

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

LESTER P. VOIGT, Secretary,
Department of Natural Resources,

Petitioner,

Case No. 145-300

vs.

JUDGMENT

WISCONSIN STATE
PERSONNEL BOARD,

Respondent.

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

The above entitled review proceeding having been heard by the Court on the 28th day of April, 1975, at the City-County Building in the City of Madison; and the petitioner having appeared by Attorney Lynn S. Adelman of the law firm of Lerner and Adelman; and the respondent Board having appeared by Assistant Attorney General Robert J. Vergeront; and Maurice H. Van Susteren having appeared in person and by Attorney Bruce K. Kaufmann of the law firm of Jenswold, Studt, Hanson, Clark & Kaufmann; and the Court having had the benefit of the argument and briefs of counsel, and having filed its Memorandum Decision wherein Judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the Order portion of the Decision of respondent Wisconsin State Board of Personnel dated December 24, 1974, entered in the matter of Lester P. Voigt, Secretary, Department of Natural Resources, Appellant, v. C. K. Wettengel, Director, State Bureau of Personnel, and Maurice H. Van Susteren, Respondents, Case No. 74-93, which reads:

"IT IS ORDERED that the action of the Director is affirmed, except that it is modified with respect to the legal basis therefor and with respect to the Director's Order, in the manner expressed in the accompanying Opinion"

be, and the same hereby is, modified so as to strike therefrom all words

which follow the words "IT IS ORDERED that the action of the Director
is affirmed", and, as so modified, said Order of the Respondent Board
is affirmed.

Dated this 25th day of May, 1975.

By the Court:



Reserve Circuit Judge

LESTER P. VOIGT, Secretary,
Department of Natural Resources,

Petitioner,

Case No. 145-300

vs.

MEMORANDUM DECISION

WISCONSIN STATE
PERSONNEL BOARD,

Respondent.

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

This is a proceeding by petitioner Voigt, Secretary, Department of Natural Resources (hereafter DNR) instituted pursuant to ch. 227, Stats., to review a decision of respondent Wisconsin State Personnel Board (hereafter Personnel Board) labeled "Opinion and Order" dated December 24, 1974.

STATEMENT OF FACTS

Maurice H. Van Susteren from about November 1, 1952, to July 1, 1967, was employed as a hearing examiner by the Public Service Commission. As a result of the Kellett reorganization of state administrative agencies effective July 1, 1967, he was transferred as a hearing examiner to the Department of Resource Development. Effective July 1, 1968, the Department of Resource Development was merged into DNR with no change in Van Susteren's job classification or duties.

As of times material to this controversy Van Susteren's job classification under state civil service was Attorney 12, and his position number in this classification was 30-DNR (Exhibit 11, R. 22, 26). The description of the duties of a 30-DNR is as follows:

"Performs team hearing role in the capacity of an examiner or prepares and presents the department's position. In examiner capacity, conducts hearings, examines witnesses, writes decision based on findings of fact, and conclusions of law. In addition to hearing responsibilities, functions as a

legal specialist in a program activity. Assists departmental legal counsel in all legal matters including establishment of record for Attorney General prosecution of order non-compliers."

Under date of August 28, 1972, Deputy Secretary Beale issued in behalf of the Secretary the following memorandum (Exhibit 17, R.50):

"TO: Bureau of Legal Services

"FROM: John A. Beale

"SUBJECT: Work Assignments

"As you know, over the past several years we have had a need for the development of a system of legal opinions issued by the Bureau. This matter relates both to the research and writing of opinions and the cataloging of new and previously issued opinions for convenient access.

"To accomplish this important job, a Research Section is established within the Bureau. Mr. Van Susteren will head the r w section; Mr. Mail will supervise the Examiner Section and Mr. Kurtz the Solicitor Section. Specific assignments of other people within the Bureau will be made shortly and, in the meantime, personnel assignments will remain as they are except for the section chief assignments made above.

"JAB /s/

"John A. Beale."

