STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

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DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS,
STATE OF WISCONSIN,

Petitioner, Case No. 79-CV-389

and

BEN L. MARTIN,

Cross-Petitioner
and/or Petitioner,

MEMORANDUM ON
MOTION OF RESPONDENT
FOR RELIEF FROM
JUDGMENT

vs.

PERSONNEL COMMISSION
STATE OF WISCONSIN,

Respondent.

* *

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

* *

The respondent Commission on April 29, 1980, filed a motion for relief from the Court's judgment herein dated March 10, 1980, and a hearing was held thereon on June 9, 1980, at which all parties appeared by counsel.

Two contentions have been advanced by the Commission as to why the Court should vacate its judgment of reversal which was predicated on the Court's determination that the Commission lacked jurisdiction to hear Ben L. Martin's appeal to it. The first was that such determination was based on an error of fact, viz., that Martin's appeal to the Personnel Board, predecessor of the Commission, from the report of Verne Knoll, Acting Director of the Bureau of Personnel, dated March 3, 1976, was assigned No. 76-145. The second contention was that the Court erred as a matter of law in concluding that the Commission did not have jurisdiction to hear Martin's appeal under sec. 16.05(7), Stats.

The Court is satisfied that Martin's appeal from the Knoll report was not given No. 76-145, but the latter number related to other attempts to secure action from the Board with respect to the filling of the EOC position. The basis of this mistake in fact came about as a result of counsel for respondent supplying information to the Court at the Court's request which was inaccurate. The Court in no way places any blame on respondent's counsel for supplying such inaccurate information because she acted in good faith in supplying it to the Court believing it to be accurate. This error in fact had to do with the Court's conclusion that the Commission possessed no jurisdiction to hear Martin's appeal under sec. 16.05(1)(f), Stats. See the Court's Memorandum Decision dated May 10, 1980, at page 10.

The Court finds it unnecessary to again determine whether the Commission possessed jurisdiction under sec. 16.05(1)(f) because of the conclusion it has now reached that it committed error in concluding that sec. 16.05(7) did not provide the Commission with jurisdiction.

The Court has concluded that the grievance procedure culminating in Board review at the last step under 16.05(7), and direct appeal to the Board under sec. 16.05(1)(e), complement each other and cover totally separate types of personnel action. Thus sec. 16.05(1)(e) does not limit the subjects that may be grieved through all steps of the grievance procedure so as to ultimately reach the Board (now the Commission) to those stated in such statute.

That the two routes of appeal, one under sec. 16.05(1)(e) and the other under sec. 16.05(7), were meant to remain distinct and not to overlap or duplicate each other in subject matter, is confirmed by the State of Wisconsin Department of Administration's Administrative Practices Manual, Part: Personnel, Section: Administration, Subject: Non-contractual Employe Grievance Procedures; Effective August 24,1966, revised October 1, 1974, of which the Court takes judicial notice.

The Manual defines grievance in par. I.D.1.b. as

> "a personnel problem involving an employe's ... expressed feelings of unfair treatment or dissatisfaction with aspects of his/her working conditions within the agency which are outside his/her control. However, only 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 a Civil Service Statute (s. 16.01 - 16.38, Wis. Stats.)
>
> " * * *
>
> " may be appealed to the state personnel board."

Martin's grievance falls squarely within this definition; on the other hand, demotions, lay-offs, suspensions, discharges, and reductions in pay are <u>not</u> included within the meaning of grievance.

Furthermore, the Manual states explicitly in par. I.C.1:

> "This procedure shall not preclude or otherwise interfere with statutory appeal rights provided to an employe for appeal from disciplinary actions under s. 16.28(1), Wis. Stats., or from direct actions of the Director of the State Bureau of Personnel or from decisions of appointing authorities under ss. 16.05(1)(e) and (f) Wis. Stats."

The effect of par. I.C.1 is to preclude appeal of grievances involving demotions, lay-offs, suspensions, discharges, and reductions in pay under sec. 16.05(7). Thus sec. 16.05(7) would be rendered meaningless under the restrictive interpretation placed on it by the Court in its original memorandum decision.

