

STATE OF WISCONSIN

PERSONNEL COMMISSION

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CHARLES E. KENNEL,  
Appellant,

v.

DEPARTMENT OF TRANSPORTATION,  
Respondent.

Case No. 78-263-PC

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LARRY BRAUER,  
Appellant,

v.

DEPARTMENT OF TRANSPORTATION,  
Respondent.

Case No. 78-265-PC

\* \* \* \* \*

FRANK P. MURPHY,  
Appellant,

v.

DEPARTMENT OF TRANSPORTATION,  
Respondent.

Case No. 78-266-PC

\* \* \* \* \*

DECISION  
AND  
ORDER

NATURE OF THE CASE

These cases, filed pursuant to §230.45(1)(c), Stats., involve an appeal from a decision of the respondent to transfer the appellants at

their present classifications and levels of pay from their present duty station in Transportation District 2 (Waukesha), to Department of Transportation offices elsewhere in the State. The matter was heard by Commissioners Charlotte M. Higbee and Joseph W. Wiley on February 7 and 8, 1979.

#### FINDINGS OF FACT

1. The appellants in this case are employed by the Respondent in its Waukesha office in the Real Estate Section. Appellants Kennel and Brauer are classified Real Estate Agent 2; Appellant Murphy is classified Real Estate Agent 3.

2. By letter dated November 17, 1978, (Comm. Exh. 1) they were formally notified of a decision to transfer them out of District 2 effective January 1, 1979. Brauer and Murphy were being transferred to Madison, and Kennel to Superior.<sup>1</sup> The letter, jointly signed by T. R. Kinsey, District Director, District 2, and Marvin Schaeffer, Administrator, Division of Transportation Districts, stated in part:

"Our department has recently conducted a number of intensive department-wide studies on the level of staffing in the department in relation to existing programs and program levels. One of these studies was in the real estate area. The real estate study showed that the department had excess real-estate positions budgeted and also an imbalance of real estate staff to present program in several of the districts. . . . No lay-off of real-estate staff will be necessary. We did however, find that the Waukesha and Milwaukee Districts had excess real estate staff in relation to their present programs, while several other districts had a deficiency in their staff/present program ratios. In order to balance our real estate staff state-wide it became necessary for us to reduce the real estate

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<sup>1</sup>In early December Kennel was given the option of transferring to Madison rather than Superior.

staff in the Milwaukee and Waukesha Districts. Essentially, the least senior staff within each of the two districts from among those individuals possessing the critical skills are being transferred with their position to other districts."

3. The following is the sequence of events relating to the decision to transfer the appellants.

a. September 20, 1978. District Director in Madison wrote to Schaeffer recommending that he be permitted to fill two real-estate positions as his office, due to the loss of a Real Estate Technician and an LTE, was continuing to fall behind in "Lands Management, railroad first right investigations and pre-project activities for improvement programs" and expected difficulty in the area of "control of outdoor advertising." (Resp. Exh. 4)

b. October 3, 1978. The Deputy Secretary approved a two-step program to deal with "imbalance of Real Estate Staff." The first step provided for reallocation of six positions from Waukesha and Milwaukee to districts with greater needs. "It is hoped that most, if not all, of needed reallocations can be attained through voluntary moves." The second step (reevaluation of staff allocation) is to take place following a decision on merger of the Milwaukee and Waukesha districts and development of a firm six-year program. (Resp. Exh. 5)

c. October 5, 1978. Schaeffer asked the District Directors of Waukesha and Milwaukee to reduce their staffs by three employees each.

d. October 6, 1978. Kinsey called together the Waukesha real estate staff and advised them that three District 2

positions were being transferred to other districts within the State to correct an imbalance in the deployment of real estate personnel state wide. The change would be accomplished by voluntary transfer, transfer of retirees' positions or by designation.

e. October 7, 1978. One employe, Eugene Brazeau, volunteered to take an early retirement, and another, Patricia Anderson, volunteered to transfer. A few days later appellants Murphy and Brauer were advised in individual meetings with the District director that they too were being considered as possible transferees.

f. October 16, 1978. James Machnik, Real Estate Supervisor, transferred from Milwaukee to Waukesha giving District 2 an imbalance of four over rather than three over the proposed staff level.

g. October 16 or 17, 1978. Kinsey discussed proposed transferees with Machnik but did not discuss them with Eugene Sell, who had been District 2 Real Estate Supervisor for 19 years.

h. October 23, 1978. Kinsey advised Schaeffer and H. L. Fiedler, Administrator, Division of Facilities, that he had identified the following persons' positions for possible reallocation: Brazeau Anderson; and Sell (potential retiree), Murphy, and Brauer. Anderson was later rejected by Schaeffer as a possible transferee because she was said to be too inexperienced.