By this memorandum Van Susteren was made acting head of the newly established Research Section of DNR's Bureau of Legal Services. His duties in this new capacity were outlined in detail in a memorandum dated August 29, 1972, (Exhibit 18) issued by Damon, Assistant Director of the Bureau of Legal Services. Van Susteren's prior work assignment was primarily concerned in conducting hearings. Under the changes made by Beale's memorandum of August 28, 1972, the duties of the new Research Section which he headed were to clear opinions before they were issued to ascertain whether consistent with prior opinions; after opinions were so cleared by the Research Section they were to be circulated through the Bureau of Legal Services and if there was any adverse comment they

were to be reviewed by a Review Committee of which Van Susteren was chairman; the Research Section was to render legal advice to the DNR employees engaged in law enforcement, which work would entail doing legal research; and the Research Section was also to devote attention to the updating of the statutes applicable to, or administered by, DNR (Exhibit 18, R. 51-52).

On September 11, 1972, Van Susteren filed an appeal with the Wisconsin State Personnel Board, pursuant to sec. 16.05(1)(e), Stats., alleging that he had been demoted without just cause. On the same day he also appealed to the Director of the Bureau of Personnel (hereinafter the Director), pursuant to sec. 16.03(4)(a), Stats., which provides that "the Director . . . shall hear appeals from employees from personnel decisions . . . when such decisions are not subject for . . . hearing by the [Wisconsin State Personnel] Board."

After considerable procedural maneuvering, involving one prior review proceeding taken to the Circuit Court of Dane County, the respondent Board decided in a decision dated January 10, 1974, over the opposition of the Secretary that, because Van Susteren had alleged in his appeal to the Board that his reassignment was "illegal" and "an abuse of discretion," the proper procedure was for the Director to hold a hearing pursuant to sec. 16.03(4)(a), Stats.; and such a hearing before the Director was ordered (R. 1-6).

Such a hearing was held by the Director on April 2, 1974. Thereafter the Director issued his decision dated July 15, 1974, wherein he ordered the Secretary to return Van Susteren to his former position as "Hearing Examiner". The order further stated that if DNR wished to fill the position of Chief of the Research Section it was to proceed to do so in accordance with the applicable statutory provisions and Personnel Rules (R. 182). The Director accompanied his decision with these findings of fact and conclusions of law (R. 183-184):

"FINDINGS OF FACT

"1. That the appointing authority of the Department of Natural Resources did, on or about August 28, 1972, reorganize the Bureau of Legal Services of the Department of Natural Resources, by creating a new section known as the Research Section.

"2. That on or about August 28, 1972, the appointing authority transferred employe Maurice Van Susteren from an existing and recognized agency Hearing Examiner position to the newly created position of Chief of the Research Section with the understanding that the appellant was to perform the duties and responsibilities of such new position in an acting capacity.

"3. That no notification was received by the Director of the State Bureau of Personnel of the establishment of the new position, Chief of the Research Section, in accordance with Pers 3.03(1) and 16.07(2)(c).

"4. That this transfer was made without formal notice to the Director of the State Bureau of Personnel and particularly without his approval as required by sec. 16.23, Wis. Stats.

"CONCLUSIONS OF LAW

"That the transfer of the Appellant into the position of Chief, Research Section, Bureau of Legal Services in the Department of Natural Resources was improper and that the transfer was made without notification to and approval of the Director of the State Bureau of Personnel and therefore is illegal and void."

On August 22, 1974, in compliance with the Director's order, the Secretary reassigned Van Susteren to his former function of holding hearings. Pursuant to sec. 16.05(1)(f), Stats., the Secretary appealed the decision of the Director to respondent Board. While the Board had statutory authority to take evidence de novo on the appeal it decided to proceed on the basis of the record made before the Director.

Briefs were filed by counsel for the parties involved and on December 24, 1974, it issued its decision in the form of an opinion and order which is the subject of this review. The Board's order reads as follows:

"IT IS ORDERED that the action of the Director is affirmed, except that it is modified with respect to the legal basis therefor and with respect to the Director's Order, in the manner expressed in the accompanying Opinion".

The Board's opinion portion of its decision was subdivided by various headings the last of which immediately preceding the Order was "Conclusion" which read as follows:

"We conclude that Mr. Van Susteren's transfer was illegal for three reasons. First, it was made pursuant to a reorganization that was initiated without authorization by the head of the department, the Natural Resources Board, and lacked gubernatorial approval. Secondly, it was in violation of Sec. 16.07(2), relative to consultation and notice to the Director and notice to the employee involved concerning changes in duties incident to reorganization. Thirdly, it was in violation of Sec. 16.23 requiring specific authorization by the Director for all transfers. We conclude that each of the foregoing reasons independently requires the conclusion that Mr. Voigt's action in changing Mr. Van Susteren's duty assignment was unlawful.

