

STATE OF WISCONSIN      CIRCUIT COURT      DANE COUNTY

DEPARTMENT OF TRANSPORTATION,  
STATE OF WISCONSIN,

Petitioner,      Case No. 79-CV-1312

vs.

JUDGMENT

WISCONSIN PERSONNEL COMMISSION,  
STATE OF WISCONSIN (Charles  
Kennel, Larry Brauer and Frank Murphy),

Respondent.

BEFORE: Hon. GEORGE H. CURRIE, Reserve Circuit Judge

The above entitled review proceeding having been submitted to the Court for determination upon the briefs filed by counsel, oral argument being waived, pursuant to the agreement of Assistant Attorney General Maureen McGlynn, counsel for petitioner Department, and of Attorneys Roderick J. Matthews and Patricia B. Hodulik of the law firm of Sieker and Matthews, counsel for respondent Commission; and the Court having filed its Memorandum Decision wherein Judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the Decision and Order of respondent Wisconsin Personnel Commission, State of Wisconsin, dated February 15, 1979, in the appeals of Charles E. Kennel, Larry Brauer, and Frank P. Murphy, appellants, v. Department of Transportation, respondent, Case Nos. 78-263-PC, 78-265-PC, and 78-266-PC, be, and the same hereby are, reversed, and the matter is remanded with directions to dismiss these appeals.

Dated this 21<sup>st</sup> day of July, 1980.

**RECEIVED**

JUL 22 1980  
Pers Comm.

By the Court:

George H. Currie  
Reserve Circuit Judge

STATE OF WISCONSIN            CIRCUIT COURT            DANE COUNTY

\*\*\*\*\*

DEPARTMENT OF TRANSPORTATION,  
STATE OF WISCONSIN,

Petitioner,                            Case No. 79-CV-1312

vs.

MEMORANDUM DECISION

WISCONSIN PERSONNEL COMMISSION,  
STATE OF WISCONSIN (Charles  
Kennel, Larry Brauer and Frank Murphy),

Respondent.

\*\*\*\*\*

BEFORE: Hon. GEORGE R. CURRIE, Reserve Circuit Judge

\*\*\*\*\*

This is a proceeding by petitioner Department of Transportation (hereafter DOT) under ch. 227, Stats., to review a decision and order of respondent Wisconsin Personnel Commission (hereafter the Commission) dated February 15, 1979, which rejected DOT's transfer of its employees Kennel, Brauer and Murphy from the Transportation district in which they were employed to other Transportation districts, and remanded the matter to DOT "for action in accordance with this Decision".

STATEMENT OF FACTS

DOT is responsible under the Wisconsin Statutes for, among other things, "all matters pertaining to the expenditure of state and federal aid for the improvement of highways," sec. 84.01 (2), Stats., see gen. sec. 15.46 et seq., Stats. DOT's statutory responsibility in highway matters is delegated internally to, among others, the Division of Highways and Transportation Facilities and the Division of Transportation Districts, each of which is headed by a Division Administrator.

During the period immediately relevant to this action, Marvin Schaeffer was Administrator of the Division of Transportation Districts and H. L. Fiedler was Administrator of the Division of Highways and Transportation Facilities.

As the name implies, the Division of Transportation Districts headed by Schaeffer has within it a number of district offices spread geographically throughout the state. The record here is concerned primarily with Districts 1 (Madison), 8 (Superior), 2 (then in Waukesha) and 9 (then in Milwaukee). Early in 1979, after this proceeding arose, but prior to the hearing before the Commission, the Milwaukee and Waukesha Districts were merged into a single district with the combined jurisdiction of both former districts, a single district director and the anticipation of a combined staff at the management level. As a result, the director of the former Waukesha District, Thomas Kinsey, was transferred to a position in La Crosse.

Charles Kennel, Larry Brauer, and Frank Murphy are DOT employees who worked in the Waukesha district and were so employed in the fall of 1978. Kennel and Brauer were classified as Real Estate Agent 2, while Murphy was a Real Estate Agent 3, at all times relevant hereto. All worked in the relocation assistance area.

In the fall of 1978, DOT determined that there were imbalances on its real estate staff, throughout the state. Certain districts were found to be short-handed in the real estate area, whereas others, including the Waukesha and Milwaukee districts, had excess staff. To deal with this problem, Schaeffer and Fiedler recommended a two-step plan for the reallocation of real estate staff among the districts. The first stage of the plan called for the reallocation of six real estate positions from the Milwaukee and Waukesha districts to areas with immediately greater needs. It was contemplated at that time that

necessary reallocations could be achieved by voluntary moves and attrition.