- i. October 27, 1978. Following a discussion between Kinsey and Machnik as to whether Kennel or Hammond (another Real Estate Agent 2) was more appropriate as a replacement for Anderson's name on the proposed transfer list, Kennel was named.
  - j. November 7, 1978. Appellants verbally advised of the transfer decision by Kinsey.
  - k. November 17, 1978. Letters to Kennel, Brauer, and Murphy were sent advising them of the transfer decision.
  - l. November 28, 1978. Appeals filed with the Commission by Murphy and Brauer. Kennel's appeal was filed December 1, 1978.
  - m. December 5, 1978. Effective date of appellants' transfers was changed from January 1, 1979, to February 11, 1979.
  - n. December 15, 1979. Appellants wrote to John Roslak, DOT Personnel Director, requesting that they be assigned on a "temporary loan basis."
  - o. December 29, 1978. Roslak replied to appellants that the current and anticipated future real estate program required permanent transfer. The request for loan basis transfer was denied.
4. All three appellants objected not only to the transfers themselves but also to the timing (holiday season) and the short notice (approximately five weeks) on the transfers, but each had a number of personal concerns:
- a. Kennel - He is 52 years of age; wife has rheumatoid arthritis and a dropped foot as a result of polio; her health would be aggravated by the climate in Superior; he has high blood pressure; wife is employed in the District 2 area, would lose income, retirement credits; total moving costs would not be covered.

b. Brauer - His April 1978 request for transfer into District 2 had just been approved on September 19, 1978; living expenses would be higher but no promotion was involved; family was opposed to the move.

c. Murphy - He is 63 years of age; had been involuntarily transferred into District 2 with the promise that it would be permanent; he purchased a home and intended to retire there; family had no desire to leave; transfer would be financially impossible; has high blood pressure; Doctor advises against move; has service-connected disability.

5. Apart from personal concerns, appellants objected to the fact that Kinsey was involved in selection of involuntary transferees from a class (Real Estate Agents) that included Kinsey's own wife. (About a year prior to the transfer order, Kinsey had married Margaret Zastrow, now a Real Estate Agent 2 in Waukesha.)

6. Appellants believed that Zastrow may have been excluded from consideration for transfer through favoritism by her husband. This belief is based in part upon the fact that Zastrow was one of two real estate employees whose recommended merit increase for FYE 1978 was not cut in half by Kinsey.

7. Respondent contends that the criteria used in selecting transferees were objective and that Kinsey's wife was excluded from consideration not because of her marriage to him but rather because she did not fit the criteria. They also contend that the final selection was made by Schaeffer and not by Kinsey. Of the persons involved in the transferee designation, none had knowledge that Kinsey was married to Zastrow until after the decision was made, except Kinsey.

8. The evidence adduced at the hearing is inconsistent as to the criteria for selecting positions to be transferred:

a. The reallocation plan approved by the Deputy secretary

was unspecific as to criteria even though the specific needs of the district with the most critical shortage (Madison) were known. The plan did indicate that "most, if not all, " of the needed changes would be accomplished through voluntary moves.

b. According to Schaeffer, the involuntary choices should be the least senior person with appraising and negotiating skills, and should accommodate the needs of the "short" districts and at the same time maintain a balanced staff in Waukesha and Milwaukee.

c. Kinsey based his recommendations on the organizational needs in the southeast and in the "short" districts, the most effective use of Waukesha personnel, bargaining contracts, seniority, retirement potential and future organization of District 2 as he envisioned it.

9. Notwithstanding 8a above, at least three of the six reallocations are involuntary; notwithstanding 8b above, two of the three transferees had skills primarily in relocation rather than appraisal and negotiation; and notwithstanding 8c above, one of the persons transferred is less than two years away from retirement eligibility and the staff left in District 2 would be largely specialists rather than generalists, which Kinsey considers undesirable from a managerial standpoint. Also, notwithstanding 8c above, the transfer in of Machnik from Milwaukee to Waukesha was not consistent with the objective to reduce real estate Personnel in the districts with excess and to transfer them to districts which were "short." Both Waukesha and Milwaukee had excesses.

10. The appellants perceive a potential benefit to Zastrow as a result of their designation as transferees in that she would be the sole relocation specialist left in the district and could become heir to appellant Murphy's Real Estate Agent 3 billet.

