

STATE OF WISCONSIN

STATE PERSONNEL BOARD

BJARNE BREILID,

Appellant,

v.

DEPUTY DIRECTOR, STATE BUREAU
OF PERSONNEL,

Respondent.

Case No. 77-137

OFFICIAL

OPINION AND ORDER

Before: James R. Morgan, Calvin Hessert and Dana Warren, Board Members.

NATURE OF THE CASE

This is an appeal relating to a selection process. The appellant also has requested an investigation. The respondent objected to subject matter jurisdiction on the grounds that the appeal was untimely filed. A hearing was held on the question of timeliness and the findings which follow are restricted to that question.

FINDINGS OF FACT

1. An examination for the position of administrative assistant 4 - assistant to museum director - Waukesha area was announced January 10, 1977.
2. This examination was conducted:
 - (a) on an open competitive basis
 - (b) by the State Bureau of Personnel
 - (c) on a non-delegated basis for the State Historical Society.
3. The appellant was examined and was ranked fifth on the final register.
4. The appellant was not among those certified (the first three names on the register).

5. The appellant was notified of his score on the exam and his ranking on the register on May 20, 1977.

6. On June 3, 1977, the appellant discussed the selection process for this position with Richard Erney, the director of the State Historical Society.

7. Mr. Erney expressed sympathy with appellant's situation respecting this selection process. He stated that he had questioned the Bureau of Personnel about the possibility of utilizing a selective certification that would result in the appellant's certification for this position. If it could not, then the agency would review the applicants who had been certified and determine whether an appointment could be made from that group. If no appointment were made and none of the certified applicants were to withdraw, the agency would then report to the director who would determine whether the failure to appoint were reasonable. If he were to so determine, the agency would then proceed to construct a new register utilizing a selection process that would put more stress on museum experience. Otherwise the director would order that an appointment be made from among the certification of the top three.

8. Later that day the appellant was informed through another Historical Society employe that the Bureau of Personnel had advised that it would not be permissible to utilize a selective certification.

9. The appellant was informed on June 28, 1977, that a selection had been made from among the three certified applicants.

10. The successful applicant for the administrative assistant 4 position was appointed July 3, 1977.

11. The appellant's limited term employment with the State Historical Society was terminated effective June 30, 1977.

12. The appellant filed an appeal (Appellant's Exhibit 1) with the Personnel Board on July 12, 1977.

CONCLUSIONS OF LAW

1. Pursuant to s. 16.05(2), Wis. Stats., the latest operative date for appeal purposes relative to the examination was May 20, 1977.

2. The appeal in this matter was not timely filed pursuant to s. 16.05(2), Wis. Stats.

3. The elements of an equitable estoppel are not present and the respondent is not equitably estopped from alleging untimeliness.

4. The appellant never appealed the termination of his limited term employment.

5. As a limited term employe, the appellant was not an employe with permanent status in class and therefore had no appeal rights on termination and the board has no jurisdiction pursuant to s. 16.05(1)(e), Wis. Stats. See also s. 16.21(4).

6. The Personnel Board lacks jurisdiction over this case as an appeal.

7. This is not an appropriate case for the Personnel Board to exercise its discretionary investigative powers pursuant to s. 16.05(4), Stats. with respect to the examination and selection process for administrative assistant 4 - assistant to museum director - Waukesha area.

OPINION

The operative appeal date was May 20, 1977, when appellant received notice of the exam results. The examination is exactly what the appellant attempted to appeal (see appeal letter and supplement, Appellant's exhibits 1 and 2) and was the only facet of the process that was directly appealable to the board. The appointment of the incumbent to the position is not appealable to the board because it is not an action of the director and therefore is subject neither to s. 16.05(1)(f), Stats., nor to any other appeal provision. With respect to the

termination of appellant's limited term employment, he did not appeal this and if he had, it would have been ineffective since limited term employes lack appeal rights. See ss. 16.05(1)(f) and 16.21(4), Wis. Stats. The appeal is clearly untimely relative to the date May 20, 1977.

The appellant has argued that respondent is equitably estopped from asserting that the appeal was untimely filed on the grounds that he delayed filing his appeal because he was lead to believe the Historical Society was working on resolving the selection process to his advantage.

The elements of an equitable estoppel against a state agency are:

(1) inequitable conduct by the agency amounting to a fraud or manifest abuse of discretion,

(2) irreparable injury to the other party

(3) who was acting honestly and in good faith in reliance on the agency's acts. See Pulliam and Rose v. Wettengel, Wis. Pers. Bd. No. 71-51 (11/25/75); Jefferson v. Eiffler, 16 Wis. 2d 123, 132-133 (1962); Surety Savings & Loan Assn. v. State, 54 Wis. 2d 438, 445 (1972).

In this case, there is at the outset a failure of the first element. In the final analysis, all the agency told the appellant was that if it could not make an appointment from among those initially certified, it might be able to conduct a second selection process depending on the decision of the Bureau of Personnel. It cannot be concluded that this representation was inequitable. The agency did not misinform the appellant as to his appeal rights as in the Pulliam and Rose case.*

The appellant also argues that the board accept jurisdiction over this matter as a grievance pursuant to s. 16.05(7), Stats. Since the matter was

* While apparently no one in the agency advised the appellant of his appeal rights, this does not excuse compliance with the statute. See Jabs v. State Board of Personnel, 34 Wis. 2d 245, 250-251 (1967).

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never processed as a grievance, this would clearly be an attempt to circumvent the time requirements of s. 16.05(2). Furthermore, although the departmental grievance procedure was not put in evidence, we take official notice of the uniform grievance procedure promulgated by the director of the Bureau of Personnel pursuant to Chapter Pers. 25, W.A.C., Administrative Practices Manual, August 24, 1966. This procedure expressly excludes from coverage limited term employes. See § I. B.

The appellant also requests that the Board assume jurisdiction over this matter as an investigation pursuant to s. 16.05(4), Stats. The appellant clearly had a right to appeal under s. 16.05(1)(f), Stats., had he exercised it in a timely manner. In such a situation, it is inappropriate for the board to hear the case under its broad grant of investigative authority, since the more specific statute controls. See State ex rel. Department of Administration v. Personnel Board, Dane County Circuit Court #149-295 (4/17/76); c.f., State ex rel. Hart v. Personnel Board, Dane County Circuit Court # 151-038' (6/10/76).

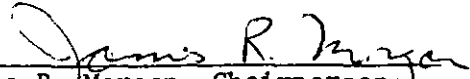
The appellant also requested for the first time at the hearing an investigation into the circumstances relative to his approximately four years of employment as an LTE. It was agreed that if the appellant desired to pursue this, that his attorney would submit a written request. Therefore, this decision has not addressed that issue.

ORDER

This appeal is dismissed for failure of subject matter jurisdiction.

Dated: 2-20, 1978.

STATE PERSONNEL BOARD


James R. Morgan, Chairperson