part:

The board may make investigations and hold hearings on its own motion or at the request of interested persons and issue recommendations concerning all matters touching the enforcement and effect of this subchapter and rules prescribed thereunder. If the results of an investigation disclose 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.

The subject matter of this appeal and that which is denominated appealable by §30.10, W.A.C., does concern "matters touching the enforcement and effect of this subchapter and rules prescribed thereunder." The appellant is an "interested person." Furthermore, this is not a situation where a party is trying to use a "back door" approach to having a matter heard by the board under s. 16.05(4), Stats., after having failed to file an appeal in a timely manner under s. 16.05(2), Stats. Compare, State ex rel. Department of Administration v. Personnel Board, Dane County Circuit Court No. 149-295 (4/17/76); State ex rel. Hart v. Personnel Board, Dane County Circuit Court No. 151-038 (6/10/76). With respect to the discretionary aspect of the board's investigative authority, the board has held that ordinarily it will exercise that jurisdiction in cases that raise broad and important policy questions. See, e.g., Schwartz v. Schmidt, Wis. Pers. Bd. No. 74-18(1/17/75). While a question perhaps could be raised whether that criterion would be met in these appeals in a theoretical sense, it is noted that this is the first case to be appealed to the board under §Pers. 30.10(2), W.A.C., in the almost four years the career executive program has been in operation. As a case of first impression, it has at least the potential to be a significant precedent on the application of Chapter Pers. 30, W.A.C. The board would have no difficulty in handling this matter as an investigation without whatever authority that might

be provided by §Pers. 30.10(2), W.A.C. It is unnecessary at this time to consider whether other appeals under this subsection would have to be considered on a case by case basis with respect to exercise of the board's jurisdiction.

Adequacy Of Allegations/Issues

At the prehearing conference the appellant argued that the appellant had not made sufficient allegations to invoke the board's jurisdiction under §Pers. 30.10, W.A.C. Also at the prehearing the parties propounded the following substantive issues:

Respondent: Whether the transfer of the appellant was reasonable and proper?

Appellant: 1. How was the personnel transaction identified--e.g., as a lateral transfer, reassignment, demotion, or something else?

2. Whether or not in effectuating that personnel transaction, any law, either statutory or administrative (rules of the director), was violated?

3. If there was any violation, what is the remedy?

In his prehearing brief, the respondent now proposes another statement of issue which he alleges "clearly limit the hearing to issues within the jurisdiction defined by §Pers. 30.10."

A review of the appeal letter dated June 9, 1977, leads the board to the conclusion that it is adequate to invoke whatever jurisdictional basis is contained in §Pers. 30.10, W.A.C. Regarding a statement of issue, the board utilizes the suggestion set forth by respondent in his brief for the purpose of providing statutory notice of the hearing on the merits:

1. Was the appointing authority's action reasonable and proper?
2. Was the reassignment for disciplinary purposes?
 - a. Did such reassignment violate s. 16.28, Wis. Stats.?
 - b. Was such reassignment for just cause?

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The appellant objects to the respondent modifying the issue propounded through counsel at the prehearing conference, citing Nunnelee v. Knoll, Wis. Pers. Bd. No. 75-77 (3/76). However, that case involved an actual stipulation, which is not present here, and therefore the criteria set forth in that case are not wholly applicable.

Burden Of Proof

The respondent's position is that he has the burden of establishing a reasonable and proper basis for his actions. The burden then shifts to appellant to establish that even if reasonable and proper on its face, the decision was a subterfuge for disciplinary action.

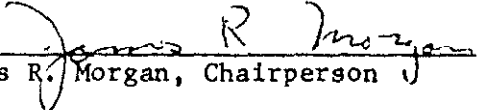
The appellant has not taken issue with this position and the board concludes that it is a correct statement of the allocation of the burden of proof in this proceeding.

ORDER

The objection to subject matter jurisdiction is overruled. This case will proceed to hearing on the basis of the issues set forth above as the "matters asserted" and with the burden of proof as discussed above.