11. "Strife," "personality conflicts" and "strained relationships" have characterized the dealings between Kinsey and the Real Estate section because Kinsey has no confidence in the managerial ability of Vincent J. Weisinger, District 2, Real Estate Section Chief.

12. In arriving at a decision as to the transferees, Kinsey did not consult with Weisinger regarding his appraisal of the real estate staff being considered but rather relied on the advice of the newly transferred Machnik.<sup>2</sup>

13. Given the potential for the imbalance to have been temporarily accommodated through "interdistrict loaning of staff and the judicious use of the central appraisal pool;" and, given the fact that the imbalance, as was anticipated by the two-step program (3b above), could have been "attained through voluntary moves" and attrition, the forced transfers served no useful management purpose.<sup>3</sup>

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<sup>2</sup>Although he was out due to illness at the time of Kinsey's recommendation, Weisinger did return to work full time on November 3, 1978, and was available prior to the final decision on the designees.

<sup>3</sup>This finding is corroborated by the agency's experience since the filing of the appeals.



OPINION

This matter is before the Commission as an appeal of a decision on a non-contractual grievance at the third step, pursuant to §230,45(1)(c), Stats., (1977). This subsection provides that the Commission shall:

"Serve as final step arbiter in a state employe grievance procedure relating to conditions of employment, subject to rules of the secretary providing the minimum requirements and scope of such grievance procedure."

While no such rules have been promulgated to date, chapter 196, Laws of 1977, §129(4q), provides:

"The rules of the director of the bureau of personnel in the department of administration promulgated under section 16.03, 1975 Stats., shall remain in full force and effect until modified...."

Section Pers 25.01, WAC, has not been modified and contains the following language:

"...each department shall, as required by the director, establish a written grievance procedure. Such procedure shall meet standards established by the director."

Therefore, in the absence of rules promulgated by the DER secretary, the aforesaid rule of the director, and the grievance procedure standards issued pursuant to the rule, provide the framework for the grievance system. These standards are contained in the Administrative Practices Manuel, State of Wisconsin, Department of Administration, Subject: Non-contractual Employe Grievance Procedures, effective 8/24/66, revised 10/1/74. Matters appealable at the fourth step to the board (now Commission) are set forth at §I. D. 1. b.:

" However, only those complaints which allege that an agency had violated, through incorrect interpretation or unfair application:

- 1) a rule of the Director, State Bureau of Personnel or Civil Service Statute....

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may be appealed to the State Personnel Board."

This brings the Commission to the question of the legal standard to be applied in the decision of an appeal of this nature. This case was noticed for hearing with the use of the issue suggested by the respondent at the prehearing conference. See conference report dated December 26, 1978:

"Whether the Department of Transportation, through incorrect interpretation or unfair application, has violated the Civil Service Statute or Administrative Rule."

The transactions here in question are transfers. Neither the statutes, see §230.29, Stats., (1977), nor the administrative code, see chapter Pers 15, WAC, provide any criteria for the transfer decision.

The language set forth in the above statement of issue, which in turn is taken directly from the above-cited APM, appears to provide some guidance in this type of situation. The APM language and the issue for hearing contain the phrase "unfair application." The word unfair means: "not just or impartial; biased; inequitable." Webster's New Word Dictionary, Second College Edition (1972).

In order for the term "unfair application" to have any meaning, the legal standard of review must encompass more than the bare question of whether the agency followed the procedures set forth in the statutes and rules, such as obtaining the approval of the administrator. Such a limited review would not include any application of the "unfair application standard." In such case that language might as well not be in the APM. Furthermore, an approach that gives full effect to the "unfair application" terminology is consistent with general principles of administrative law relating to an administrative appeal of an administrative decision. See

Marshfield Community Bank v. State Banking Board., 496 S.W. 2d 17, 25-26

(MO 1973). In that case, Missouri statutes provided for appeals to the State Banking Board of decisions of the commissioner of finance granting or denying bank charters. The statutes did not specify the scope of the hearing or the legal standard to be applied. See §§361.094, 361.096, MO Stats., (1969). On appeal the following argument was made as to the scope of the board's authority:

"Respondent makes an analysis of the various statutes dealing with the duties and responsibilities of the Commissioner of Finance, and reaches this conclusion: 1) that the Commissioner 'is the ... 'agency' ... within the Division of Finance who is vested with discretionary authority to grant or deny a bank charter;' 2) that his discretion in this matter may not be overridden except for palpable abuse; 3) that, in consequence, 'the Banking board may only review the action of the Commissioner and determine whether or not his action was supported by competent and substantial evidence or was arbitrary and capricious;' 4) that such a review would necessarily be confined to the record before the Commissioner on which he based his decision; hence 5) that 'when the Banking Board purports to act beyond this function and to conduct a de novo hearing and to substitute its discretion for that of the Commissioner of Finance, it has gone entirely outside its jurisdiction and authority.'"