On October 5, 1978, Kinsey, then the Waukesha district director, and Harvey Shebesta, the Milwaukee district director, were informed of the reallocation plan. They were asked to reduce their respective staffs by three persons each. Kinsey advised his employees of the plan and that it would be accomplished by voluntary transfers, retirements or designations. Subsequently, one employee volunteered to take early retirement, while another, Patricia Anderson, volunteered to transfer. However, Anderson's request was denied because it was thought she lacked the necessary experience. In addition, one James Machnik, a Real Estate Supervisor, transferred into the district on or about October 16, 1978. Thus, as of late October, 1978, there remained a total of three excess real estate staff members in the Waukesha district. \*

Kinsey was to make a recommendation as to possible transferees. Among the group of employees classified as Real Estate Agents, and thus potentially eligible for transfer, was his wife, Margaret Zastrow. Kinsey proceeded to make a recommendation to Schaeffer, in which he identified Murphy and Brauer as potential transferees. Schaeffer then met with a group of persons from DOT's central office and determined that Murphy and Brauer would be transferred to the Madison district, while Kennel was to be transferred to Superior. The three were told of the transfer decision by Kinsey on November 7, 1978, and were advised of the same in writing by letter dated November 17, 1978 (Comm. Ex. 1). This letter then explained the decision to transfer

the affected individuals as follows:

"No lay-off of real-estate staff will be necessary. We did however, find that the Waukesha and Milwaukee Districts had excess real estate staff in relation to their present programs, while several other districts had a deficiency in their staff/present program ratios. In order to balance our real estate staff state-wide it became necessary for us to reduce the real estate staff in the Milwaukee and Waukesha Districts. Essentially, the least senior staff within each of the two districts from among those individuals possessing the critical skills are being transferred with their positions to other districts."

At the time Schaeffer made the transfer decisions at issue

here Schaeffer was not aware of Kinsey's marriage to Zastrow,

although Ben Mullen, DOT's Director of Real Estate, apparently was.

Schaeffer testified at the hearing that the decision would not have

been different had he known about the marriage.

After receiving notification of the decision to transfer them and

their positions as ordered, all three met with DOT Secretary Cattanach

to ask that the decision be reconsidered. Each expressed personal concerns, including financial hardship, in opposition to the move. Kennel urged that he not be transferred to Superior partly on the basis that his wife, who is physically handicapped, would be adversely affected by the harsher climate in that area. At that point, late in November, 1978, an additional vacancy for a Real Estate Agent occurred in the Madison District. As a result, Kennel was offered the option, which he refused, to transfer to Madison rather than Superior, as originally directed.

In late November and early December Kennel, Brauer and Murphy filed appeals of the transfer decisions with respondent Commission. Each alleged that the decision in question created personal hardship and that the Department's action was unreasonable, arbitrary and capricious or an abuse of discretion (Comm Exs. 2, 3, 4).

A prehearing conference was held before Commissioner Durkin on December 11, 1978. The prehearing conference report which served as the statutory notice of hearing required by sec. 227.07, Stats., stated the issue for hearing to be "whether the Department of Transportation, through incorrect interpretation or unfair application, has violated the Civil Service Statute or Administrative Rule" (Prehearing Conference Report of December 26, 1978).

The matter was heard before Commissioners Higbee and Wiley on February 7 and 8, 1979. The Commission's decision and order were issued on February 15, 1979. The Commission concluded that it had subject matter jurisdiction pursuant to sec. 230.45 (1) (c), Stats., (Conclusion No. 1, p. 15), and that:

- (a) Kinsey's involvement in designating transferees from a class that included his wife; and (b) the ordering of involuntary transfes [sic] under the circumstances herein described, were unfair applications of the Statutes and Administrative Rules.

(Conclusion No. 5, p. 15). (Emphasis supplied). As noted above, the

Commission rejected the DOT's action and ordered the matter remanded for further action in accordance with its decision.

### THE ISSUE

The principal issue raised by DOT is that the Commission lacked subject matter jurisdiction to hear the appeals of Kennel, Brauer and Murphy. It also has raised other issues going to the merits of the Commission's decision, but the Court is precluded from resolving these because of its conclusion that the Commission lacked subject matter jurisdiction.

### STATUTES AND ADMINISTRATIVE RULE INVOLVED

Section 230.03, Stats., provides in relevant part

(1) "Administrator" means the administrator of the division [of personnel].

\* \* \*

(1) "Department" means the department of employment relations.

\* \* \*

(11m) "Secretary" means the secretary of the department.

Section 230.04 (5), Stats., provides in relevant part.

(5) The secretary shall promulgate rules on all matters relating to the administration of the department and the performance of the duties assigned to the secretary, except on matters relating to the provisions of subch. II, the responsibility for which is specifically charged to the administrator.