The Court agrees with this statement contained in the Commission's brief on the motion:"This scheme establishing two separate and complementary routes of access to Board review - direct and immediate appeal to the Board under sec. 16.05(1)(e) of an appointing authority's action having immediate adverse impact on the employee, and appeal to the Board under sec. 16.05(7) of other, less damaging actions only after the internal grievance procedure has been exhausted within the state agency - is a logical one..."

Because of the Court's conclusion that the Commission possessed jurisdiction to hear Martin's appeal, it is now necessary that the Court

consider the other issues stated at page 2 of its original memorandum decision, viz.:

a. Whether the Commission's decision and order were affected by a due process error in procedure in that it did not appear therefrom that the Commission had consulted with the examiner on the issue of credibility of witnesses.

b. Whether certain of the Commission's findings of fact were unsupported by credible evidence in the record.

c. Whether the Commission erred as a matter of law in attributing legal responsibility to DILHR for use of the trainee classification.

d. Whether DILHR had the prerogative of appointing either of the two certified applicants other than Martin to the EOC position.

e. Whether the Commission properly refused to award back pay to Martin.

Failure to Consult with Examiner as to Credibility of Witnesses

It is established law that in a situation where an agency or board rejects or reverses the recommended findings and order of its hearing examiner, due process of law requires that the examiner first be consulted as to his or her personal impressions of the witnesses. Braun v. Industrial Comm., 36 Wis. 2d 48, 56-57, 153 N.W. 2d 81 (1967). Due process further requires that the record of the agency or board affirmatively show that it had the benefit of the examiner's first-hand impressions of the material witnesses. Braun, supra, at 57. A reviewing court under ch. 227 is not to presume that the agency consulted with the examiner as to his or her personal impressions of witnesses. Id.

Since the decision in Braun, a second due process requirement has been forged which is that the agency prepare a separate statement

or memorandum opinion setting forth the reasons, facts and ultimate conclusions relied upon in rejecting the recommendations of the examiner and in substituting its own findings and decision. Appleton v. ILHR Dept., 67 Wis. 2d 162, 171, 226 N.W. 2d 497 (1975); Transamerica Ins. Co. v. ILHR Dept., 54 Wis. 2d 272, 284-285, 195 N.W. 2d 656 (1972); Burton v. ILHR Dept., 43 Wis. 2d 218, 224-225, 168 N.W. 2d 196, 170 N.W. 2d 695 (1969).

DILHR is not raising the issue that there was a failure by the Commission to comply with the separate statement or memorandum opinion requirement. The reason for this is undoubtedly due to the fact that the comments of the Commission in making additions to the examiner's findings and changes in her conclusions of law, together with the opinion appearing in the decision following the conclusions of law, probably constitute compliance with this due process requirement

However, DILHR strenuously argues that a consultation by the Commission with respect to the credibility of the three members of the interview panel was a due process requirement that was not complied with. The Commission contends that because it adopted all of the examine findings of fact and made no finding of fact contrary thereto, there was nc requirement that a credibility memorandum be procured from the examin

DILHR's position is that the examiner necessarily made a factual finding that the ranking of the three candidates on the certification list

meant that Miller would have ranked second with a score of 94.1 behind Martin with a score of 95.3, and the three certified candidates would have remained the same (Tr. March 8, 1977, 210-211). Kaisler specifically testified that the ranking of the candidates on the certification list did not affect his decision in any way (Tr. March 8, 1977, 109). Spencer also testified that the rankings did not influence his selection, and furthermore that he did not even know the rankings when the candidates were interviewed (Tr. March 8, 1977, 183-184). Kehl testified that the numerical value given to the rankings did not affect his decision in the least (Tr. April 25, 1977, 169), and that he did not even look at the document certifying and ranking the three candidates (Tr. April 25, 1977, 105). Kehl further testified that in his prior appointing experiences, his selection was not influenced by the rankings of the candidates, and that frequently he selected the candidate ranked second or third (Tr. April 25, 1977, 166-167).