"The Director, in his decision in the last paragraph thereof, orders Mr. Voigt to return Mr. Van Susteren to his former position as hearing examiner.' We find that Mr. Van Susteren formerly held the position of chief examiner and therefore we order that he be reinstated to that position."

ISSUES PRESENTED

Petitioner Secretary's brief asserts that the Board's decision was affected by errors of law within the meaning of paragraph (b) of sub (1) of sec. 227.20, Stats., and that a crucial finding of fact made in such decision is unsupported by substantial evidence in view of the entire record as submitted within the meaning of paragraph (d) of the same subsection. This finding was the one which found that Van Susteren prior to his reassignment to be Chief of the Research Section held the position of Chief Examiner.

On the basis of the contentions advanced by the briefs submitted the Court deems these are the issues it is required to resolve:

(1) Was the assignment of Van Susteren to the position of Chief of the Research Section a "transfer" which required the approval of the director?

(2) Was the creation by the Secretary of a Research Section in DNR's Bureau of Legal Services an "internal organization" within the meaning of sec. 15.02(4), Stats., so as to require approval of the Governor and the DNR Board?

(3) Was the respondent Board's order modifying the Director's decision so as to order the reinstatement of Van Susteren as Chief Examiner improper both from the standpoint of law and the evidence?

WAS THERE A "TRANSFER"
WHICH REQUIRED THE
DIRECTOR'S APPROVAL?

Sec. 16.23, Stats., provides:

"A transfer may be made from one position to another only if specifically authorized by the director."

For the definition of "transfer" as used in sec. 16.23, it is necessary to refer to Wis. Adm. Code, Pers. 15.01, which states.

"A transfer is the movement of an employee with permanent status and class from one position to a vacant position allocated to a class having the same pay rate or pay range maximum."

If a "transfer" is the movement from "one position to a vacant position allocated to a class . . .," it is necessary to know the legal meaning of "position" and of "class."

It is clear that with respect to Van Susteren his class was that of Attorney 12, because "class" is defined by sec. 16.07(1), Stats., which deals with classification of employees by the Director. Classes are the "grade levels or classifications" to which positions are allocated.

A "position" is established pursuant to Wis. Adm. Code, Pers. 3.01, which provides:

"(1) If an appointing authority has made budgetary provisions for a new position in his agency and desires to fill the position, he shall, in writing, describe the duties,

responsibilities, and essential qualifications of the position and provide other pertinent information required by the Director.

"(2) The Director shall then allocate the position to the appropriate class."

A "position" is identified by "position standards" which, pursuant to Wis. Adm. Code, Pers. 2.04(1), "shall include a definition statement identifying the nature and character of the work and examples of work performed." The positions into which Attorney 12 class employees are subdivided is set forth in Exhibit 11, (R. 25-31), having Position Numbers 20 through 61. Van Susteren's Position Number is DNR-30 (See R.22, 30).

The Secretary is the "appointing authority" for DNR inasmuch as sec. 15.05(1)(b), Stats., provides:

". . . All the administrative powers and duties of the department [DNR] are vested in the secretary to be administered by him under the direction of the [DNR] board."

The Secretary contends that he merely reassigned duties to Van Susteren and did not "transfer" him to a new position. The Court is of the opinion that a comparison of Van Susteren's duties in his position as hearing examiner specified in the position description of DNR-30 (Exhibit 11, R. 26) and his duties as chief of the Research Section as outlined in Damon's memorandum of August 29, 1972 (Exhibit 18 R. 51-52) afford a rational basis for the Board's holding in its decision under review that the Secretary in assigning Van Susteren to be chief of the Research Section violated sec. 16.07(2)(c), Stats., which provides:

"When anticipated changes in program or organization will significantly affect the assignment of duties or responsibilities to positions, the appointing authority shall, whenever practicable, confer with the director within a reasonable time prior to the reorganization or changes in program to formulate methods to fill positions which are newly established or modified to the extent that reclassification of the position is appropriate. In all cases, appointing authorities shall give written notice to the director and employe of changes in the assignment of duties or responsibilities to a position when such changes in assignment may affect the classification of the position."

Implicit in this holding by the Board is that Van Susteren was being assigned to a new position. Thus under this holding there was a "transfer" within the meaning of sec. 16.23, Stats.