Section 230.45 (1) (c), Stats., provides:

(1) The commission shall:

\* \* \*

(c) Serve as final step arbiter in a state employee grievance procedure relating to conditions of employment, subject to rules of the secretary providing the minimum requirements and scope of such grievance procedure.

Chapter 196, Laws of 1977, the session law which created the Department of Employment Relations (hereafter DER) and the Personnel Commission and reorganized the Bureau of Personnel as the Division in the Department of Administration, provided in relevant part.

(4q) The rules of the director of the bureau of personnel in the department of administration promulgated under section 16.03 (3), 1975 Stats., shall remain in full force and effect until modified by the administrator of the division of personnel of the department of employment relations, as created by this act.

The Administrative Practices Manual, State of Wisconsin, Department of Administration, Subject: Non-contractual Employee Grievance Procedures, effective 8/24/66, revised 10/1/74 (hereafter APM), which apparently was prepared by the Director of the Bureau of Personnel, permits appeals of

.... those complaints which allege that an agency has violated, through incorrect interpretation or unfair application,

1) a rule of the Director, State Bureau of Personnel or Civil Service Statute.....

#### THE COURT'S DECISION

The Court deems it desirable to first set forth the general principles which are applicable to the subject matter jurisdiction of an administrative agency such as the Commission.

The Commission is an administrative agency whose powers are limited by the statutes conferring such powers expressly or by fair implication, Mid-Plains Telephone v. Public Serv. Comm., 56 Wis. 2d 780, 786, 202 N.W. 2d 907 (1973); State (Dept. of Admin.) v. ILHR Department, 77 Wis. 2d 126, 136, 252 N.W. 2d 353 (1977). Additional subject matter jurisdiction cannot be conferred upon the Commission by waiver or consent, Cudahy v. Department of Revenue, 66 Wis. 2d 253, 260, 224 N.W. 2d 570 (1974), nor can power be



created by estoppel, State ex rel. Democrat Printing Co. v. Schmiede, 18 Wis. 2d 325, 336, 118 N.W. 2d 815 (1963); or because the agency and the courts might think it desirable as a matter of public policy, State ex rel. Dept. of Pub. Instruction v. ILHR Department, 68 Wis. 2d 677, 229 N.W. 2d 591 (1975); DH&SS v. State Personnel Board, 84 Wis. 2d 675, 267 N.W. 2d 644 (1978). See also, 2 Am. Jur. 2d Administrative Law sec. 331 (1962). Finally, questions of subject matter jurisdiction can be raised at any time, including after appeal, cf. sec. 802.03 (8) (d), Stats.

The appropriate starting point for the resolving of the issue of the Commission's subject matter jurisdiction in this instance are the provisions of sec. 230.45 (1) (c) set forth above. This section makes the Commission the final step arbiter in state employee grievance procedure "relating to conditions of employment, subject to the rules of the secretary providing the minimum requirements and scope of such grievance procedure." (Emphasis added). The Secretary referred to is the Secretary of DER.

The parties are in disagreement as to the meaning to be attributed to the word "scope" with respect to whether it restricts the subject matter of what may be appealed to the Commission under this section. DOT contends that it does while the Commission argues to the contrary, contending that the word "scope" is limited to the procedure to be followed by the Commission. The Court is of the opinion that the Secretary of DER may adopt rules that restrict the subject matter of grievances which may be appealed to the Commission. It seems inconceivable that the legislature intended by enacting sec. 230.45 (1) (c) to require that every grievance that has anything to do with a condition of employment is appealable to the Commission. Such an interpretation might well place a burden upon the Commission which it and its staff would be unable to handle.

It is conceded that up to the time this matter was heard and decided by the Commission the Secretary of DER had promulgated no rules under the authorization provided by sec. 230.45 (1) (c). DOT takes the position that without such rules by the Secretary of DER the Commission was without subject matter jurisdiction to process the instant appeals of Kennel, Brauer and Murphy. The Commission, on the other hand, points out that sec. 230.45 (1) (c) was enacted as part of ch. 196, Laws of 1977, which created DER and the Commission, and as an interim measure certain pre-existing rules were continued in effect by sec. 129 (4q) of that chapter, which section has been quoted above.

DOT contends that sec. 129 (4q) of ch. 196, Laws of 1977, is not applicable because sec. 230.45 (1) (c) refers to rules made by the Secretary of DER while sec. 129 (4q) of ch. 196, Laws of 1977, covers rules of the Director of the Bureau of Personnel. The Court does not find such argument to be convincing. There was no office precisely parallel to that of Secretary of DER under the previous law. The Court is of the opinion that the 1977 legislature, which also had enacted sec. 230.45 (1) (c), could not have intended that the Commission would be powerless to process grievances under that statute until the Secretary of DER got around to promulgating rules "providing the minimum requirements and scope of such grievance procedure". Therefore, the legislature provided that the rules of the Director of the Bureau of Personnel which governed the former Personnel Board's functioning should be continued until modified by the Administrator of DER. Apparently whoever drafted sec. 129 (4q) of ch. 196 overlooked that sec. 230.45 (1) (c) placed the function of drafting the new rules in the Secretary of DER rather than the DER Administrator who is subordinate to the Secretary.

