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DECISION
DATED AND RELEASED

MAY 30 1979

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).

FILED

No. 78-837

MAY 30 1979

STATE OF WISCONSIN

CLERK OF COURT OF APPEALS IN COURT OF APPEALS
OF WISCONSIN DISTRICT IV

PATRICK A. LYONS,

Petitioner-Appellant,

v.

STATE OF WISCONSIN
(PERSONNEL BOARD),

Respondent.

APPEAL from a judgment of the circuit court for Dane county:
MICHAEL B. TORPHY, JR., Circuit Judge. Reversed.

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

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JUN 4 1979

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DYKMAN, J. Patrick A. Lyons appeals from a judgment of the Dane County Circuit Court modifying and affirming a decision and order of the Wisconsin Personnel Board.

The facts relevant to this appeal date back to 1973. In February, 1973, Lyons was the chief of the Inheritance Tax Bureau in the Income, Sales, Inheritance and Excise Tax Division of the Department of Revenue. He was classified as a "Revenue Administrator Three." In late 1972 the Department of Revenue was reorganized and certain changes were made in the duties and responsibilities of the position occupied by Lyons. On February 18, 1973, the director of the Bureau of Personnel in the Department of Administration "reallocated" Lyons' position from Revenue Administrator III to Revenue Administrator II.

Lyons appealed the reallocation to the State Personnel Board pursuant to sec. 16.05(1)(f), Stats. (1975).¹ The personnel board entered an order and memorandum decision in case no. 73-36 on November 24, 1974. The order read:

IT IS ORDERED that the action of the Respondent Wettengel [Director, Bureau of Personnel, Department of Administration] in reallocating the Appellant's classification from Revenue Administrator III to Revenue Administrator II is hereby rejected.

IT IS FURTHER ORDERED that the Respondent Wiegner [Secretary, Department of Revenue] initiate the appropriate demotion in lieu of layoff action, pursuant to Wis. Adm. Code Pers 22.

IT IS FURTHER ORDERED that Respondent Wiegner desist from any action to seek reimbursement from the Appellant for any additional compensation he may have received by the action of the Director incorrectly reallocating his position.

IT IS FURTHER ORDERED that Appellant be granted any intervening servicewide salary adjustments including merit to which he would have been entitled.

The order was not appealed by any of the parties and therefore is of full effect.

By letter dated January 21, 1975, the Department of Revenue informed Lyons that he had been demoted to Revenue Administrator II, effective February 18, 1973. This 1973 date was the effective date of the "reallocation" deemed improper in case no. 73-36. The letter alleged that the relevant personnel rules had been complied with and informed Lyons of his right to appeal under Wis. Adm. Code Pers sec. 22.05 within 15 days of receipt of the letter.

By letter to the board dated January 22, 1975, Lyons:

1. Asked the board to conduct an investigation under sec. 16.05(4), Stats., to determine whether the Department of Revenue had complied with the order entered in case no. 73-36. The major complaint seemed to be that the Department of Revenue owed Lyons \$2,562.98 because it had not returned Lyons to the status of Revenue Administrator III.

2. Appealed the demotion action pursuant to sec. 16.05 (1)(e), Stats. (1975).

On June 5, 1975, the attorney for the personnel board wrote to the parties requesting information on the status of the appeal, designated as case no. 75-7. The letter stated that there had already been a prehearing conference, although the record contains no other reference to that conference.

By letter dated June 12, 1975, the attorney for Lyons stated that his client's position was stated with "specificity and detail" in his January 22 letter. He also wrote:

Absent further Board action as to how its Decision in ... Case No. 73-36, is to be applied in terms of its effective date, it appears to me that the only issue remaining is precisely that; the effective date of its Decision dated November 26, 1974.

Needless to say, we would like the Board to consider or reconsider, as the case may be, its Opinion in that matter with this issue in mind. ...

On November 26, 1975, there was a prehearing conference in the case. At that time the parties stipulated that "the issue presented by this appeal is whether or not the Respondent [Secretary, Department of Revenue] complied with the Board's Opinion and Order in Case No. 73-36?" The parties also "agreed and stipulated to submit this matter for decision on simultaneous position papers or briefs, reserving the right to request an evidentiary hearing."

On January 27, 1976, the personnel board dismissed the appeal in case no. 75-7, based on briefs by the parties.

The briefs primarily argued the question of whether the Department of Revenue could demote Lyons retroactively. In his brief Lyons also stated:

It is the position of the Appellant that if he is indeed to receive a demotion in lieu of layoff, as directed by the earlier Board "ORDER":

(a) Such action must be accomplished in full present compliance with the procedures established under Pers 22.03;

(b) Written notice of such action be given to the Appellant not less than fifteen (15) calendar days prior to the effective date thereof in accordance with Pers 22.05;

(c) The Appellant be accorded mandatory reinstatement rights and placed upon the appropriate reemployment register in accordance with Pers Ch. 16; and

(d) The Appellant receive payment of all intervening servicewide salary adjustments including merit in the classification of Revenue Administrator Three to the effective date of any valid and legal change in the classification.