The Secretary's brief stresses the expert testimony of the witnesses Christensen and Brainerd. Christensen has been a personnel analyst for the Bureau of Personnel, Department of Administration, for six and a half years, and Brainerd is a senior classification analyst for this Bureau.

Christensen testified that Van Susteren, by virtue of his being in research in an acting capacity, had not been transferred and had not undergone any change in status or position:

"Q That's correct. In an acting capacity.

A In an acting capacity, O.K. If he was in an acting capacity, we would still consider him to be a hearing examiner and as such, the agency could request if he'd reached the maximum of his range and they wanted to give him a merit increase, they'd request the Director to re-allocate the position to an Attorney 13.

Q Even though the majority of his duties and responsibilities now that he's serving the acting capacity were not, in fact, hearing examiner's?

A As far as we're concerned, those are not his duties and responsibilities.

Q What were his duties and responsibilities?

A His duties and responsibilities are those of a hearing examiner. He is functioning in an acting capacity, a temporary type of an assignment . . ." (R. 92-93).

Christensen further on redirect examination explained why an acting position is not a transfer:

"Q O.K. Upon what do you base this opinion that you have given both myself and Mr. Charne, that an acting position is not a transfer until a certification is requested for and granted?

A Well, do we have a copy of the rules here? Let's see how a transfer is defined.

Q Page 45.

"A O.K. . . . A transfer is the movement--reading from Chapter Pers. 15, a transfer is the movement of an employee with permanent status and class from one position to a vacant position allocated to a class having the same pay rate or same pay range maximum. This position--the chief of the research section has not been classified. So it has not been classified. There can be no transfer.

Q The position hasn't been classified?

A That's correct." (R. 104-105).

Christensen then testified that:

". . . . A transfer has to be between positions and in order for it to be a transfer, the position has to be classified because if it's classified at a different level, say if it was classified as an Attorney 13 or an Attorney 11, then it would not be a transfer. It would be either a promotion or a demotion." (R. 106).

Brainerd in his testimony corroborated Christensen. When asked by Van Susteren's attorney whether he had determined or felt that Van Susteren had been laterally transferred, Brainerd replied: "No, it was not my position that his--he had--the position, in fact, had been laterally transferred. That was not my position." (R. 109).

Brainerd further explained that the procedure of placing individuals in an acting capacity is used frequently by agencies:

"A. This is a practice that is frequently followed in state service and I am sure--other organizations, governmental organizations as well, that when a position is vacated, it may be a necessity to management or administration of that agency to have the position filled immediately in order to carry out the transactions of the organizations and many times due to either budget restrictions or the budgetary process or the examination process, etc., there are undue time delays and, therefore, the positions are filled at times in acting capacities until such a time as they can be filled permanently." (R. 113).

On redirect examination, Brainerd made clear that his use of the clause "when a position is vacated" was not intended as a limiting phrase and that the procedure of placing individuals in acting capacities is used in many situations.

However, there is no provision in the statutes or Personnel rules of the Bureau which provide for persons serving in acting positions

within the class to which the employee is classified. This is undoubtedly a legitimate practice for handling vacancies on a temporary basis, or with the employee's consent, for periods of some length. However, the evidence here gives rise to the reasonable inference that the assignment of Van Susteren to be chief of the Research Section was intended as a permanent rather than temporary assignment.

Christensen gave as his principal reason why he did not consider there had been a transfer of Van Susteren to a different position the provision of Adm. Code, Pers. 2.04 (R. 80). This rule reads in part as follows:

"Position standards are descriptive and not restrictive and they shall not be construed to limit or modify the power of the appointing authority to assign tasks or direct or control the work of employees under his supervision."

This provision means that the appointing authority, in this case the Secretary, may assign additional tasks to an employee beyond those set forth in his position standards. Van Susteren's position standards are those set forth under No. 30 in Exhibit 11 (R. 26). However, when the Secretary not only assigned additional duties to him in his assignment as chief of the Research Section, but withdrew from him his principal activity of conducting hearings, a situation was created which afforded the basis for both the Director and the Board finding that a transfer within the meaning of Wis. Adm. Code, Pers. 15.01, had occurred. In interpreting rule Pers. 15.01 it must be kept in mind that this rule implements sec. 16.23, Stats., which requires the approval of the Director to a transfer from one position to another, and rule Pers. 2.04 should not be accorded an interpretation that would circumvent this statutory requirement.

