

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 WILBERT KRAUS,
 Appellant,
 v.
 DEPARTMENT OF HEALTH AND
 SOCIAL SERVICES,
 Respondent.
 Case No. 78-268-PC

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 BENEDICT KRAUS,
 Appellant,
 v.
 DEPARTMENT OF HEALTH AND
 SOCIAL SERVICES,
 Respondent.
 Case No. 79-63-PC
 * * * * *

DECISION

NATURE OF THE CASE

These are appeals pursuant to s. 230.44(1)(d), Stats. (1977), with respect to the respondent's decision not to appoint Wilbert and not to consider Benedict Kraus for appointment to certain positions in the classified service on the basis of an application of the DHSS Code of Ethics. Pursuant to stipulation a consolidated hearing was held on May 22, 1979, before hearing examiner Anthony J. Theodore.

FINDINGS OF FACT

1. The following Findings are made with respect to Wilbert Kraus:

a. In June 1978 there occurred a vacancy in a Power Plant Equipment Operator position in the classified civil service at Taycheedah Correctional Institution (TCI)

b. Following a certification, Superintendent Nona Switala informed Wilbert Kraus that his voluntary demotion to this position was confirmed and that he should report to work in his new position on November 6, 1978. See Appellant's Exhibit 1, letter dated October 3, 1978.

c. This position would have been under the supervision of Albert Kraus, Superintendent of Buildings and Grounds, and brother of Wilbert Kraus.

d. Subsequent to the transmittal of Appellant's Exhibit 1, the Bureau of Personnel and Employment Relations, DHSS, advised Ms. Switala that she would not be permitted to appoint Wilbert Kraus to the position in question because the DHSS Code of Ethics, Respondent's Exhibit 1, would not permit such a transaction. This information was transmitted to Wilbert Kraus in a letter from Ms. Switala dated October 24, 1978, Appellant's Exhibit 2.

2. The following Findings are made with respect to Benedict Kraus:

a. On July 17, 1978, Albert Kraus, brother of Benedict Kraus, was promoted to the position of Superintendent of Buildings and Grounds.

b. This promotion left vacant the classified position of Assistant Superintendent of Buildings and Grounds at TCI. This position was under the supervision of the superintendent position.

c. Benedict Kraus took the examination for this position, was successful and was certified sometime in October 1978.

d. Prior to this time Benedict Kraus had been employed for at least 10 years at TCI as a maintenance mechanic under the direct supervision of Albert Kraus. (The DHSS Code of Ethics contained a "grandfather clause" that had permitted the continuation of this arrangement.)

e. Ms. Switala requested approval of DHSS Bureau of Personnel and Employment Relations for a procedure whereby Benedict Kraus could be considered for appointment without the involvement of Albert Kraus in the interview and appointment process. See Appellant's Exhibit 4.

f. Ms. Switala was informed by memo of December 15, 1978, from the Bureau of Personnel and Employment Relations, Appellant's Exhibit 8, that the appointment of Benedict Kraus to the assistant superintendent position would not be permitted by the DHSS Code of Ethics.

g. Following this communication Ms. Switala gave no further consideration to Benedict Kraus for this position and appointed one of the other certified candidates to the position.

h. Benedict Kraus had the best qualifications for the position of those certified and there is a very high likelihood that he would have been appointed had he been considered.

3. The DHSS Code of Ethics, Respondent's Exhibit 1, was promulgated by Secretary Donald E. Percy as DHSS "Administrative Order #1.52," effective July 1, 1977.

4. The DHSS Code of Ethics was not developed pursuant to the

rule-making procedure of Chapter 227, Stats., and it was not filed as a rule pursuant to s. 227.023, Stats.

5. The DHSS Code of Ethics contains, in part, the following:

II. Definitions

* * *

"c. 'Immediate family' means any individual related to an employe as a husband, wife, parent, grandparent, child, brother, sister, grandchild, in-law or legal dependent for Wisconsin State income tax purposes.

* * *

III. Conflicts of Interest

f. Nepotism

1. The Department of Health and Social Services will not hire any person into a position where member(s) of that person's immediate family participate(s) in the hiring process for that position.

2. The Department of Health and Social Services will not permit employment of persons in positions which would result in their being under the direction or immediate supervision of a member of their family.

3. Persons employed prior to July 1, 1977 that are under the supervision or direction of a member of their immediate family may continue their employment.

6. DHSS was particularly interested in having a nepotism provision in its Code of Ethics because of problems of nepotism in the department in 1977 which had received newspaper coverage.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to ss. 230.44(1)(d) and 230.45(1)(a), Stats.

2. The DHSS Code of Ethics, Respondent's Exhibit 1, constitutes an administrative rule.

3. The DHSS Code of Ethics, not having been developed and promulgated pursuant to the rule-making procedures of Chapter 227, Stats., is invalid and void.

4. The actions of the respondent preventing the appointments of the appellants as set forth in the findings were illegal and an abuse of discretion.