DILHR contends that the Commission, in reaching its opposite conclusion, necessarily made a finding that the ranking on the certification list did in fact influence the selection of the interview panel. DILHR points to the Commission's conclusion of law 5 which reads:

> "Under the circumstances here present, the violations of the Civil Service Code set forth above had a direct causal effect on the non-appointment of the appellant to this position." (Emphasis supplied.)

One of the Civil Service Code violations alluded to was according Miller veterans' points in violation of sec. 16.12(7), Stats., as set forth in conclusion of law 1.

The Commission contends that it, in making the statement "had a direct causal effect" in conclusion of law 5, was not making a finding of fact, but was stating a legal conclusion that, when an error occurs in according one of the three applicants certified to the appointing authority veterans' points to which he or she was not entitled with the result such

applicant 's numerical score was highest of the three, when otherwise he or she would not have been so ranked, this was an error of law which voids the appointment.

The Court accepts the Commission's explanation of what was intended by conclusion of law 5. Thus it is immaterial whether the members of the interview panel were actually influenced by the top numerical ranking of Miller in appointing him. Whether the conclusion of law was legally proper is a matter to be considered in passing on Issue (d). As a result of the Court adopting this interpretation of conclusion of law 5, no consultation with the examiner with respect to credibility of witnesses was required.

Whether Certain Findings of Fact Were Unsupported by Substantial Evidence.

DILHR contends there are these two findings of fact of the Commission that are unsupported by substantial evidence in the record:

(1) The alleged finding contained in conclusion of law 5 that the addition of five veterans' points to Miller's score had a direct causal effect on the non-appointment of Martin.

(2) The finding contained in conclusion of law 3B that the use of the trainee designation was not appropriate.

In view of the Court's determination above that the alleged finding (1) was a conclusion of law and not a finding of fact, it becomes unnecessary here to set forth any evidence presented with respect thereto. This leaves only finding (2) to be considered.

Wisconsin Administrative Code section Pers. 20.03(1) provides in part: "The director may authorize the use of the trainee classification when: (a) Qualified applicants are not available for the objective classification, or (b) Filling the position as a trainee will be more appropriate than appointment in the objective classification."

George Kaesler, then Director of the Bureau of Administrative Support, testified that he had two goals for filling the EOC position: hire someone from within Job Service (hence the use of the competitive promotional examination), and to attempt to hire a minority person. (Tr. March 8, 1977, at 103). DILHR advances the attaining of these goals was the reason why Kaesler, in consultation with Duane Sallstrom, DILHR Personnel Director, chose to designate the position as a trainee one.

The examiner in his proposed finding of fact 6 found, "There were at least two individuals, appellant and one of the other certified candidates, who were qualified for the position without the trainee designation." The Commission amended this finding by adding thereto:

> "In addition to the at least two individuals who were qualified for the position at the objective level without the trainee designation, there were at least two others who possibly would be qualified. The use of a trainee designation was either entirely unprecedented or very unusual for a position at this high level (salary range 14). The position is in a high level supervisory classification with considerable latitude for independent judgment, responsible for functioning as a technical consultant in a particular field of specialty, and has the responsibility for a statewide program. The two people definitely qualified are black."

The two people referred to in the above quoted finding were Martin and Joe McClain. Following the statement of this addition to finding of fact 6 the Commission commented as follows (at page 5 of its decision):

> "The Proposed Finding is correct in and of itself. The finding that at lease two individuals were qualified at the objective level is based on the testimony of the DILHR personnel director. However, he recognized that there might have been as many as

four people qualified. See transcript of hearing held 3/8/77, p. 206:

> "'Q Do you recall how many individuals roughly would have been eligible to compete for this job had it not been designated trainee?
>
> A I don't think it would have been any more than about four people at that time. Maybe even only two. But it wouldn't have been any more than four. Probably only two.'

"This, while in the witness's opinion there would have been at least two people there might have been as many as four.

"The other material in this finding added by the Commission is based on undisputed testimony by representatives of the State Bureau of Personnel, which is required to authorize trainee designations, and the official class specifications for the classification of the position."

