

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 SUSAN G. LEVY, *
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 Appellant, *
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 v. *
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 DIVISION OF PERSONNEL, *
 *
 Respondent. *
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 Case No. 78-289-PC *
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DECISION

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(a), Wis. Stats., from the action wherein appellant, a former unclassified employe, was treated as a new employe in terms of benefit eligibility and carry-over of accrued benefits when she was appointed to a project position through a non-competitive process. The issues are: 1. Whether or not the policy enunciated as a basis for such action is illegal and/or an abuse of discretion, and 2. Whether or not respondent is equitably estopped from applying that policy to the appellant. The matter was heard before Charlotte M. Higbee, Commissioner, on March 29, 1979.

FINDINGS OF FACT

1. In late September, 1973, appellant was appointed to an unclassified position in the office of the Governor.

2. Appellant continued to serve in that position until November 1975, when she began work in the Wisconsin Resettlement Assistance Office (WRAO), a section in the Bureau of Disaster Resources in the Division of Emergency Government, Department of Local Affairs and Development (DLAD), with salary

and other benefits at the level of a Community Services Technician 2 in the classified service.

3. Appellant remained an unclassified employe on loan from the Governor's office, which was reimbursed for the appellant's salary and fringe benefits. She worked under the administrative control of DLAD, and her staff were employed by DLAD as LTE's.

4. When it became apparent that there would be a continuing flow of refugees, the appellant requested that the WRAO staff be made permanent state employes rather than LTE's. Failing that, she recommended and the administrator of the Division of Emergency Government requested the establishment of WRAO project positions under the new Civil Service Reform Act.

5. Effective October 23, 1978, appellant was appointed to a non-competitive project position as Community Services Specialist 2, continuing without interruption in the same position of Coordinator of DLAD's resettlement assistance program.

6. Appellant did not submit a notice of termination of her unclassified employment nor was a termination interview conducted. Appellant was not reimbursed for her unused vacation and holiday hours, which should be done at the time an employe is terminated.

7. At the time appellant accepted the project position, she did not know that project positions could be established competitively and that project employes hired through competition had all the rights and benefits of permanent employes including layoff rights. She had not been advised by either her supervisor or the DLAD personnel manager that, although she was eligible for the same fringe benefit program as permanent employes, she could not carry over her unused vacation and sick leave from her unclassified

position. Appellant did understand that she would not have the same layoff, reinstatement and bumping rights; transfer or closed promotional eligibility to any permanent position; or carry-over of her project fringe benefits at the end of the project employment.

8. On the basis of five year's continuous service with the state at the end of September, 1978 appellant was eligible to earn three week's vacation per year. At the beginning of her project appointment, appellant had accrued two one-half Saturday holidays, three personal holidays, and one vacation day, plus a considerable amount of sick leave. (There is no finding as to the precise number of hours.)

9. At the time of appellant's project appointment, the DLAD personnel manager was not aware that the appellant would lose her accrued vacation and sick leave, although, late in June, 1978, she had received a copy of the Chapter 34 Addenda to the Personnel Manual (Respondent's Exhibit 4) along with a memorandum from the Division of Personnel dated June 28, 1978, (Appellant's Exhibit 2) which was developed at about the time the first project position was created.

10. During discussions regarding establishment of the WRAO project positions, emphasis had been on the former LTE's and concern over their having fringe benefits. Although the subject never came up in their conversations, appellant's supervisor had assumed as "a reasonable person would" from reading the statute that all of her benefits from her unclassified position would carry over at the beginning of her appointment.

11. The letter dated November 7, 1978, confirming appellant's appointment did not address the issue of carry-over of benefits from her previous position. It did advise her of her eligibility for fringe benefit programs

within the project position in accordance with the statutory provisions.

(Respondent's Exhibit 2a)

12. As a result of questions raised by the appellant following her employment in the project position, the DLAD personnel manager contacted the respondent division of Personnel orally on October 30, 1979, for clarification of appellant's situation, following up on the same day with a written request for information, at respondent's suggestion. On November 13, 1978, the Division of Personnel responded; and on November 20, 1978, the DLAD payroll coordinator orally advised the appellant that there would be no carry over of past service benefits except for the insurance and retirement programs. (Respondent's Exhibit 2b)

13. On November 21, 1978, the Acting Deputy Administrator of the Division of Personnel issued a memorandum to all state personnel managers on the subject of "Clarification of Procedures Relating to Project Appointments" (Appellant's Exhibit 1), which set forth the procedures to be followed, in a case like the appellant's, when unclassified employees are subsequently appointed to project positions through non-competitive means. This is the first document issued by the respondent specifically addressing this issue.

14. The appellant received a copy of the November 21, 1978, memo along with the Chapter 314 Addenda and the June 28, 1978, memo on December 5, 1978.

15. Neither §230.27 Stats, nor the June 1978 Addenda I-III to Chapter 314 of the Wisconsin Personnel Manual (Respondent's Exhibit 4) make reference to the carry-over of prior service benefits into a project position; both address only eligibility for benefits during the term of the project

employment and the rights of project employees at the termination of the project.

16. On February 27, 1978, the Committee on Senate Organization introduced Senate Bill 111 which inter alia, is intended to clarify the benefit status of project employees and includes the added provision that no seniority or continuous service earned and no benefits or rights acquired as an unclassified employee may be applied to a project appointment. (Respondent's Exhibit 3) These revisions were recommended by the respondent.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over this appeal pursuant to §230.44(1)(a), Wis. Stats.