The crucial question, the answer to which is determinative of the issue of the Commission's subject matter jurisdiction to hear and determine the instant grievances, is whether the applicable then existing rule of the former Director of the Bureau of Personnel, conferred such jurisdiction. The rule of the Director relied upon by the Commission is the APM rule quoted above under the heading STATUTES AND ADMINISTRATIVE RULE INVOLVED. This rule permitted the processing of non-contractual employee grievance complaints by the Personnel Board which alleged that an agency "has violated, through incorrect interpretation or unfair application" a rule of the Director or a civil service statute.

The Commission at page 10 of its decision stated the applicable civil service statute was sec. 230.29 and the applicable rule of the Director was chapter Pers 15, Wis. Adm. Code. Section 230.29, Stats., provides that a transfer may be made from one position to another only if specifically authorized by the Administrator of DER. Chapter Pers 15, Wis. Adm. Code consists of several sections. The only one of such sections which appears to have any application here is sec. 15.01 which defines "transfer". The Commission made no finding that Schaeffer, as the appointing authority, did not have the delegated authority to make the transfers, but did state at page 10 of its decision, "The transactions here in question are transfers." In the same paragraph it further stated that neither sec. 230.29, Stats., nor Chapter Pers 15, Wis. Adm. Code, "provide any criteria for the transfer decision."

Nowhere in its decision did the Commission come to grips with the effect to be accorded the words "has violated" in the APM rule on which it grounded its subject matter jurisdiction. It simply ignored these words. At the prehearing conference the parties had agreed on the issue to be decided to be as follows.

"Whether the Department of Transportation, through incorrect interpretation or unfair application, has violated the Civil Service Statute or Administrative Rule."

After quoting this statement, the Commission's decision then stated (at p. 10):

"The language set forth in the above statement of issue, which in turn is taken directly from the above-cited APM, appears to provide some guidance in this type of situation. The APM language and the issue for hearing contain the phrase 'unfair application.' The word unfair means 'not just or impartial; biased; inequitable.' Webster's New Word Dictionary, Second College Edition (1972)."

The Court interprets the APM rule to require that an agency has violated a statute or rule either by applying an incorrect (i.e. mistaken) interpretation or by applying the statutes unfairly (e.g. applying different standards for different persons). Under this interpretation of the APM rule, a complaining party would not be entitled to relief under the APM rule for perceived unfairness or for questionable interpretations of the statutes and rules which fall short of actual statutory violations. The language "through incorrect interpretation or unfair application" clearly modifies and limits the verb "had violated." The Commission's claim that it need find only unfair or inequitable treatment in order to accord Kennel, Brauer and Murphy the relief they seek cannot reasonably be upheld in the face of the express requirements of the APM rule.

The specific language of the APM rule is clear and unambiguous, and mere general policy considerations, relied on by the Commission, cannot control, cf. DH&SS v. Personnel Board, 84 Wis. 2d 675, 682-683, 267 N.W. 2d 644 (1978).

In the recent Commission case of John R. Stasny v. Department of Transportation, Case No. 78-158-PC, the appellant employee sought to challenge a management decision which, in part, changed his assigned work location from Madison to Fort McCoy, Wisconsin (Finding No. 20).

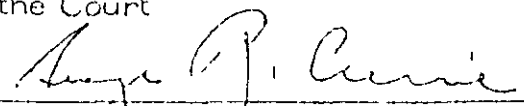
The Commission refused to entertain Slusny's claims that an additional training officer (his position) was not needed at Fort McCoy and that the duties he was assigned could as easily have been performed in Madison, concluding that the need for an additional training officer position at Fort McCoy or the location of the position at Madison "are issues of program management and are not subject to review by the Commission" (Conclusion of Law 6). Here DOT's determination that it could better accomplish its program needs by the transfer of Kennel, Brauer and Murphy rather than transferring three other employees was a program management decision which violated no civil service statute or administrative rule.

For the reasons stated above the Court determines that the Commission lacked subject matter jurisdiction to hear and determine the grievances filed by Kennel, Brauer and Murphy.

Let judgment be entered reversing the Commission's decision and order and remanding the matter with directions to dismiss the appeals.

Dated this 21st day of July, 1980.

By the Court

  
Reserve Circuit Judge

RECEIVED

JUL 22 1980

*Pers Comm*