STATE OF WISCONSIN PERSONNEL COMMISSION

ALDEN W. BAHR,

Appellant,

v.

Executive Director,
INVESTMENT BOARD,

Respondent.

Case No. 89-0009-PC

RULING
ON
PETITION
FOR
REHEARING

This matter is before the Commission on the appellant's petition for rehearing filed with the Commission on May 22, 1989. On May 1, 1989 the Commission issued a decision and order dismissing this appeal for lack of subject matter jurisdiction because appellant was an employe in the unclassified service at the time of his discharge. Appellant filed a petition for rehearing on May 22nd contending that the decision contained both a material error of fact and a material error of law.

The alleged misstatement of fact is a sentence on page 5 of the decision which reads:

> Upon the May 17, 1988 effective date of the relevant provisions of 1987 Wisconsin Act 399, the appellant was appointed to an unclassified position with the respondent agency. [Footnote omitted]

Appellant asserts:

> Appointment infers an affirmative act.... There is no evidence in the record to support the assertion that Alden Bahr was appointed to the position of Investment Analyst on or after the date the position became unclassified. There is no evidence in the record that Alden Bahr accepted a position in the unclassified service and no evidence that he resigned from or was removed from the classified service in order to accept an appointed unclassified position.

The questioned sentence in the Commission's decision resulted from an assertion in the appellant's response to the respondent's motion to dismiss:

> On February 8, 1982, Alden W. Bahr (Bahr), Appellant, was hired by the Investment Board as an Investment Analyst. That position was in the classified state service. On August 7, 1982, Bahr completed his six-month probationary period and was given a permanent appointment in the classified service. On May 17, 1988, pursuant to Wis. Stats. §25.16(2) the position of Investment Analyst was moved from the classified service to the unclassified service and Bahr continued in that position. [Emphasis added]

Pursuant to section 97, 1987 Wisconsin Act 399, §25.16(2), Stats., was amended to read:

> The executive director shall appoint the employes necessary to ~~perform the duties~~ carry out the functions of the investment board ~~under~~, except that the investment board shall participate in the selection of investment directors. The executive director shall appoint all employes outside the classified service, except ~~that the executive director shall appoint investment directors in the unclassified service. The members of the board shall participate in the selection of such directors. Such investment directors shall serve a probationary period of not less than 6 months nor more than 2 years as determined by the members of th board~~ blue collar and clerical employes. Neither the executive director, any investment director nor any other employe of the board shall have any financial interest, either directly or indirectly, in any firm engaged in the sale or marketing of real estate or investments of any kind, nor shall any of them render investment advice to others for remuneration.

Section 406, 1987 Wisconsin Act 399, revised §230.08, Stats., to read:

> (1) CLASSES. The civil service is divided into the unclassified service and the classified service.
>
> (2) UNCLASSIFIED SERVICE. The unclassified service comprises positions held by:
>
> * * *
>
> (p) All employes of the investment board, except blue collar and clerical employes.

* * *

> (3) CLASSIFIED SERVICE. (a) The classified service comprises all positions not included in the unclassified service.

Finally, according to §ER 1.02(4), Wis. Adm. Code:

> "Appointment" means the action of an appointing authority to place a person in a position within the agency in accordance with the law and chs. ER1 to 47 and ER-Pers 1 to 34, effective when the employe reports for work or is in paid leave status on the agreed starting date and time. "Appointment" does not include an acting assignment under ch. ER-Pers 32. (emphasis added)

This rule does not apply to an appointment into the unclassified service, since §ER 1.02(10), Wis. Adm. Code, defines "employe" as:

> ...any person who receives remuneration for services rendered to the state under an employer - employe relationship in the classified civil service, except where otherwise stated or modified by rule. (emphasis supplied)

Furthermore, the rule requires the appointing authority's action be in accordance with chapters ER 1-47 and ER-Pers 1-34. Obviously, an unclassified appointment is not required to conform to all of these civil service rules.

In any event, while a formal appointment may not have occurred, appellant has cited no authority for the proposition that an appointment of any kind is always a prerequisite for changing an employe's status from the classified service to the unclassified service. Section 25.16(2), Stats., as amended ("...The executive director shall appoint all employes outside the classified service....") mandates that the executive director appoint employes and that their status will be unclassified. There is no language in this subsection that is inconsistent with the notion that legislation, particularly §230.08(2)(p), Stats., placing certain positions occupied by investment board employes into the unclassified service, could change the

status of those employes holding over from classified to unclassified without the necessity of further appointment. There is no reason why the legislature cannot simply change the character of an employe's civil service status from classified to unclassified by statutory fiat, without the need for an appointment process of the employe to the same position in the unclassified service. See State ex rel. Nelson v. Henry, 216 Wis. 80, 256 N.W. 714 (1934), where the employe had permanent status in class as a deputy oil inspector when in 1933 the legislature created a new agency, transferred the state oil inspection department to that agency, and changed the appointing authority for the deputy oil inspectors.[1] The employe continued to perform the same duties and responsibilities without interruption after the law took effect, and subsequently was discharged without being accorded the normal civil service process for permanent classified employes. The employe argued that his employment status was never changed and hence his discharge without just cause was illegal. The appointing authority argued that the change in the law had the following effect:

> The position of the respondents is that ch. 461, Laws of 1933 (hereinafter referred to as ch. 461), abolishing the office of state inspector of illuminating oils and creating in the treasury department of the state a bureau in charge of the state supervisor of inspectors under the general charge of the state treasurer, impliedly discharged all deputy oil inspectors and effected a reorganization of the oil inspection department of the state; that it does not appear that the relator became an oil inspector after that act went into effect, because the petition does not state that he was appointed as such by the state treasurer, or that he qualified as such by filing the oath and giving the bond prescribed by sec. 168.04; that permitting the relator to remain in performance of the duties of an oil inspector was

---

[1] Unlike the situation in the instant case where there was a change from the classified to the unclassified service, in this case the position in question stayed in the classified service.

> in effect at most only a new original appointment; that under the civil service act original appointments are only temporary, and that appointees thereunder may be removed within six months for any reason satisfactory to the appointing officer, and that all the statutes require to effect removal is a notice from the appointing officer that the appointment will not be made permanent, and that the notice of discharge given the petitioner was equivalent to such notice. 216 Wis. at 84.

The Court rejected the argument that these and other provisions of ch. 461 had this effect:

> "... It seems clear that the office of deputy inspector was not abolished by the new act. And it also seems clear that if the office was not abolished by the act, the person holding such office when the act went into effect was not removed by the act....
>
> * * *
>
> ... Those duties [of the prior agency] had to be performed by somebody. The officers, other than the supervisor, performing those duties must of necessity by force of their office continue to perform them else those duties would not be performed. The organization of the oil inspection department would of necessity continue until changed by the officers of the new bureau authorized to make changes. Unless otherwise indicated therein, the act must be construed as contemplating and intending that the existing personnel would continue in their positions unless and until reorganization should abolish or change the duties of their positions...." 216 Wis. at 85-86.

Finally, the Court rejected the argument that Section 8 of the Act ("All employes now employed in the department and bureaus affected by this act shall be eligible to appointment in the bureau created thereunder and shall be given preference in such employment and appointment.") indicated a legislature intent that the employes were removed by operation of law:

> "... In view of the necessity of the continuance of the performance of the duties imposed upon the new bureau without interruption by the officers at the time performing those duties, no new appointments would be required unless or until reorganization of the department should change the duties those officers were performing. We interpret this provisions as applying only when such changes in duties and personnel were effected by reorganization as to require new appointments to be made....
>
> * * *

> ... If, as we hold, his office continued after the act went into effect and the act did not remove him from that office, then a new appointment ... was not necessary...." 216 Wis. at 87-89.

Similarly, in the instant case, the position in question was not abolished, it was moved from the classified to the unclassified service, and no appointment was necessary to place the employe in the position following the change in status. As in State ex rel. Nelson v. Henry, supra, this conclusion is not affected by the fact that the appointing authority is authorized to make appointments following the transition.

State ex rel. Anderson v. Barlow, 235 Wis. 169, 182-183, 292 N.W. 290 (1940), is also helpful with respect to the issues raised here. In that case, legislation which abolished the tax commission and created a department of taxation gave the new agency head authority either to hire new employes or to reappoint employes from the old commission. Plaintiffs were a group of former commission employes who simply continued in employment without appointment after the Commission was abolished and the department created, but subsequently were discharged. One of the arguments on behalf of the employes concerned the fact that they had attained permanent status in class by virtue of their service at the Commission, and that the legislation which gave the agency head the option of either hiring them or hiring new employes in effect deprived them of this status illegally.

The Court discussed this contention as follows:

> It is contended... that the petitioner having once acquired definite civil-service status, this status must be regarded in the nature of a property right of which the owner thereof is not to be lightly deprived at the whim or caprice of a subsequent legislature or of a department head. Rights under the civil service law are conferred by act of the legislature. What the legislature may give it may take away....