OPINION

The legislature has provided for a code of ethics for state employees in s. 19.45(11), Stats.:

"The legislature recognizes that all state public officials and employees should be guided by a code of ethics and thus:

(a) The administrator of the division of personnel ... shall adopt rules to implement a code of ethics for classified ... state employees"

Chapter Pers. 24, Wis. Adm. Code, was promulgated pursuant to the predecessor provision to the foregoing statute. Section Pers. 24.10 provides in part:

"(1) With the prior approval of the director, an appointing authority may modify this chapter to permit the development of provisions unique to a particular department, office or position in conformity with chapter 11 [sections 19.41 - 19.50] Wis. Stats., and this chapter."

It is noteworthy that the DHSS Code of Ethics differs substantively and substantially from Chapter Pers. 24, including at least two points which were determinative with respect to the transactions here in question.

The DHSS Code of Ethics defines "immediate family" as:

"... any individual related to an employe as a husband, wife, parent, grandparent, child, brother, sister, grandchild, in-law or legal dependent for Wisconsin State income tax purposes." Paragraph II, c.

This definition is broader than the definition found at s. Pers. 24.02(2):

" ... any individual related to an employe as a husband, wife or legal dependent for Wisconsin state income tax purposes."

The appellants are considered "immediate family" with respect to their brother Albert under the DHSS Code of Ethics, but not under Chapter Pers. 24.

The DHSS Code of Ethics prohibits as a conflict of interest the "employment of persons in positions which would result in their being under the direction or immediate supervision of a member of their family."

Paragraph II. F. 2. This provision prohibited placing the appellants in positions under the supervision of their brother, while these transactions would not appear to have been prohibited by or violative of Chapter Pers. 24.

Section 227.01(9), Stats., defines a rule as:

" ... a regulation, standard, statement of policy or general application and having the effect of law, issued by an agency to implement, interpret or make specific legislation enforced or administered by such agency or to govern the organization or procedure of such agency."

The DHSS Code of Ethics, Respondent's Exhibit 1, constitutes a rule under this definition. See, e.g., Frankelthal v. Wis. Real Estate Brokers Board, 3 Wis. 2d 249, 253, 257b, 89 N.W. 2d 825 (1958):

"We have no hesitancy in holding that the issuance by the board in 1956 of the mimeographed instructions for renewal of real-estate broker's licenses which contained the requirement that all members of a partnership must be licensed as a condition to licensing the partnership, constituted the making of a rule ...

* * *

When a party files an application for a license with an administrative agency and the latter points to some announced agency policy of general application as a reason for rejecting the application, such announced policy constitutes a rule" (emphasis supplied).

See also Schoolway Transportation Co. v. Div. of Motor Vehicles, 72 Wis. 2d 223, 240 N.W. 2d 403 (1976); Dane County v. DHSS, 79 Wis. 2d 323, 255 N.W. 2d 539 (1977); Will v. DHSS, 44 Wis. 2d 507, 171 N.W. 2d 378 (1969).

In the opinion of the Commission the underlined language applies squarely to this case. The appointments of both appellants were prevented solely by the application of the DHSS Code of Ethics.

Since the DHSS Code of Ethics was not promulgated as a rule pursuant to Chapter 227 rule-making procedures it is invalid and void. See Schoolway Transportation v. Div. of Motor Vehicles, 72 Wis. 2d at 237.

Even if the DHSS Code of Ethics had been promulgated as a rule pursuant to Chapter 227, in the opinion of the Commission it would be in excess of statutory authority. By s. 19.45(11)(a), Stats., the legislature directed the administrator to adopt rules to implement a Code of Ethics for state employees. This provision cannot be construed as authority for DHSS to have issued its own rules on the subject. The director may have had the authority to authorize by s. Pers. 24.10(1), Wis. Adm. Code, appointing authorities to "modify this chapter to permit the development of provisions unique to a particular department, office or position in conformity with chapter 11, [sections 19.41 - 19.50] Wis. Stats., and this chapter." However, the Commission cannot construe the provisions of the DHSS Code of Ethics here in question, paragraphs II. C. and III. F., as provisions unique to a particular department" They are general and substantive expansions of the Pers. 24 rules themselves.

Section 230.44(4)(d), Stats., states:

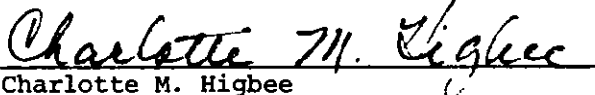
"The commission may not remove an incumbent or delay the appointment process as a remedy to a successful appeal under this section unless there is a showing of obstruction or falsification as enumerated in s. 230.43(1)."

There has been no such showing in this case. It is the opinion of the Commission that Wilbert Kraus should be appointed by voluntary demotion to the power Plant Equipment Operator position in question if it is still vacant at the time of the entry of this order. If it is not vacant, he is entitled to such an appointment at such time as a vacancy may occur. With respect to Benedict Kraus, it is the opinion of the Commission that if the Assistant Supervisor of Buildings and Grounds position in question is vacant at the time of the entry of this order, he is entitled to appointment to that position on a promotional basis. If it is not vacant he is entitled to such an appointment at such time as a vacancy may occur. Such appointments would be contingent on the appellants being otherwise eligible at the time.

ORDER

The actions of the respondent are rejected and these matters are remanded for action in accordance with this decision.

Dated: Dec. 4, 1979. STATE PERSONNEL COMMISSION


Charlotte M. Higbee
Commissioner

AJT:jmg

7/24/79