

Milwaukee as a staff technician. In the May 13, 1971 memorandum offering the position, Appellant was also told that if he did not accept the position, the Department felt that it was in his family's and his best interests for him to resign. Subsequent to Appellant's accepting the position, he was warned that failure to begin work on the designated date of June 21, 1971 would result in disciplinary action. This warning dated June 3, 1971 was sent by Stanley W. Welsh, Natural Resources Administrator 5.

Some of the duties which the position at the new Southeast District office was to potentially involve were:

- 1) Coordination of sand blanket requests and obtaining of technical recommendations;
- 2) Coordination of applications for solid waste disposal sites;
- 3) Coordinating the entire land acquisition program for the District;
- 4) Assist Mr. Trecker (District Supervisor of Forestry and Recreation, Southeast District, Milwaukee) in the forestry problems in the District as well as assisting the District Director in Resource matters as necessary;
- 5) Maintain contact with Fire Control personnel on Federal Government surplus property for Departmental use.
(Excerpted from Memorandum, dated May 13, 1971, from Robert W. Conners to Appellant, part of Board's Exhibit 5.)

Appellant's present duties include verifying travel vouchers and time sheets and working with invoice vouchers, field orders, purchase orders and other forms which are related to departmental

procedures in the office of the supervisor of services. In addition, he screens and does the work in the General Services Administration (G.S.A.) on a department-wide basis which affects all the programs eligible for G.S.A. surplus equipment. Using his resource background, he makes field surveys for the snowmobile trail program.

In February, 1973 Appellant took an oral examination for a Natural Resources IV position. He was certified with two others for the interviews held on March 13, 1974. There were in all seven to be interviewed including four lateral transfer candidates. Four were actually interviewed. Three withdrew before the interviews. Appellant was not recommended for the position.

Appellant wrote a letter of appeal to the Personnel Board on March 26, 1974. The letter was received by this Board's office on March 28, 1974. Appellant apparently did not appeal to the Director under Section 16.03 (*) (a).

III. Conclusions

The Board Does Not Have Jurisdiction Over This Appeal.

Respondents contend that the Personnel Board has no jurisdiction over this appeal. We find merit in the contentions made by each Respondent.

Respondent Wettengel claims that his authority over the selection process ends once an applicant for a position is certified on the list of eligibles. Therefore, unless the examination process itself were illegal or in violation of the civil service law, he as Director could not be held liable for any alleged violations during the interviews.

Under Section 16.03 (1), Wis. Stats., the powers and duties of the Director are defined as follows:

The director is charged with the effective administration of this subchapter. All powers and duties, necessary to that end, which are not exclusively vested by statute in the personnel board or appointing authorities, are reserved to the director. (Emphasis added.)

Section 16.04, Wis. Stats., outlines the powers and duties of the appointing authorities. It states in pertinent part:

- (1) Each appointing authority shall:
 - (b) Appoint persons to the classified service, designate their title, assign their duties and fix their compensation, all subject to this subchapter and the rules of the Director. (Emphasis added.)

Putting these two subsections together, it is clear that the Appointing Authority has the exclusive power to appoint persons to a position. However, there is one qualification. The appointment must be made within the civil service laws and rules.

The recruitment and examination process is determined and developed by the Director. (Sections 16.11 and 16.12, Wis. Stats.; Wisconsin Administrative Code Chapter Pers. 6.) The Director supplies to the Appointing Authority a certified list of eligibles or other lists of names as provided in the laws and rules. An example of the latter list would be a list of persons interested in transfer. (Section 16.20, Wis. Stats., Administrative Code Section Pers. 12.02.) From these lists the Appointing Authority makes his selection.

Under Section 16.20 (2), Wis. Stats., the Director does have the authority to order the Appointing Authority to make an appointment when one is not made from the list of eligibles within sixty

days "if the director determines that the failure to make an appointment is not justified under the merit system." This authority, however, does not give the Director the power to actually select a particular person to fill the position nor does it give him the power to actively regulate the methods of selection. He can only order the Appointing Authority to make a selection and appoint that person to the position.

If, however, the position is filled illegally or by abuse of discretion, then an appeal by an employee to the Director may be made. (Section 16.03 (4), Wis. Stats.) The Director may then issue an enforceable order to correct the illegal action. (Section 16.03 (5), Wis. Stats.)

In the instant appeal Appellant became eligible for appointment after passing the examination and being certified by the Director. Appellant has failed to demonstrate any evidence which shows that there was any bias against him through this part of the process. In fact, his certification implies that there was none.