2. The burden of proof is on the appellant to show to a reasonable certainty, by the greater weight of credible evidence either (a) that the action of the respondent was illegal or an abuse of discretion, Reinke v. Personnel Board, 53 Wis. 2d 123 (1971) or (b) that respondent is equitably estopped from asserting that respondent's action was not illegal or an abuse of discretion. Ryan v. DOR, 68 Wis. 2d 467 1975; Porter v. DOT, 78-154-PC, May 14, 1979.

3. The appellant has carried her burden of proof on the first issue; she has shown that the respondent's action in denying the carry-over of the benefits she had accrued as an unclassified employee to her project appointment was an abuse of discretion. The issue of equitable estoppel is therefore moot.

OPINION

The Personnel Commission will take official notice of the relevant

provisions of the Wis. Stats., the Wis. Administrative Code, and the Report of Employment Relations Study Commission which preceded passage of the Civil Service Reform Act.

Section 230.27 Stats., by which the 1977 Legislature established project positions, makes reference to the rights and privileges for which a project employe is eligible after six months and specifically excepts tenure transfer, reinstatement, promotion eligibility and layoff benefits. This the appellant understood at the time she began her project employment. All of these exceptions relate to the termination of the project employment; nowhere does the statute address the situation wherein a project employe has accrued benefits as the result of previous state employment, nor does the statute make any distinction between competitive and non-competitive project positions.

The respondent Division of Personnel promulgated addenda to Chapter 314 of the Personnel Manual for guidance in the implementation of the statute. However, it is readily apparent in reviewing testimony adduced at the hearing that the appointing authority, DLAD, did not understand the respondent's policy to preclude the carry-over of appellant's vacation and sick leave. In fact, so strong was the contrary assumption that this issue was never discussed prior to appellant's appointment; appellant was not reimbursed for her accrued vacation time; and appellant's supervisor testified that a reasonable person would assume from reading the statute "that all the benefits would be there" other than those excepted.

"It is the general rule that an administrative agency has only those powers which are expressly conferred or which are fairly implied from the four corners of the statute under which it operates. Racine Fire & Police

Commission v. Stanfield, 70 Wis. 2d 395, 399, 234 NW 2d 307 (1975);
Wisconsin Environmental Decade Inc. v. Public Service Commission,
69 Wis. 2d 1, 16, 230 NW 243 (1975). Therefore, no agency may issue
a rule that is not expressly or impliedly authorized by the legislature."
State (Department of Administration) v. ILHR Department, 77 Wis. 2d, 126,
136, 252 NW 2d 353 (1977). "[A]ny reasonable doubt of the existence of an
implied power of an administrative agency should be resolved against
the exercise of such authority" ID.

"In construing a statute, the primary source used is the language
of the statute itself. Nekoosa-Edwards Paper Co. v. Public Service Commission,
8 Wis. 2d 582, 591, 99 NW 2d 821 (1959). When a statute is ambiguous, it
is permissible to look to the legislative intent, which is to be found
in the language of the statute in relation to its scope history,
context, subject matter, and object to be accomplished." Wis. Environmental
Decade Inc. v. PSC, Ibid, 350.

The propose of §230.27 Stats. was to restrict the use of limited term
employment to cases where agencies have provisional and emergency needs and
to expand the types of employment opportunities to meet more adequately the
needs of agencies and employes; the latter in the case of project employment,
includes the provision of "the benefits and obligations of a classified
civil servant but clearly limits the obligation of the state to the
lifetime of the project." Wisconsin Civil Service, Report of the
Employment Relations Study Commission, pp 48-49, June 30, 1977.

That there has been considerable confusion regarding project
appointments is evidenced by the fact that the appointing authority did not
understand the Addenda to the Personnel Manual to mean what they were

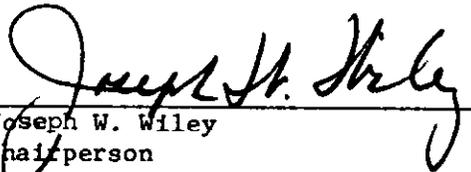
intended to convey. The respondent subsequently issued a memorandum clarifying its policy, but only after the appellant had questioned the policy because it operated to her detriment. On its face, DLAD had treated the change of appellant's position as a transfer; as such, it was not unreasonable for both DLAD and the appellant to assume that there would be a transfer of credits in accordance with PERS 18.04(2) of the WAC. In order to rectify this ambiguity, the respondent has requested legislative revision.

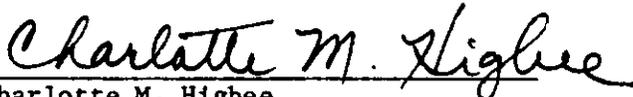
Is is the Commission's determination that respondent's policy barring carry over of benefits into a project position, whether competitive or non-competitive, is an abuse of discretion in that it exceeds its authority under §230.27 Stats., and that such carry over should be permitted in the instant case. At the termination of her project position, appellant will lose any unused benefits earned during the project position; but such credits as accrued to appellant during her service in the unclassified position will be retained and transferred if appellant reenters classified service within the reinstatement period.

ORDER

IT IS HEREBY ORDERED that the action and decision of the respondent in denying appellant carry-over of her accrued benefits from an unclassified position to a project appointment is rejected and the matter is remanded to the respondent for action in accordance with this decision, pursuant to §230.44(4)(c).

Dated: Oct 12, 1979. STATE PERSONNEL COMMISSION


Joseph W. Wiley
Chairperson


Charlotte M. Higbee
Commissioner