Dated: 2-20, 1978.

STATE PERSONNEL BOARD


James R. Morgan, Chairperson



State of Wisconsin \ DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF CORRECTIONS
WISCONSIN CORRECTIONAL INSTITUTION - OAKHILL
P O BOX 238
OREGON, WISCONSIN 53575
TEL 608-835 3107

October 11, 1977

RECEIVED

OCT 12 1977

Anthony J. Theodore
Legal Counsel
1 West Wilson Street
Madison, WI 53702

STATE PERSONNEL BOARD

Dear Mr. Theodore:

Re: Basinas v. Carballo; 77-121

With respect to your request of September 28th, the following is submitted:

On June 20th, Mr. Basinas wrote to Chairperson DeWitt of the Personnel Board that he could not proceed with the preparation of his grievance until he was specifically informed on the amount of time he could take to prepare for his grievance. In the letter to Ms. DeWitt, Mr. Basinas stated, "Until further direction is given me I will limit my activities greatly since I do not wish to in any way violate the work rules of the Department of Health and Social Services and the Division of Corrections."

Following postponement of the pre-hearing, Mr. Basinas again prepared a memorandum which was sent to his immediate supervisor requesting information on the amount of time that he could devote to his grievance and stating, "Since it is imperative that I move on resolution of my grievance as quickly as possible, I am requesting a timely response". No response in writing has been given to Mr. Basinas' request by anyone in the Division of Corrections.

Since the postponement of this pre-hearing, Mr. Basinas has devoted his time to the administration of the new institution at Oakhill. During the summer, incidences have affected all state employees and specifically those in the correctional institutions.

1. From about July 1st to July 17th, the employee's strike consumed all of Superintendent Basinas' time dealing primarily with the National Guard, Police and Sheriff's Officers. After the first 24 hours (was on duty 23½ hours) he was on a twelve hour on, twelve hour off schedule. Following the strike, several weeks of tenuous balance were experienced before the institution was returned to normality.

2. Aftermath problems occurred when a second strike was threatened because the Legislative Joint Committee on Employee Relations questioned some of the provisions of the work-stoppage settlement.
3. Preparations to defend the Department/Division and institution regarding a Citizens' complaint alleging pollution of certain streams by the Oakhill Sewerage Plant. Informal and formal hearings were held during August and September.
4. In September, the institution suffered a "food boycott" which threatened the safety of most residents and staff and resolution of that problem was terribly costly in terms of time.
5. An Oakhill vehicle was involved in an accident in which a party in the other automobile was killed and ten prisoners were injured. This, too, was time consuming.

The above were handled at a time when new programming was introduced continuously at Oakhill (see attached reports) and when new staff was hired and trained. These changes in programming were accomplished by Superintendent Basinas with an Acting Director of Treatment, an Acting Director of Security who left well over six weeks ago (the institution has been operating without a Security Director since his departure); without a Business Administrator until three weeks ago and, to date, without a Personnel Manager or Superintendent of Buildings and Grounds, all critical positions. Mr. Basinas has, in fact, been all things to all "men" devoting about sixty hours or more per week to the operation of Oakhill. He has, in fact, followed the advice of his supervisors "in gathering together staff and programs and making it (Oakhill) a cohesive unit (letter from Supt. James Mathews, dated 6/8/77).

Mr. Basinas has been in contact with Attorney John Kasimatis who remains the attorney of record at this time since July, 1977. Attorney Richard Graylow was asked early in September to review the pending case and to give counsel about its preparation and all procedures which must necessarily follow. That study is now under way by Mr. Graylow.

Events of the last four months and the absence of any

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definitive direction from the Division Office does not in any way indicate "deliberate delaying" and any argument to dismiss is baseless and unsound.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Andrew W. Basinas". The signature is written in dark ink and is positioned above the typed name.

Andrew W. Basinas
Superintendent

AWB/mt

cc: Attorney John Kasamitis
Attorney Richard Graylow
Attorney Kristine Randall
Acting Personnel Director - Verne Knoll