While both Christensen and Erainerd were experts in the field of interpreting Personnel rules set forth in Wis. Adm. Code, Pers., so

likewise was Wettengel, the Director of the Bureau. It is clear from the Director's decision that he disagreed with Christensen's and Brainerd's rule interpretations that no transfer had occurred. Certainly the Board was not legally bound to adopt the rule interpretations voiced by Christensen and Brainerd that no transfer had occurred.

Because a rational basis exists for the Director's and the Board's determination that a transfer did take place, the Court deems that it should defer to the same.

The Wisconsin Supreme Court has repeatedly declared that the interpretation of a statute adopted by the administrative agency charged by the legislature with the duty of applying it is entitled to great weight. Libby, McNeill & Libby v. Wisconsin E. R. Comm. (1970), 48 Wis. 2d 272, 280; Chevrolet Division, G.M.C. v. Industrial Comm. (1966), 31 Wis. 2d 481, 488; Cook v. Industrial Comm. (1956), 31 Wis. 2d 232, 240. It is only when the interpretation by the administrative agency is an irrational one that a reviewing court does not defer to it. Wisconsin Southern Gas Co. v. Public Service Comm. (1973), 57 Wis. 2d 643, 652.

Inasmuch as a transfer occurred it was invalid because of the failure to request and obtain the Director's approval as required by sec. 16.23, Stats., as well as his failure to comply with the requirements of sec. 16.07(2)(c), Stats.

WAS THE CREATION OF A RESEARCH SECTION WITHIN THE BUREAU OF LEGAL SERVICES AN "INTERNAL ORGANIZATION" WITHIN THE MEANING OF SEC. 15.02(4), STATS.?

Sec. 15.02(4), Stats., provides:

"Internal Organization and Allocation of Functions. The head of each department or independent agency shall, subject to the approval of the governor or, where applicable, the coordinating council for higher education, establish the internal organization of the department or independent agency and allocate and reallocate duties and functions not

assigned by law to an officer or any subunit of the department or independent agency to promote economic and efficient administration and operation of the department or independent agency. The head of the department may delegate and re-delegate to any officer or employe of the department or independent agency any function vested by law in the head of the department."

Counsel for Van Susteren urged both before the Director and later before the Board that the creation by the Secretary of a Research Section within the Legal Services Bureau of DNR constituted a reorganization within the meaning of this statute so that the assignment of Van Susteren to be chief of that Section was invalid because no approval had been had from the Governor nor the DNR Board.

The Director in his decision of July 15, 1974, held that no reorganization had occurred within the meaning of sec. 15.02(4), Stats. The portion of the Director's decision dealing with this issue stated (R. 181):

"I do not concur with the Appellant's position that the creation of the Research Section within the Bureau of Legal Services was such an act of reorganization as to require the approval of the Governor under Section 15:02(4), Wis. Stats.

"Since the effective date of this statutory section former Governor Knowles, in effect, delegated to heads of Departments reorganizational changes affecting units of State Government below Bureau level. This policy has been continued by Governor Lucey. Delegation to Departments of reorganizational changes below Bureau level has been formalized by Administrative Practices Manual #1, Part: Administration; Section: Management; Subject: Reorganization, effective January 1, 1974, issued by the Department of Administration and approved by the Governor."

The Board in its decision reached exactly the opposite conclusion from that of the Director and held that the creation of the Research Section in the Bureau of Legal Services of DNR constituted a reorganization within the meaning of sec. 15.02(4), and made this an additional ground for holding the Secretary's assignment as chief of the Section invalid inasmuch as there had been no authorization for the creation of the Section by the DNR Board nor by the Governor.