Finally, it is inescapable that, regardless of how he got there, at the time of his termination appellant was employed in a position in the unclassified service. Section 230.34(1)(ar), Stats., clearly states:

> "Paragraphs (a) and (am) [requiring just cause for disciplinary action] apply to all employes with permanent status in class in the classified service ...." (emphasis added)

Appellant cites Castelaz v. Milwaukee, 94 Wis. 2d 513, 289 N.W. 2d 259 (1980), a case decided under the City of Milwaukee Civil Service code, apparently for the proposition that once an employe achieves permanent status in class, this status is not abrogated by appointment to an unclassified position. However, this case has little significance for the instant matter, primarily because it was decided under the provisions of ch. 63, Stats., and related rules, while this case involves ch. 230, subchapter II, which relates to the state civil service.

In Castelaz, an employe was appointed to a position in a temporary, federally-funded project program and subsequently terminated without being accorded the normal civil service termination or layoff process. The Court noted that when Castelaz was appointed to this position "he was required to take the Civil Service Merit exam for that position...." Id. at 517-518. The city argued that he held an exempt position,[2] but the Court determined that it did not need to decide that point:

> The defendants argue that Mr. Castelaz held an exempt position under sec. 63.27, Stats. 1971, and that he was therefore not guaranteed tenure in his employment. We need not determine whether the position that Mr. Castelaz held was exempt under this section because it is clear from the record, and the defendants concede, that Mr. Castelaz was a regular city civil service employee when he was laid off or terminated. (footnote omitted)

---

[2] An exempt position is similar to an unclassified position.

Id. at 520

The Court went on to hold:

> " ... When an exempt position is filled by a civil service employee he is entitled to the protection of the substantive as well as the procedural rights conferred by those rules. Although the statute refers to exempt and classified positions it must be kept in mind that the civil service laws were designed to protect employees and not positions....
>
> Once an employee achieves full civil service employment status, he is entitled to the protection of the civil service laws. The purpose of providing exempt positions in city employment is to allow more flexibility than the civil service system provides in filling those positions. But once the decision is made to place a civil service employee in an otherwise exempt position, a determination must have been made by the hiring authority that the position is one which is compatible with the civil service laws. When a civil service employee occupies an exempt position he cannot be laid off, removed, discharged or reduced for reasons which would be in violation of the statute and rules. Likewise, he is entitled to the procedural protection of the rules. (footnote omitted)

Id. at 522

It must be kept in mind, however, that the Court deemed it significant that Castelaz had been appointed to the position in question after having taken a civil service exam and that "he received a 'regular' City Civil Service appointment to that position...." Id. at 518. Unlike appellant he was not occupying a position the status of which the legislature changed from classified to unclassified. The situation in the instant case is much more comparable to that in State ex rel. Anderson v. Barlow, 235 Wis. 169, 292 N.W. 2d 290 (1940), discussed above, where the Court rejected the employes' argument that their previously-acquired permanent status in class protected them from discharge after they held over in positions in a newly-created agency. Furthermore, the city civil service rules cited by the Court in Castelaz provide for appeal of a disciplinary action by any "'employe regularly appointed (having passed his probationary period),'" 94

Wis. 2d at 527. This can be contrasted with the requirement under the state civil service code at §230.34(1)(ar), Stats., that the requirement of just cause for disciplinary action only applies to "employes with permanent status in class in the classified service...." (emphasis supplied)

The appellant also asserts that the Commission's decision reflects a material error of law:

> The laws regarding removal from office in unclassified service are inapplicable in this case because Alden Bahr never became an unclassified employee. He neither resigned from nor was removed from the classified service. Even his position did not change. The only change made was to reclassify the position, not the person. The law clearly states that once Bahr became a classified state employee he could only be terminated for just cause. (emphasis added)

The underscored portion of appellant's petition is incomplete. Once appellant became a classified employe he could not be terminated without cause, but this protection continued only so long as he remained a classified, as opposed to an unclassified, employe.

As explained above, the appellant was serving in an unclassified position at the time of the termination of his employment, not a classified position. As was noted in footnote 3 on page 7 of the Commission's May 1st decision, the legislature has moved other positions from the classified to the unclassified service and on at least one occasion has provided certain additional rights to the employes involved in the event of their subsequent termination. No comparable rights were established for the Investment Board positions when they were moved into the unclassified service in 1988. The absence of comparable language is indicative of a legislative intent to not extend such rights to those persons who, up to the effective date of the act, had been employed in positions in the classified service, other than blue collar and clerical employes.

The appellant's petition for rehearing is denied.

Dated: June 21, 1989 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

KMS/AJT:rcr
RCR01/4

Parties:

Alden W. Bahr
c/o Atty. Jane L. Anderson
Kelly & Haus
121 E. Wilson St., 1st Floor
Madison, WI 53703

Marshall Burkes
Executive Director
State Investment Board
121 E. Wilson St., 2nd Floor
Madison, WI 53702