STATE OF WISCONSIN

STATE PERSONNEL BOARD

KATHRYN GLASNAPP, et al.,

Appellants,

v.

SECRETARY, Department of Health and Social Services and DEPUTY DIRECTOR, Bureau of Personnel,

Respondents.

Case No. 77-38

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 Wis. Stats. §16.05(1)(f), of the Director's denial of the appellants' reclassification request.

FINDINGS OF FACT

1. For approximately three and one half years prior to September of 1976, the authority to reclassify Department of Health and Social Services (DHSS) employes between the Disabilities Claims Adjudicator (DCA) II and III levels was delegated to DHSS by the State Bureau of Personnel.

2. During the period of this delegation, the standard policy was to reclassify employes from the DCA II to III level on the basis of quality of work, time in position, experience, and training at the lower DCA II level. This policy was actually implemented on a regular basis in reclassification requests from at least as early as 1974 until at least as late as 1976.

3. The result of this implementation was that DCA II level employes were automatically reclassified to the higher DCA III level upon completion of one year of satisfactory performance, experience, and training at the lower DCA II level.

4. In April of 1977, the appellants requested reclassification of their positions in DHSS from the DCA II level to the DCA III level.

5. No allegation is made that the appellants do not qualify for the reclassification under the aforementioned standard of time, experience training, and quality of work in their current lower classification.

6. The reclassification requests were denied by the State Bureau of Personnel because the appellants allegedly had not been performing the duties and responsibilities of the requested higher level of classification (DCA III) during the six months prior to the time of their request.

7. The position descriptions submitted with the appellants' requests were inaccurate. In actuality, they had not been performing some of the duties and responsibilities of the higher DCA III level either at the time of their request or for the six months prior to that request.

8. One of the appellants' main concerns regarding their employment was the availability of promotion and reclassification. During most of their employment, they believed reclassifications would be handled under the previous policy of time and performance in the lower level position.

CONCLUSIONS OF LAW

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

2. The burden of proof is on the appellants to show to a reasonable certainty, by the greater weight of the credible evidence, that the action of the Director denying their reclassification request was incorrect and that they should be reclassified as DCA III level employes.

See Reinke v. Personnel Board, 53 Wis. 2d. 123 (1971).
Ryczek v. Wettengel, 73-26, (7/3/74).
Lyons v. Wettengel, 73-36, (11/20/74).
Alderden v. Wettengel, 73-87, (6/2/75).

3. The Wisconsin Administrative Code, § Pers. 3.03(2), requires that an employe perform the duties and responsibilities of the higher level position he or she is to be reclassified to for at least six months prior to that reclassification.
Raup v. Wettengel, 73-60, (8/29/75).
Raup v. Clapp, 73-179, (8/29/75).

4. The appellants failed to show either that they meet this Wis. Adm. Code § Pers. 3.03(2) test for reclassification or that the provision is inapplicable to reclassifications from the DCA II to the DCA III level.

5. To establish that the respondent should be equitably estopped from applying the criteria of Wis. Adm. Code § Pers. 3.03(2), the appellants must show conduct by the respondent amounting to fraud or a manifest abuse of discretion, an honest and good faith reliance by the appellants on this conduct, and an irreparable injury to them 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 Assn. v. State, 54 Wis. 2d 438 (1972).

6. The appellants do not show a reliance resulting in irreparable injury. Thus equitable estoppel does not lie here and it is not necessary to consider the other elements of estoppel.

7. The appellants thus failed to carry the burden of showing that the respondent's action was incorrect and that they merit DCA III level classification.

8. The appellants' request for a monetary award in lieu of equitable estoppel cannot be granted because the Board does not have statutory authority to modify actions of the Director. It may only affirm or deny such actions.
Voigt v. Wisconsin State Personnel Board, 145-300, (Dane County Circuit Court, 1975).

OPINION

There is no evidence on the record indicating that Wis. Adm. Code § Pers. 3.03(2) is invalid or does not apply to reclassifications in general. Nor is there sufficient evidence accurately detailing the appellant's duties and responsibilities in a manner that would support a determination as to whether or not the Pers. 3.03(2) standard has been met.

Instead, the major thrust of the appellants' argument in this case is that they do qualify for reclassification under the standard of time, experience, training, and quality of work in the lower level position and that the respondent should now be estopped from applying anything other than this standard which was previously used.

For estoppel to lie against the respondent, the appellants must show some conduct by the respondent which amounts to fraud or to a manifest abuse of discretion, an honest and good faith reliance by the appellants on that conduct, and an irreparable injury to them resulting from that reliance. Failure to show any one of these elements constitutes failure to show that the respondent should be estopped from some action.