If there had been bias which was illegal or an abuse of discretion during the interviewing and appointment process, then the Director would have had authority to correct it under Section 16.03 (4)(a) as discussed above. But Appellant did not invoke Respondent Director's authority under that section. Therefore, we conclude we have no jurisdiction over Respondent Wettengel. However, we do feel that the proper appeal route should be made more clear to employees who wish to appeal from personnel decisions of the appointing authorities when those decisions are alleged to be illegal or an abuse of discretion.

The second major aspect of the appeal argues that the Department was not giving Appellant work within his classification. If true, this in itself could be a violation of the civil service law and could lead to the result Appellant claims occurred, that is, he was placed at a disadvantage for advancement purposes.

This, however, is again not within the direct purview of the Director to control. The Appointing Authority has control of the work assignments of each employee within a particular department. (Section 16.04 (1) (b).) If the Department were giving Appellant improper work assignments, then he should have appealed under Section 16.03 (4) (a), Wis. Stats., to the Director.

Appellant did not appeal to Respondent Wettengel from the alleged actions of the Department. Therefore, we conclude that we do not have jurisdiction over Respondent Wettengel in this appeal.

Respondent Voigt also contends that this Board has no jurisdiction over this appeal. The authority of the Personnel Board to hear appeals is found in Sections 16.05 (1) (e), (f), (g), (h), Wis. Stats.. The Board also may be designated as the final step in the state grievance procedure under Section 16.05 (7).

Section 16.05 (1) (e) grants this Board the authority to hear appeals involving demotions, lay-offs, suspensions or discharges where it is alleged that the decision of the Appointing Authority was not based on just cause. Under the facts of this appeal none of these categories can be applied to Appellant's situation. Appellant does claim that he was demoted because his duties and responsibilities have changed, becoming more clerical since his transfer. However, the definition of demotion as found in Administrative Code Section Pers. 17.01 states:

A demotion is the movement of an employee with permanent status in one class to a position in another class that has a lower single rate or pay range maximum.

Appellant's classification and pay range remained the same before and after the transfer. The transfer necessarily involved a change of duties. A list of potential duties was drawn up by Appellant, Robert W. Conners, Personnel Administrative Officer 2, Department of Natural Resources, Alta Ehly, Natural Resources Administrator 3, Department of Natural Resources, and Edgar Trecker, Supervisor of Forestry in the Southeast District. That the duties which Appellant actually performed did not encompass all of the ones that were thought to be potentially part of the new job in the new district does not mean that Appellant was demoted. Therefore, we conclude that under this subsection we have no jurisdiction to hear the appeal.

Section 16.05 (1) (f) grants this Board jurisdiction over an appeal from a decision or action of the Director. In the instant case, there was no decision by the Director except the one which certified Appellant as eligible for the position he was seeking. Appellant did not appeal from that decision. Therefore, this subsection cannot be used as a basis for jurisdiction.

Neither Sections 16.05 (1) (g) nor (h) apply to the instant appeal. Appellant is not bringing his appeal before the Personnel Board under the county merit system rules under Section 49.50 nor is he asking the Board to review and act upon decisions of an impartial hearing officer under Section 111.91 (3).

Finally, we conclude that we have no jurisdiction under Section 16.05 (7) to hear this appeal. This case is not the final step in the state grievance procedure.

Therefore, after reviewing all the possible bases of appellate jurisdiction over Respondent Voigt, we find that we have none.

The Personnel Board Has
Jurisdiction Under Section
16.05 (4), Wis. Stats.

Appellant was not represented by counsel. He should have more properly filed his appeal with the Director under Section 16.03 (4) (a). Once a decision came down and assuming it was unfavorable to Appellant, he could have then appealed that decision to this Board under Section 16.05 (1) (f). However, he did not follow that procedure.

Although Appellant did not specifically request an investigation, we are going to treat his letter of March 26, 1974 as such. The Board's power to investigate is found in Section 16.05 (4). This subsection states in pertinent part:

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

In Schwartz v. Schmidt, Case No. 74-18, January 17, 1975, we held that the above statutory language gave the Personnel Board a discretionary power to investigate. We stated:

The use of the word "may" (in the statute) indicates that interested persons do not have a legal right to compel the Board to make an investigation and do not have a legal right to compel the Board to make an order even if it finds illegal conduct or conduct violative of "the intent and spirit of the law."
. . . The purpose of the section seems to be directed to broad policy matters related to the "enforcement and effect" of the civil service law.

