

COURT OF APPEALS  
DECISION  
DATED AND RELEASED

JUN 26 1979

FILED

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CLERK OF COURT OF APPEALS  
OF WISCONSIN

A party may file with the Supreme Court  
a petition to review an adverse decision by  
the Court of Appeals pursuant to s. 808.10  
within 30 days hereof, pursuant to Rule  
809.62 (1).

No. 78-719

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT IV

MINA A. EHLI,

Petitioner-Appellant,

v.

STATE PERSONNEL BOARD,

Respondent.

**NOTICE**  
This opinion is subject to fur-  
ther editing. If published the  
official version will appear  
in the bound volume of the  
Official Reports.

APPEAL from the order and judgment of the circuit court  
for Dane county: RICHARD W. BARDWELL, Circuit Judge.

Affirmed.

Before Gartzke, P.J., Bablitch, J. and Dykman, J.

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GARTZKE, P.J. Appellant was employed as a Teacher 1 by the Department of Health and Social Services September 14, 1975. She held no other position with the state at that time. The record does not disclose whether a Teacher 2 position was open at that time. It appears to be assumed by all parties that appellant would have been appointed to the position of Teacher 2 if the department found she was qualified for that position. We make the same assumption.

October 10, 1975, she requested reclassification as a Teacher 2. The department denied the request on grounds that she lacked ten months of teaching experience, a requirement for the position of Teacher 2, even though she had earlier performed the duties of a teacher in another state position prior to her certification and appointment to the Teacher 1 position.

Appellant appealed to the personnel board under sec. 16.05(1)(f), Stats. 1975.<sup>1</sup> The board found that appellant had ten months of teaching experience prior to her certification in May, 1975, that such experience could be acquired without teacher certification and that the department erred in denying her reclassification request. August 1, 1977, the board rejected the action of the department and remanded the matter for reclassification of appellant as a Teacher 2 with salary and benefits retroactive to a date 45 days after the date she filed her appeal with the board.<sup>2</sup>

Appellant petitioned the circuit court for Dane County for review under ch. 227, Stats. She contended that reclassification should include salary and benefits retroactive to the date she was hired, September 14, 1975, or, alternatively, to the date she filed her appeal with the board, December 15, 1975, rather than 45 days after the date she filed her appeal. The circuit court affirmed the order of the board.

The sole issue on this appeal is whether the board has statutory authority to award backpay and benefits to a date commencing prior to the date fixed by the board.

Appellant's appeal to the board was pursuant to sec. 16.05(1)(f), Stats., which provides that the board shall:

Hear appeals of interested parties and of appointing authorities from actions and decisions of the director. After such hearing, the board shall either affirm or reject the action of the director and, in the event of rejection, may issue an enforceable order to remand the matter to the director for action in accordance with the board's decisions. Any action brought against the director for failure to comply with the order of the board shall be brought and served within 60 days after the date of the board's finding.

Section 16.05(1)(f), Stats., does not expressly authorize the board to order backpay benefits. The board therefore has no such power unless it can be found by necessary implication in the statutes. The general rule is that a board has only those powers which are expressly conferred or which are, by necessity, to be implied from the statute under

which it operates. "The effect of this rule has generally been that such statutes are strictly construed to preclude the exercise of a power which is not expressly granted." Racine Fire and Police Comm. v. Stanfield, 70 Wis.2d 395, 399, 234 N.W.2d 307 (1975) (citation omitted).

An implied power of the board to award backpay cannot give an employee greater rights to backpay than are given to the employee by the statutes. Section 16.38(4), Stats., provides,

Any employe who has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and who has been reinstated to such position or employment by order of the board or any court upon review, shall be entitled to compensation therefor from the date of such unlawful removal, demotion or reclassification at the rate to which he would have been entitled by law but for such unlawful removal, demotion or reclassification, and such employe shall be entitled to an order of mandamus to enforce the payment or other provisions of such order.

Section 16.38(4), Stats., does not authorize an award of backpay to appellant. She was not "removed" or "demoted" from a position of employment when she was classified as a Teacher 1 because she held no other position at that time. She was not "reclassified" in or from a position for the same reason.