In the sole attempt to establish reliance resulting in an irreparable injury, appellant Glasnapp, in testimony representative of all the appellants, stated that her alleged reliance on the application of the time and satisfactory work reclassification standard had the following effect on her continued employment: "When I first joined the bureau one of my main concerns was the availability of promotion and, also, reclassification and it had a great deal to do with my staying." The Board does not doubt the credibility of this statement. However, we do find that it falls short of a showing of reliance resulting in irreparable injury. Proof of the elements of estoppel must be clear and convincing—it cannot

rest on mere inference or conjecture. Gabriel v. Gabriel, 57 Wis. 2d. 424 (1972). The appellants here must show more than a mere hope that the situation would be a certain way. Sandstrom v. Schmidt, 73-158, (1/2/75). What they must show is that their alleged reliance has resulted in their foregoing some alternative course of action, Landaal v. State of Wisconsin, 138-392 (Dane County Circuit Court, 1973), or in their being induced to change their 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), and that this forebearance or change has resulted in an injury.

In the present case, the appellant's statements on this topic were in regard to her continued employment. The forebearance of action or change in position that they suggest is that she might have left her DCA II level position with DHSS were it not for her alleged reliance. Yet, the statements only suggest this. They do not clearly and convincingly state that she would have left had she known otherwise.

The appellant first stated that the availability of reclassification was "one" of her "main concerns." The most the Board can conclude from this statement is that the appellant had more than one main concern in regard to the nature of her employment and that the reclassification aspect was just one of these concerns. The appellant then stated that "it had a great deal to do with my staying." However, just because it had a great deal to do with her staying does not mean that it was determinative of that issue. If anything, it suggests that it was less than determinative. The Board cannot accept this statement as clear, convincing evidence that the appellant would not have stayed or would have taken any action other than continuing her employment as she did, had she not so allegedly relied. At most, the two statements taken together merely suggest that the appellant might have acted

otherwise had she known how her future reclassification request would be processed. Certainly, this proof does not meet the test of clearly and convincingly showing that the appellant's alleged reliance resulted in her foregoing some alternative course of action or in her changing her position in some way. Any such conclusion would have to rest on mere conjecture or inference. The most that these statements do show is that the appellant hoped that the situation would be a certain way. Having failed to show a change in position or action, the appellant obviously has also failed to show that such a change has resulted in an injury.

Thus, the appellants have failed to meet the burden of showing an essential aspect of equitable estoppel. The failure to show any one of the essential aspects constitutes failure to establish estoppel. Hence, there is no need to consider here the merits of the other elements.

The appellants have also failed to carry the burden on two additional assertions. First of all, the appellants suggested in their opening statement that the Wis. Adm. Code § Pers. 3.03(2) provisions are prefaced with the word "normally" and that their situation is one in which the provisions would not normally be applied. However, the record does not show that the appellants' situation is one of the exceptional types of situations that would typically be excluded from the provisions. Secondly, in their closing statements, the appellants challenge the method by which the respondent rescinded the delegation of reclassification authority from DHSS. A memo from the Deputy Director of the State Bureau of Personnel to a personnel officer of DHSS was produced during the hearing. The contents were stipulated to be a statement of withdrawal of DCA II to DCA III level reclassification authority from DHSS. The appellants allege that the withdrawal is void because the reclassification authority was not withdrawn from the

Secretary of the department to whom it was originally delegated. However, the appellants do not attempt to show that this was the official withdrawal of authority, that no withdrawal order did go to that secretary, or even that one must indeed go to that secretary. All the record shows is one memo of notification of action taken and any determination that this was the only notification of withdrawal or that it was the official notification would be unwarranted.

Finally, the appellants ask for monetary relief in lieu of a finding of equitable estoppel. However, it is clear from the wording of Wis. Stats., §16.05(1)(f) and from the decision in Voigt v. Wisconsin State Personnel Board, 145-300 (Dane County Circuit Court, 1975) that the Board has no authority to modify actions of the Director that are before it upon appeal. The Board's authority is limited to affirming or rejecting those actions.

Thus, the appellants have failed to carry their burden of proving to a reasonable certainty, by the greater weight of the credible evidence, that the Director was incorrect in denying their request for reclassification.

ORDER

IT IS HEREBY ORDERED that the action of the respondent is affirmed and the appeal is dismissed.

Dated: April 11, 1978 STATE PERSONNEL BOARD

James R. Morgan, Chairperson