. . . The Board will exercise its jurisdiction in instances where the facts of a particular case reflect a need to do so. (supra, pp. 2-3.)

In the instant appeal Appellant is presenting issues which would have been more properly brought before the Director in the first instance. Under Section 16.03 (4) (a) the Director must hear appeals from employees which allege illegality or abuse of discretion by Appointing Authorities in their personnel decisions. If the Board were to take jurisdiction under Section 16.05 (4) in all cases which should and could be properly brought before the Director, then we would be usurping the Director's authority under Section 16.03 (4) (a) as well as emasculating the requirement under Section 16.05 (1) (f) that there be a decision by the Director first before we gain jurisdiction over certain matters of appeal.

However, since the power to investigate is discretionary, we decide that in this case we will exercise that power. Appellant was without counsel. At the time Appellant's letter was received, it should have more properly been transmitted to the Director for him to take whatever action he felt necessary. However, this was not done. Further, the case has been pending before the Board for well over a year. Since a hearing on the merits was held on May 13, 1975, we conclude that we will take jurisdiction of this case under our power to investigate.

Appellant Failed To
Meet His Burden Of Proof

Assuming arguendo that this Board does have jurisdiction over the instant appeal, then Appellant's contentions fail because of insufficient proof. The five issues which were agreed upon by the parties were as follows:

- 1) Was it predetermined before Appellant sought the promotion to Natural Resources Forester IV that he would not be selected?
- 2) Did the Department of Natural Resources prohibit Appellant from participating in forestry related activities so as to lessen his chances for the promotion?
- 3) Assuming Appellant was assigned duties outside his class specifications, did this place Appellant at a disadvantage in competing for a promotion?
- 4) Was the interviewing board biased against Appellant?
- 5) Since his voluntary transfer to the Southeast District Office in June of 1971, has Appellant had to perform duties which are not in his class specifications?

Appellant has the burden of proof in a case such as this.

(73 C.J.S., Public Administrative Bodies and Procedure, Section 124.)

But he failed to meet his burden by not producing sufficient evidence to establish his contentions.

Appellant spent most of his time attempting to prove that he was not performing duties and responsibilities within his classification. (Issue No. 5, supra.) Most of his duties involve working with various forms and requisitions. A resource background was needed to properly and accurately fill out most of these forms. About twenty per cent of his time was spent in supervising the snowmobile trail program.

Appellant failed to establish that the majority of his time was spent on tasks outside his classification. In fact, the record indicates that most of his time was spent on duties which called upon his resource experience and educational background.

Appellant did establish that his transfer to the Southeast District Office was involuntary. It is true he had requested a

transfer from Wildcat Mountain Park but evidently had not wanted to be transferred to the new district office. But the question of voluntariness is not an important aspect of the last issue. Appellant did not show how this transfer adversely affected him.

Appellant failed to produce any evidence which would go to establish the bias which is a large part of issues numbered one through four. On issue four he stated only that Thomas Kroehn, District Director of the Southeast District, Milwaukee, was on the interviewing panel. However, there was no evidence produced which showed Mr. Kroehn's alleged bias toward Appellant. The Interview Evaluation sheet (Respondents' Exhibit No. 1) appeared to be straight forward and did not indicate any predisposition on the part of the interviewing board.

Appellant never really confronted issue number three. No evidence was produced specifically on this issue.

Regarding issue two, Appellant did elicit testimony from Mr. Kroehn that Appellant had to pay his own expenses to forestry meetings and conferences and had to attend them on his own time. However, there was strong rationale for the state not paying Appellant's way. The topics of the meetings were not in the area in which Appellant was working. The state cannot be expected to send employees to meetings from which it will receive at best tangential benefit.

Finally, Appellant did not establish issue number one. The evidence of his job duties did not show that he had no chance at all for the promotion to Natural Resources IV.

Therefore, we conclude that Appellant failed to meet his burden of proof on each of the five issues.

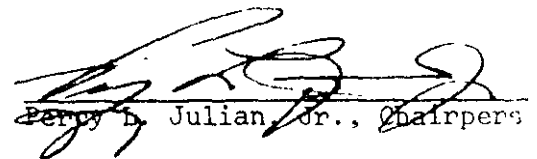
ORDER

IT IS HEREBY ORDERED that this appeal against Respondent Wettengel be dismissed for lack of jurisdiction.

IT IS FURTHER ORDERED that the decision of Respondent Voigt be affirmed.

Dated November 25, 1975.

STATE PERSONNEL BOARD


Percy H. Julian, Jr., Chairperson