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BARRY M. LEVENSON,

Appellant,

v.

VERNE H. KNOLL, Deputy Director,  
State Bureau of Personnel,

Respondent.

Case No. 76-69

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**OFFICIAL**

OPINION AND ORDER

Before: JULIAN, Chairperson, STEININGER and DEWITT, Board Members.

NATURE OF THE CASE

This is an appeal of a decision of the Director refusing to waive part of Appellant's probationary period. This case has been submitted for decision on a factual stipulation and written arguments.

FINDINGS OF FACT

We incorporate by reference as if fully set forth the stipulation signed May 10, 1976, and the attached exhibits 1-13, all of which is attached hereto, as our findings of fact in this appeal.

CONCLUSIONS OF LAW

Briefly summarized, the Appellant's arguments are as follows: The Wisconsin Statutes provide for the possibility for a lengthened probationary period for professional positions. Section 16.22(1)(b). The Director at the request of the appointing authority may waive any portion of the lengthened probationary period so long as at least six months have been served. S. 16.22(1)(c). These provisions, and Sections Pers. 13.02(4) and 13.03, W.A.C., provide the basis for the appeal.

The Respondent argues:

". . . the one year probationary period for Appellant's position was not adopted under the above provisions. It is, therefore, not capable of being waived pursuant to these sections.

A one year probationary period for attorneys was created in the Director's Pay Plan recommendations submitted to the Joint Committee on Employment Relations pursuant to the mandate of Wis. Stats. 16.086 . . . The Respondent is of the opinion that it is beyond his powers to change a provision of this plan . . . ."

Section 16.22 Wis. Stats., provides the statutory authority for the administration of probationary periods. It provides in subsection (1)(a), as relevant, that probationary periods shall be for a period of six months. The only provision in S. 16.22 that would provide a basis for a one year probationary period is S. 16.22(1)(b), but it is very clear that if this option is exercised the provisions of S. 16.22(1)(c) come into play:

"(c) Upon request by the appointing authority, the director may waive any portion of the lengthened probationary period but in no case before a six month probationary period has been served."  
(emphasis supplied)

There is no other statutory basis for a one year probationary period. Section Pers. 13.02(6), W.A.C. provides that "all probationary periods shall be for six months duration except: . . . (6) As specifically provided in separate pay schedules." This presents the question of whether a one year probationary period provided for in a pay schedule, as here, is independently derived apart from S. 16.22(1)(b), Wis. Stats., so that it is not necessarily modified by the provisions of S. 16.22(1)(c), as indicated above.

No administrative agency may issue a rule or regulation that is not legislatively authorized. Kachian v. Optometry Examining Board, 44 Wis. 2d 1, 8 (1969). There is no provision in S. 16.22, Wis. Stats., that would provide a basis for S. Pers. 13.02(6), W.A.C., except for subsection (1)(b). The provisions of S. 16.086, Wis. Stats. (compensation plan) do not provide such a statutory basis. See S. 16.086(1)(a) General Provisions:

"The compensation plan is the listing of the dollar values of the pay rates and ranges and the within range pay steps of the separate pay schedules to which the classes and grade levels for positions in the classified service established under the classification plan are assigned.

In addition, the compensation plan may, when applicable, include provisions for supplemental pay and pay adjustments, and other provisions required to implement the plan or amendments thereto. Provisions for administration of the compensation plan and salary transactions shall be provided in the rules of the director."

This provision cannot be construed as independent authority for the establishment of a lengthened probationary period through the compensation plan. We perceive no such authority in any other part of S. 16.086. The Respondent has suggested no other statutory basis for S. Pers. 13.02(6), W.A.C., and we are unable to ascertain any. Therefore, we conclude that S. Pers. 13.02(6) does not provide any independent basis for the Director to establish a one year probationary period for a position such as Appellant's. The authority emanates from S. 16.22(1)(b), Wis. Stats., and S. Pers. 13.02(6) is construed in this case as a procedural provision for the implementation of the authority granted by S. 16.22(1)(b). Accordingly, the provisions of S. 16.22(1)(c) concerning waiver of the additional probationary period are available to the Respondent and he then must consider the appointing authority's request for waiver on the merits.

ORDER

The decision of the Respondent denying the request to shorten Appellant's probationary period is rejected and this matter is remanded for action in accordance with this decision.

Dated July 28, 1976. STATE PERSONNEL BOARD

  
Laurene DeWitt, Vice-Chairperson