Accordingly, the Appellant herein, through this appearing counsel of record, respectfully requests the Board to issue an enforceable order directing the "appointing authority," ... to proceed in conformity with the requests contained herein in Subsections (a), (b), (c), and (d), and for such other and further relief as the Board may deem appropriate.

The respondent to the appeal in case no. 75-7 argued that the previous order of the board did not make the reallocation a nullity but made it a demotion. The respondent argued that the personnel board in its earlier order had

demoted Lyons "in fact" and that the respondent's actions effectuated that demotion.

The personnel board's dismissal stated the issue as whether the demotion should be retroactive to February 18, 1973. The personnel board said in case no. 73-36 that its November 24, 1974 order had been intended to require the Department of Revenue "to provide de jure status to a de facto demotion, not to restore the Appellant to Revenue Administrator III effective February 18, 1973."

By motion dated February 11, 1976, Lyons moved the personnel board for an order directing a rehearing. In his memorandum in support, Lyons argued that by dismissing the action, the personnel board deprived Lyons of the opportunity to litigate the legality of the transaction identified as a demotion in lieu of layoff. He said, "Assuming the personnel transaction to be, as a matter of law, a demotion in lieu of layoff and considering the effective date ... to be February 18, 1973 ... a number of issues are presented ..." enumerating procedural rules that the Department of Revenue must comply with in demoting an employee. Lyons argued that those issues needed a hearing based upon the impossibility of separating the issue of the propriety of the demotion from the issue of the retroactivity of a demotion.

Lyons also argued that de facto demotions are not recognized under the Civil Service Act or applicable Wisconsin case law.

The personnel board issued a "proposed opinion and order on motion for rehearing," which concluded that (1) the personnel board had power to grant a rehearing; (2) the stipulation of the parties to submit the case on briefs eliminated any claim of error for failure to hold an evidentiary hearing; (3) the issues allegedly left unresolved in the January 27 opinion dismissing the appeal were waived when the parties stipulated that the only issue was whether the Department of Revenue had complied with the order in case no. 73-36; (4) the January 27 opinion must be modified to eliminate the retroactivity of the demotion, based on existing case law; (4) consideration of other issues was precluded because of the stipulation entered by the parties at the prehearing conference; (6) Lyons was a Revenue Administrator III until January 21, 1975 (the date of the demotion letter).

Lyons objected to this proposed order, stating that he must be reinstated as a Revenue Administrator III to the present time, not just to January 21, 1975. "The Appellant has yet to be properly and legally demoted in lieu of being

laid off. The most recent attempt to do so was rejected by this Board in its most recent undated Opinion and Order." The essence of Lyons' argument was that if the Department of Revenue could not retroactively demote under the applicable statutory authority, the board could not modify the Department of Revenue's actions to achieve a demotion.

On October 12, 1977, the personnel board issued its final order, which was substantially identical to the proposed order.

On November 10, 1977, Lyons petitioned for review under ch. 227, Stats., alleging the order was erroneous as a matter of law in that it did not either accept in totality or reject in totality the action of the Department of Revenue as required under sec. 16.05(1)(f), Stats; was erroneous because it was entered without an evidentiary hearing; and was affected by other errors and inconsistencies.

Lyons later amended and clarified his petition stating that he was appealing only from that part of the order refusing to grant benefits subsequent to January 21, 1975.

Judge Torphy entered his opinion on October 20, 1978. In that opinion he concluded:

1. The board proceeded under sec. 16.05(4), Stats.,² which provides it can issue orders concerning the enforcement

of all matters touching the enforcement and effect of the Civil Service Laws.

2. Even if the personnel board did not proceed under sec. 16.05(4), the board had authority under sec. 16.05(1)(e), Stats. (1975).³ This statute provides that in decisions concerning demotions, the personnel board "shall either sustain the action of the appointing authority or shall reinstate the employee fully."

The court said the question under this statute was what constituted full reinstatement. It concluded that in case no. 73-36, the personnel board had decided that the Revenue Administrator III position was abolished. Accordingly the extent to which the petitioner could be reinstated was limited to the effective date of the subsequent demotion, which the personnel board said was January 21, 1975. Thus, the court was of the opinion that the board action constituted full reinstatement. The court said any other holding would not make sense because the board would be required to restore Lyons to a former position, one which the personnel board determined did not exist after the personnel board had ordered Lyons' demotion.

3. Because of the stipulation as to how the case would be submitted, failure of the personnel board to hold evidentiary hearings was not in error.

4. Based on Wis. Adm. Code Pers 22.05, which required 15 days written notice prior to the effective date of demotion, the court agreed with the Department of Revenue that the effective date of the demotion should be February 5, 1975, using the letter as the notification.

Lyons appeals the decision of the circuit court. Lyons had presented two issues to that court: (1) Was the relief ordered Lyons by the personnel board consistent with the requirements applicable law? (2) Alternatively, did the board err in not providing Lyons a hearing? On this appeal, the parties agree that the issue can be restated: Has Lyons been legally demoted in lieu of lay off from Revenue Administrator III to Revenue Administrator II? If so, when?