Appellant argues that she was "reclassified" because the position she held "was always a Teacher 2 position" and

that the appointing authority wrongfully changed her position to Teacher 1. We disagree. An unintentional misclassification cannot be converted to an intentional reclassification. There is no evidence that the department intended to abolish or modify the qualifications for a Teacher 2 position. On the contrary, the department enforced the requirements for Teacher 2 as the department saw them. A Teacher 2 position is not an attribute possessed by appellant. She cannot be reclassified from a position she never held.

Section 16.28(1)(a), Stats., provides, "An employe with permanent status in class may be removed, suspended without pay, discharged, reduced in pay or demoted only for just cause." Section 16.28(1)(a) does not authorize an award of backpay to appellant. Appellant was not removed, suspended, discharged, reduced in pay or demoted. The power to order backpay for her misclassification therefore cannot be implied from sec. 16.28(1)(a).

Section 16.05(1)(e), Stats., provides that the board shall hear appeals of employees "with permanent status in class, from decisions of appointing authorities when such decisions relate to demotions, layoffs, suspensions, discharges or reductions in pay but only when it is alleged that such decision was not based on just cause." Section 16.05(1)(e) provides for review by the board of the legality of the same

acts affecting the terms of employment that are specified in sec. 16.28(1)(a), Stats. Section 16.05(1)(e) provides that the board shall either sustain the action of the appointing authority "or shall reinstate the employe fully." Power to order backpay on reinstatement is necessarily implied. If, for example, the employee has suffered a wrongful reduction in pay, "reinstatement" without backpay would be meaningless. However, no act made wrongful by sec. 16.28(1)(a) and made appealable by sec. 16.05(1)(e) includes misclassification.

No other statute has been brought to our attention which arguably authorizes the board to make a retroactive award of benefits after a finding that an employee has been misclassified.

Appellant nevertheless argues that we must find that the board has authority to award her backpay to carry out the purpose of ch. 16, Stats., and to avoid what appellant describes as an "harsh, absurd, and unreasonable" result.

Section 16.01(1), Stats., prefaces the civil service provisions in subchapter II of ch. 16 with the following statement: "It is the purpose of this subchapter to provide state agencies and institutions of higher education with competent personnel which will furnish state services to its citizens as fairly, efficiently and effectively as possible." We are not convinced that that purpose requires or permits

us to add words to subchapter II to give the misclassified employee a right which does not appear in the statutes.

We reject appellant's characterization of a construction of the statute contrary to appellant's as "harsh, absurd, and unreasonable." We agree with the circuit court's observation that there is a difference between the employee who has been demoted, removed or reclassified and the employee who has accepted a position for which he or she is over-qualified. Unlike the employee who has been demoted, removed or reclassified, the over-qualified and misclassified employee is not subjected to action which adversely changes the terms of employment after voluntarily commencing service in that position.

By the Court.--Judgment affirmed.

Publication is not recommended.

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Appendix

<sup>1</sup> All references are to the 1975 statutes, unless otherwise specified. Sections 16.05(1)(e) to (h), (2) and (7) were repealed by sec. 30, ch. 196, Laws of 1977.

<sup>2</sup> The award of retroactive salary and benefits is "pursuant to" Van Laanen v. State Personnel Board, case no. 153-348, decided by Dane County circuit court May 31, 1977. That is a misinterpretation of Van Laanen. Section 16.05(2) provides that within 45 days after the written request for an appeal the board "shall hold a hearing thereon." In Van Laanen the board held that the petitioner was wrongfully denied reclassification from Teacher 2 to Teacher 3 and ordered reclassification and backpay benefits to begin on a date 45 days after her appeal. The circuit court, on a ch. 227, Stats., review of that order, said, "The sole issue on this review is whether the Board has statutory authority to award back pay benefits to remedy petitioner's wrongful classification beyond the limited period for which such benefits were granted by the Board." The question whether the board could award backpay benefits beginning on the date ordered was not before the court and was not discussed or decided by the court. Nunnelee v. State Personnel Board, case no. 158-464, decided by the Dane County circuit court September 14, 1978, affirmed the board's refusal to award backpay beyond the period ordered, without reviewing the issue whether backpay could be awarded within the period. The circuit court in the case on appeal before us did not decide whether it was proper for the board to award backpay within the period ordered.

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