As previously noted herein the Director included in the order portion of his decision a provision that if DNR wished to fill the position of chief of the Research Section DNR could proceed to do so "in accordance with the applicable statutory provisions and Personnel Rules" (R. 182). This meant that under the Director's interpretation sec. 15.02(4), Stats., was not an applicable statute and did not have to be followed in filling the position of chief of the Research Section. However, the Board's order modified the Director's order "in the manner expressed in the accompanying opinion." If the Court were to affirm the Board's decision without any modification, the Secretary would be unable in the future to fill the position of chief of the Research Section by transferring Van Susteren or any other employee of the Legal Services Bureau upon receiving the authorization of the Director without also obtaining the authorization of the Governor and the DNR Board. Thus it is necessary that the Court decide the issue of whether the creation of the Research Section was within the meaning of sec. 15.02(4), Stats. an "internal organization"

The Legal Services Bureau originally consisted of the Examiner Section and the Solicitor Section. The creation of a Research Section under the evidence presented did not take on the performance of any function that could not have been required of the employees in the Examiner and Solicitor Sections under their position standards. This is true even with respect to Van Susteren if the new work he had been put on had been rotated among the other examiners and staff lawyers. Thus the change within the Bureau of Legal Services did not "affect funding sources or significantly affect the delivery or cost of services." See Administrative Practices Manual #1, Part: Administration; Section: Management; Subject: Reorganization, effective January 1, 1974, issued by the Department of Administration and approved by the Governor. (R. 217).

The Court is satisfied that the legislature did not intend every minor change in administrative structure of an agency to be an

approval.

The dividing line drawn in the Administrative Practices Manual #1, Part: Administration; Section: Management; Subject: Reorganization, effective January 1, 1974, issued by the Department of Administration, and approved by the Governor (R. 216-218), referred to by the Director in his decision, appeals to the Court as a logical and rational one. Under this any changes made in structure below the Bureau level did not require the Governor's approval where it did not affect funding sources nor significantly affect the delivery or cost of services.

The Board in its decision stated that this policy expressed in the Administrative Practices Manual was contrary to sec. 15.02(4), Stats. The reason advanced by the Board's decision for this conclusion was stated as follow:

"The policy expressed in the Manual is contrary to the statute, which requires gubernatorial approval of all reorganizations where the function is 'not assigned by law to an officer or subunit of the department' of Natural Resources. . . ." (Emphasis supplied).

Sec. 15.02(3), Stats., deals with internal structure of departments and provides in part:

"INTERNAL STRUCTURE. (a) The secretary of each department may, subject to sub. (4), establish the internal structure within the office of secretary so as to best suit the purposes of his department.

"* * *

"(c) For their internal structure, all departments shall adhere to the following standard terms, and independent agencies are encouraged to review their internal structure and to adhere as much as possible to the following standard terms:

"1. The principal subunit of the department is the 'division'. Each division shall be headed by an 'administrator'.

"2. The principal subunit of the division is the 'bureau'. Each bureau shall be headed by a 'director'.

"3. If further subdivision is necessary, bureaus may be divided into subunits which shall be known as 'sections' and which shall be headed by 'chiefs' and sections may be divided into subunits which shall be known as 'units' and which shall be headed by 'supervisors'." (Emphasis supplied.)

To carry the Board's logic to its ultimate conclusion, before a section could be subdivided into a unit, gubernatorial approval of the Governor would be required because it is a reorganization.

If sec. 15.02(4), Stats., is inapplicable with respect to the necessity of obtaining approval of the Governor, which the Court deems it is, then what is stated in this statute with respect to a "head of a department" reallocating duties and functions to departmental subunits is also inapplicable. Sec. 15.01(3), Stats., defines "head of the department as the . . . secretary or part-time policy board in charge of a department." Sec. 15.34, Stats., states that DNR is "under the direction and supervision of the natural resources board." Construing these two statutes together the Court is of the opinion that the DNR Board is the head of the department.

The Board's decision holds that only the DNR Board would have authority to create the Research Section in the Bureau of Legal Services which the Secretary attempted to establish. The Court is in disagreement with that conclusion.

Sec. 15.05(1)(b), Stats., as previously noted herein, vests all administrative powers and duties of DNR in the Secretary to be administered by him under the director of the DNR Board.

Sec. 15.02(3)(a), Stats., provides that "the secretary of each department may, subject to sub. (4), establish the internal structure within the office of secretary so as to best suit the purposes of his department."

Construing secs. 15.05(1)(b) and 15.02(3) together, the Secretary clearly has the authority to create such Research Section if sec. 15.02(4) is inapplicable.

THE PORTION OF THE BOARD'S
ORDER WHICH MODIFIED THE
DIRECTOR'S DECISION SO AS TO
ORDER VAN SUSTEREN'S RE-
INSTATEMENT AS CHIEF EXAMINER

Van Susteren was the appellant in the appeal proceeding before the Board and carried the burden of proof on the issue of whether he held the position of chief hearing examiner before his transfer.