DILHR has taken no exception to any of the facts set forth in the above quoted extract from the Commission's decision, and must be accepted as true. By designating the position trainee, any person who had experience as a Job Specialist 1 and 2 was eligible to take the examination while without such designation, applicants had to have at least a Manpower Specialist 4 classification. The EOC position was classified Manpower Specialist 6.

The Court concludes that there was substantial evidence in the record to support the finding made in conclusion of law 3B that the trainee designation was not an appropriate one.

Whether the Commission Erred in Attributing Responsibility for Use of Trainee Classification

The Commission let stand the examiner's finding of fact 6, the first sentence of which stated: "The EOC position was designated trainee

by respondent [DILHR] with the approval of the Director of the Bureau of Personnel." However, the Commission in its conclusion of law 3B concluded DILHR "caused the use of a trainee designation". It is this conclusion which DILHR attacks. DILHR contends that, because Pers. 20.03(1) authorizes the Director of the Bureau of Personnel to use the trainee classification in certain specified circumstances, this authority was nondelegable and therefore the legal responsibility for the use of such classification in this instance was solely the Director's responsibility.

However, a careful examination of the testimony shows the approval that the Director of the Bureau of Personnel gave was a matter of form over substance. Sallstrom testified:

> "Q What was your understanding from your capacity as a Personnel Director as to the opportunity to designate any competitive promotional job as trainee?
>
> A We never had any problem doing that. We always did that when we felt that there weren't enough qualified people at the objective level. This is quite a standard process that's appropriate in the personnel rules." (Tr. March 9, 1977 at 206.)

There was no evidence that anyone at the Bureau of Personnel had taken a more than perfunctory look at the purported need for a trainee classification, or did anything more than routinely approve DILHR's request upon its representations that the trainee classification was necessary. Paul Wright of the Bureau testified only that he "must have" been satisfied as to the need, when he approved the request for training designation. Moreover, he later went on to say that had there been three already qualified persons within the agency, it probably would not have been approved.

The Court holds that the Commission properly concluded that DILHR caused the use of the trainee classification.

Whether DILHR had the Prerogative of Appointing Either of the Two Other Certified Applicants Rather Than Martin

The applicable statute in effect at the time of the appointment of Miller to the EOC position was sec. 16.20, Stats. Sub. (1) of this section provided for the Director of the Bureau of Personnel certifying the three names to the appointing authority. Subsection (2) thereof provides the appointment shall be made by the appointing authority "from among those certified . . . in accordance with sub. 1."

It is conceded by all parties that the appointing authority is not required to appoint the top ranked candidate of the three certified. There are sound policy reasons underlying giving the appointing authority this choice of selection. One is that the appointing authority should be afforded some protection against having to employ someone in the position to be filled he feels because of personality problems or other characteristics would be difficult to work with in a harmonious manner.

For example, in the instant situation Martin had made official and unofficial complaints that those in administrative and executive positions in DILHR had not pursued affirmative action policies as vigorously as they should, and the Commission pointed out at page 4 of its decision that all three members of the interview panel had been targets of these complaints. If the panel's recommendation to appoint Miller instead of Martin had been based on a feeling that it would be difficult for Martin to work harmoniously with those having administrative authority over him, this is a matter that the Commission would have had no right to review and void absent the issues of the trainee designation and the error in according Miller veterans' points.

The crucial and difficult issue in this case, therefore, is whether the inappropriate designation of trainee classification and the

granting of veterans' points to Miller are a sufficient basis for the Commission to enter an order that in effect voided the appointment of Miller to the EOC position. The Court has concluded that they did provide such basis. The Court, however, cannot approve the Commission's conclusion stated at page 9 of its decision that these violations "had a direct causal effect on the non-appointment of the appellant to this position" if this is to be interpreted as requiring the Commission to have appointed Martin.

The Back Pay Issue

The Commission held that the statute applicable to the back pay to Martin issue was sec. 16.38(4), Stats., (1975) in effect when Miller was appointed to the position. This statute provided:

> "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 court review, shall be entitled to compensation therefor from the date of such unlawful removal, demotion or reclassification . . ."