The facts as stated above are substantially undisputed. The question presented is whether the trial court erred, and as a corollary, whether the personnel board erred, in determining that the Department of Revenue had demoted Lyons. Much is made on this appeal of the propriety or necessity of the demotion. That question is not currently before us.

We view the material facts in this case as follows: Lyons' job description and responsibilities changed when the Department of Revenue was reorganized in 1972. The change in Lyons' responsibilities, however, did not lead automatically

to a change in Lyons' status from a Revenue Administrator III to Revenue Administrator II. The Department of Revenue attempted to effectuate the change through a process of "reallocation." On November 24, 1974, the personnel board rejected the "reallocation" and determined that "demotion" was the proper method to change Lyons' status. The personnel board ostensibly ordered Lyons demoted. Under the applicable statute, sec. 16.05(1)(f), Stats. (1975), the personnel board did not have authority to order demotion but only to reject the reallocation.⁴ Thus, as of November 24, 1974, Lyons continued to be a Revenue Administrator III.

The Department of Revenue, believing that it was acting pursuant to the 1974 order, retroactively demoted Lyons. The personnel board ultimately found this demotion to be contrary to the 1974 order "as interpreted" in light of current case law. Instead of rejecting the demotion altogether and reinstating Lyons, as required under sec. 16.05(1)(e), Stats. (1975), it approved the demotion except insofar as it operated retroactively. The trial court, concluding that the personnel board was relying on sec. 16.05(4), Stats. (1975), found that the personnel board and the Department of Revenue acted lawfully, but modified the personnel board's order so that the demotion took effect 15 days after Lyons received notice of the retroactive demotion.

These facts show a most confusing situation. The confusion stems primarily from combining an investigation into the meaning of the 1974 order of the personnel board with an appeal from a decision based on one interpretation of that order.

We believe the trial court erred in affirming the final order of the personnel board. If the personnel board was acting under sec. 16.05(4), Stats. (1975), it had the statutory authority to "issue recommendations concerning all matters touching the enforcement" of the applicable statutes and rules or to "remand the action to the director or appointing authority for appropriate action within the law." The personnel board did neither, but modified an action of the Department of Revenue. If the personnel board was acting under sec. 16.05(1)(e), Stats. (1975), it had the authority to sustain the action or to reinstate the employee. Since, as of November 24, 1974, Lyons was legally a Revenue Administrator III, the personnel board could only sustain the demotion or reinstate Lyons as a Revenue Administrator III. The personnel board did neither.

The gist of the personnel board's argument now is that Lyons waived his right to challenge the procedural legality of any demotion because he stipulated all along that the

issue was whether the Department of Revenue complied with the order in case no. 73-36. The Department of Revenue maintained from the beginning that the retroactive demotion was authorized by the order. As soon as the personnel board determined that the order did not or could not order demotion, then the Department of Revenue's position was rejected. Lyons had a right to challenge the retroactivity of the demotion, and he won. He also had the right to the procedural safeguards built into the "demotion in lieu of layoff" system. Since the retroactive demotion was unlawful, the personnel board should have rejected it. If the personnel board rejects the demotion, it must be rejected in toto, not in part, and the board must either reinstate Lyons as a Revenue Administrator III (if proceeding under sec. 16.05(1)(e), Stats. (1975)), or remand for appropriate action within the law (under sec. 16.05(4)). In this case, the reinstatement order in case no. 73-36 is still in existence so that Lyons is still classified as a Revenue Administrator III. The personnel board had the authority to remand for appropriate action within the law. That action would consist of starting the demotion proceedings as set forth in the applicable rules.

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It is the opinion of this court that Lyons is currently a Revenue Administrator III, that his status has never changed since he assumed the status sometime in 1973, and that if the Department of Revenue wishes to demote a Revenue Administrator III, it must comply with present applicable rules and statutes.

By the Court.--Judgment reversed.

Recommendation: Do not publish.

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Appendix

¹Section 16.05(1)(f), Stats. (1975), reads:

(1)The board shall:

(f) 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.

²Section 16.05(4), Stats. (1975), reads:

The board may make investigations and hold hearings on its own motion or at the request of interested persons and issue recommendations concerning all matters touching the enforcement and effect of this subchapter and rules prescribed thereunder. If the results of an investigation disclose that the director, appointing authority or any other person acted illegally or to circumvent the intent and spirit of the law the board may issue an enforceable order to remand the action to the director or appointing authority for appropriate action within the law. Any action brought against the director or appointing authority 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 findings.

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³Section 16.05(1)(e), Stats. (1975), reads:

(1) The board shall:

(e) Hear appeals of employes 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. After the hearing, the board shall either sustain the action of the appointing authority or shall reinstate the employe fully. Any action brought against an appointing authority by an employe 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.

⁴The trial court thus erred in concluding that the personnel board had determined in case no. 73-36 that Lyons' Revenue Administrator III position had been abolished and that the board had ordered Lyons' demotion. The personnel board had no authority to abolish a particular position or to order the demotion of a particular person from one status to another.

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