He testified that the only document he was aware of which created the position of chief hearing examiner was Exhibit 19 (R. 135). This exhibit consists of two pages (R. 53-54). The first is a duplicated copy of a typed organization chart of the DNR's Bureau of Legal Services (R. 171) on which one of the squares is labeled "Chief Examiner" and bears the date at the bottom of "6-1-71" (R. 5). The second page lists the names of eight individuals followed by such designations as "Director", "Asst Director", "Chief Solicitor", "Chief Examiner", "Steno Reporter" and "Attorney". Van Susteren is one of the eight listed individuals and after his name is the designation "Chief Examiner". Further after each name is typed "Madison" followed by an office phone number.

Conners, Director of Personnel of DNR, testified page 2 of Exhibit 19 was a personnel directory prepared in his office used for clerical services for mailing purposes and telephone numbers (R. 172); that he assumed the organizational chart on page 1 had been prepared by Kaminsky, Director of the Bureau of Legal Services, and to the best of his knowledge it accurately depicted the situation as it was prior to August 28, 1972 (R. 171).

Van Susteren testified that when he was transferred from the staff of the Public Service Commission to the Department of Resource Development in 1967 "it was agreed at that time I would head up the hearing functions in the newly merged DRD with the public health

the Department of Resource Development (R. 134).

As to what took place in 1968 when DNR came into being as a result of the merger of the Department of Resource Development and the Conservation Department Van Susteren testified (R. 135):

"I believe that my memory serves me correctly that Mr. Kaminsky, who was then the--the chief legal officer of the conservation department, was going to be made the Acting Director of the Bureau of Legal Services in the newly formed Department of Natural Resources, that the bureau would be divided into two sections, a hearing section and a solicitors section; that I was going to continue as the chief hearing examiner and, consequently, the chief of that section and that Mr. Main was going to be the head of the solicitors section."

Subsequent to 1968 other attorneys were added to the staff as hearing examiners (R. 136). No position standards were ever established as contemplated by Wis. Adm. Code, Pers. 2.04 and Pers. 3.01 for the position of chief hearing examiner. Christensen, who was called as a witness by Van Susteren and by reason of his many years as personnel analyst for the State Personnel Board is an expert on position standards, testified that Van Susteren's position was that of No. 30 in Exhibit 11 (R. 75). An examination of Exhibit 11 (R. 22-31) discloses that there is no position listed for Attorneys 12 employed by DNR except Nos. 30 and 31, neither of which lists any duties in the nature of a chief hearing officer.

As previously determined herein, a transfer takes place under sec. 16.23, Stats., when the duties of the job to which an employee is assigned are substantially different than the position standards of the job from which he is reassigned. Thus under Van Susteren's position standards of a DNR No. 30, there would have been no transfer of Van Susteren within the meaning of sec. 16.23, Stats., if the Secretary had merely withdrawn from him whatever supervisory duties he claims to have exercised as chief hearing examiner and assigned the same to some other DNR No. 30.

In fact, Van Susteren testified that all such supervisory activities had been withdrawn from him effective May 31, 1972, under a memorandum from Ass't Director Damon, dated on that date which placed such functions in the hands of Edward Main (R. 138-139). This memorandum is Exhibit 20 (R. 55). Thus when the transfer of Van Susteren was made on August 28, 1972, he was no longer functioning as chief hearing examiner.

Therefore, the Board's finding that Van Susteren "formerly held the position of Chief Examiner", if it is to be interpreted as meaning as of the time he was transferred to the Legal Research Section, is unsupported by substantial evidence in view of the entire record as submitted.

Furthermore, because his position standards as set forth in Exhibit 11 do not include any supervisory functions, he is not entitled as a matter of law to be restored to any position other than hearing examiner which is his chief function under such position standards.

There is a further reason why it was an error of law for the Board to modify the Director's decision so as to order that Van Susteren be reinstated to the position of Chief Examiner. Sec. 16.05(1)(f), Stats., provides that, when hearing an appeal from a decision of the Director, the Board "shall either affirm or reject" that decision. The statute grants to the Board no power to modify the Director's decision.

Let judgment be entered nodifying the order portion of the Board's decision by striking that portion thereof which modified the Director's decision, and as so modified, affirming the Board's order.

Dated this 8th day of May, 1975.

By the Court:

George R. Currie
Reserve Circuit Judge