The Commission concluded that it had no power to award back pay to Martin because of the absence of such authority being provided in the only applicable statute, viz., sec. 16.38(4), Stats., 1975. In support of this conclusion it quoted this extract from its decision in Noltmeyer v. DHSS, Wis. Pers. Comm. No. 78-14-PC, 78-28-I, December 20, 1978:

> "In the Commission's opinion, these provisions bring into play the principle of statutory construction of express mention, implied exclusion. See Teamsters Union Local 695 Waukesha Co., 57 Wis. 2d 62, 67, n. 6 (1973):
>
> "'The express mention of one matter excludes other similar matters not mentioned . . . 82 CJS Statutes p. 668, sec. 333. See also 50 Am Jur Statutes, p. 238, sec. 244.'
>
> "Where the legislature has provided expressly for back pay in two specific situations, it is inappropriate to find authority to grant similar relief in the manner suggested by

the appellant. This is particularly true in light of the well established principle in Wisconsin that administrative agencies are created by the legislature and their powers are limited to those which can be found within the four corners of the Statute. American Brass Co. v. State Board of Health, 245 Wis. 440, 448 (1944). See also State ex rel Farrell v. Schubert, 52 Wis. 2d 351, 358 (1971): '... any reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority,' Murphy v. Industrial Commission, 37 Wis. 2d 704 (1968). The Personnel Board in interpreting sec. 16.05 (1)(f) and 16.38(4), Stats.(1975), has held that there is no authority to grant back pay where employes are improperly denied reclassification, see Van Laanen v. Knoll, No. 74-17 (3 / 19 and 23 / 76); and Nunnelee v. Knoll, No. 75-77 (8/1/77). Both of these decisions were affirmed in circuit court in Van Laanen v. State Personnel Board, No. 153-348 (5/31/77) per J. Currie); and in Nunnelee v. State Personnel Board, No. 158-464 (9/14/78) (per J. Eich)."

This Court is satisfied that the Commission lacked authority to order back pay to Martin.

There is a further reason why no back pay should be awarded. The Court is in disagreement with this statement made by the Commission at pages 10-11 of its decision: "With respect to other possible relief, it is the opinion of the Commission that with the exception of back pay the appellant should be 'made whole' to the extent possible for the denial of the appointment," if this means that DILHR was required to appoint Martin to the EOC position. Therefore, it would be inappropriate to now order any back pay to him.

The Commission's Order

The Commission's order reads:

"The Proposed Order is rejected and the Commission substitutes in its place the following Order:

"The position of the respondent on this grievance is rejected and this matter is remanded for action not inconsistent with this Decision. The respondent is directed to report back to the Commission within 30 days of the date this Order is entered, a statement of

position with regard to the remedy. The parties are directed to consult before the end of this 30-day period to attempt to reach agreement on an appropriate remedy. If agreement is not reached then the appellant will have 15 days from the date the aforesaid statement of position by the respondent is filed within which to file a reply."

The Court determines that such order of the Commission should be amended to substantially read:

"The Department of Industry, Labor and Human Relations is directed to report to the State Personnel Commission within 30 days of the remand of the record in Case No. 79-CV-389 by the Circuit Court of Dane County a statement of position with regard to the remedy to be directed by the Commission. The Department and Ben L. Martin are directed to consult before the end of this 30-day period to attempt to reach agreement on an appropriate remedy. If agreement is not reached then Ben L. Martin will have 15 days from the date the aforesaid statement of position by the Department is filed within which to file a reply. The remedy to be ordered by the Commission shall be consistent with the memorandum decision of the Circuit Court of Dane County entered on the motion of the Commission for relief from judgment filed in said Case No. 79-CV-389."

As so amended, the Commission's order will be affirmed. Let judgment be entered accordingly, which judgment will set aside and vacate the judgment previously entered herein dated March 10, 1980, which new judgment shall be entitled "Superseding Judgment". Counsel for the Commission is requested to draft the superseding judgment and forward it to the Court for signature after first submitting

the same to counsel for DILHR and Martin for approval as to form.

Dated this 30th day of June, 1980.

By the Court:

Reserve Circuit Judge

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