STATE OF WISCONSIN PERSONNEL COMMISSION

SHIRLEY NOLTEMEYER,

Appellant,

v.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, and DIVISION OF PERSONNEL,

Respondent.

Case Nos. 78-14-PC and 78-28-I

DECISION ON AVAILABLE REMEDY

NATURE OF THE CASE

These consolidated cases involve the refusal of the respondents to admit appellant to a civil service examination. The parties agreed at a prehearing conference to submit the case for a preliminary decision on what remedy or remedies would be available to the appellant if she were to succeed on the merits, assuming that someone else had been appointed to the position in question. The findings which follow are based on matter in the file which appears to be uncontested and are limited to the purpose of rendering this preliminary decision.

FINDINGS OF FACT

1. Case 78-28-I was commenced by a letter dated February 7, 1978, received by the Personnel Board on February 8, 1978, which requested an investigation into the rejection on January 30, 1978, of appellant's application for an examination for Safety Consultant - Fire Prevention Assistant Coordinator.

2. By letter of February 22, 1978, the Personnel Board confirmed

various conversations involving the parties and the Board which, among other things, provided for an expedited hearing on February 24, 1978, with waiver of 10 day notice of hearing requirement, so that the hearing could be conducted prior to the commencement of the examination. At this point (February 22, 1978) the appellant was proceeding without counsel.

3. A hearing was convened on February 24, 1978, before a Personnel Board hearing examiner at which the appellant appeared with counsel.

4. At said hearing, appellant's counsel objected to proceeding and requested a continuance on the grounds that he had had insufficient time to arrange for the attendance of the necessary witnesses and that there had not been a knowing waiver of the statutory time for hearing.

5. The postponement was granted over the objection of the respondents.

6. File 78-14-PC was commenced by an appeal letter dated March 3, 1978, and filed March 6, 1978, appealing the decision of the acting Deputy Administrator Verne H. Knoll dated February 22, 1978.

7. The aforesaid decision of Mr. Knoll contained in pertinent part the following:

> " ... it is my conclusion that the agency acted properly in rejecting Ms. Noltemeyer as not meeting the minimum requirements for admission to the examination .... I support this delegated decision by the agency and will take that position in any legal action that may result from the complaint filed by Ms. Noltemeyer."

8. These cases were consolidated by stipulation at a prehearing conference (see report dated 8/22/78).

CONCLUSIONS OF LAW

1. The only remedy to which appellant would be entitled if she were to prevail on the merits would be a determination that she should

have been admitted to the examination for Safety Consultant - Fire Prevention Assistant Coordinator.

OPINION

It is argued by the appellant that she would be entitled to know whether she did meet the training and experience requirements for this examination; that she is entitled to an adjudicated decision that she should have been admitted to the exam that was given in February 1978. This position is not contested by the respondents and the Commission agrees with it. See Watkins v. DILHR, 69 Wis. 2d 782, 233 NW 2d 360 (1975).

The appellant also argues that she would be entitled to a salary award. There are two specific provisions in the statutes dealing with the Commission's authority to award back pay.

Section 230.43(4), Stats. (1977), renumbered from §16.38(4), Stats. (1975), but the same in material substance, provides in part as follows:

> "If an employee has been removed, demoted, or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been reinstated to such position or employment by order of the Commission or any court after review, the employee shall be entitled to compensation therefor from the date of such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled by law but for such unlawful removal, demotion or reclassification. Interim earnings or amounts earnable with reasonable diligence by the employee shall operate to reduce back pay otherwise allowable."

Section 111.36(3)(b), Wis. Stats. (1977), authorizes back pay awards upon a finding of discrimination by an employer.[1]

The appellant makes the following argument as to Subchapter II

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[1] Section 111.33(2), Stats. (1977), provides that discrimination complaints against the state as an employer shall be processed by the Commission pursuant to §230.45(1)(b), Stats. (1977).

of Chapter 111 and §230.43(4):

> "The FEP Act, Sec. 111.31 et seq., creates general make-whole authority to be exercised in DILHR's discretion as to all non-state employes. The Personnel Commission coincidentally exercises the same authorities as to state employe claims. Nothing in the FEP Act indicates a legislative intent to circumscribe the Personnel Commission's authority under other statutes which it enforces.
>
> Section 230.43(4) states that an employe 'shall' be entitled to back pay under certain circumstances. There is no reason to assume that because this type of relief is legislatively mandated in certain situations, the Commission may not award back pay in exercising its discretion to remedy wrongs which do not involve discharge, demotion, or reclassification. The general rule of relief appropriate to the violation, Voight, supra, Kuter & North, supra, Sec. 230.44(4)(d), supra, remains."

In the Commission's opinion, these provisions bring into play the principle of statutory construction of express mention, implied exclusion. See Teamsters Union Local 695 v. Waukesha Co., 57 Wis. 2d 62, 67, n.6 (1973):

> "The express mention of one matter excludes other similar matters not mentioned .... 82 CJS Statutes p. 668, §333. See also 50 Am Jur Statutes, p. 238, §244."

Where the legislature has provided expressly for back pay in two specific situations, it is inappropriate to find authority to grant similar relief in the manner suggested by the appellant. This is particularity true in light of the well-established principle in Wisconsin that administrative agencies are created by the legislature and their powers are limited to those which can be found within the four corners of the statute. American Brass co. v. State Board of Health, 245 Wis. 440, 448 (1944). See also State ex rel Farrell v. Schubert, 52 Wis, 2d 351, 358 (1971): "in any reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority," Murphy v. Industrial Commission, 37 Wis. 2d 704 (1968).

The Personnel Board in interpreting § 16.05(1)(f) and 16.38(4), Stats. (1975), has held that there is no authority to grant back pay where employes are improperly denied reclassification, see Van Laanen v. Knoll, No. 74-17 (3/19 and 23/76); and Nunnelee v. Knoll, No. 75-77 (8/1/77). Both of these decisions were affirmed in circuit court in Van Laanen v. State Personnel Board, No. 153-348 (5/31/77) (per J. Currie); and in Nunnelee v. State Personnel Board, No. 158-464 (9/14/78) (per J. Eich).

The appellant also argues that Article I, Section 9 of the Wisconsin Constitution compels that the Commission "fashion" an appropriate remedy. This section provides in part:

> "Every person is entitled to a certain remedy in the law for all injuries, or wrongs which he may receive in his person, property, or character ...."

However, this provision only guarantees people their "day in court," see New York Life Insurance Co. v. State, 192 Wis. 404, 211 N.W. 288 (1926); Metzger v. Wis. Dept. of Taxation, 35 Wis. 2d 119, 150 N.W. 2d 431 (1967); and does not provide a vehicle for administrative agencies to fashion remedies as suggested by the appellant.

Dated: 12/20, 1978. STATE PERSONNEL COMMISSION

Joseph W. Wiley, Chairperson

Charlotte M. Higbee, Commissioner