The court rejected this argument with the following statement:

"Nobody denies that the issuance of a charter to a new bank is, in the first instance, an exercise of the Commissioner's discretionary authority. But it does not follow that his discretion is inviolable save for such abuse of it as may be reflected by the records of his own office. To say so is to equate an appeal to an administrative tribunal with a 'judicial review' by the courts. To confirm the analogy, consult the provisions of Chapter 536, RSMo 1969, V.A.M.S. If respondent has the right of it, why would the Legislature provide at all for an appeal to the Board when the same result would be accomplished under the same restrictive rule of review by simply allowing the appeal from the Commissioner's action to be taken directly to the Courts? And if the

Commissioner's decision is sacrosanct save for abuse of discretion, why did the Legislature require him to obey any order made by the Board on appeal, as it did by §361.095(4), RSMo 1969, V.A.M.S., *without* imposing, either there or elsewhere, some commensurate restraint on the scope of the Board's review? And if the Legislature did not intend for the Board to decide the case on the basis of a de novo hearing, why did it authorize the Board to subpoena witnesses who never appeared before the Commissioner and compel the production of documentary evidence beyond that contained in the Commissioner's files?"

See also Mark Twain Bancshares Inc. v. Kostman, 541 S.W. 2d 1, 3 (MO 1975).

The analogy between the Missouri situation and the statutes governing the operation of the Personnel Commission is apparent. The Commission has the power to subpoena witnesses and to conduct full evidentiary hearings. See §230.44(4)(b), Stats., (1977). Commission orders are enforceable, see §230.44(4)(c).

There are specific limits on the Commission's authority, but these are set out in particular sections and relate to particular categories of appeals or transactions. See, e.g., §230.44(1)(d), which provides a standard of "illegal or an abuse of discretion" with respect to "personnel action after certification which is related to the hiring process," or §230.44(1)(c), which imposes a "just cause" standard of review as to certain disciplinary matters. There is no basis for reading in similar kinds of restrictions, such as limiting review to "abuse of discretion" or "arbitrary and capricious action," as to other kinds of appeals where such restrictions are not imposed by statute. See Ryczek v. Wettengel, Wis. Pers. Bd. No. 73-26 (7/2/74), and Jallings v. Smith, Wis. Pers. Bd. No. 75-44 (8/23/76), where the Personnel Board rejected the application of an arbitrary and capricious standard of

review on appeals of decisions of the director pursuant to then  
§16.05(1)(f), Stats.

For these reasons, it is the opinion of the Commission that the standard of review on this appeal incorporated the question of whether there has been an "unfair application" of the transfer statute and rules, and this in turn involves the questions of whether or not the respondent's actions were unjust, not impartial, biased, or inequitable.

In examining whether there was "unfair application," the Commission does not purport to substitute its judgment for that of the respondent as to that agency's analysis of its future operational needs nor its remedy for any problems disclosed thereby. Thus, we do not challenge the respondent's determination that there is an imbalance in its real estate assignments and that it must be remedied by interdistrict reallocations of positions. However, we do consider it well within the Commission's province to scrutinize the personnel transactions which may follow from an operational determination; and, more particularly, to look into whether or not such transactions are "unfair" within the meaning of the above-cited APM.

Accepting then as given that the staffing analyses which led to the October 3, 1978, two-step program were objective and that the proposed remedy was sound, the earliest point at which the Commission's jurisdiction might come into play is at the implementation stage. It was at this stage that the Director of District 2, who was to have a central role in identifying transferees, became involved and was faced with having to designate transferees from a group that included his own wife. Shaeffer, who involved Kinsey in the criteria setting and designation

process, did not know that he had a conflict of interest. But Kinsey knew that he had one; and, the fact that he proceeded to make designations adverse to the appellants and singularly favorable to his wife (see finding 10 above) was a fundamental factor in our conclusion that the transfer designations were not impartial and were indeed inequitable.

Notwithstanding the respondent's contentions to the contrary, neither the criteria themselves nor the final designations were mandated by the deputy secretary's authorization. In fact, the inconsistencies pointed out in finding 9 above suggest that the choices may have been based on considerations other than the stated ones.

Even if the Commission were to concede that the selection criteria propounded by the respondent were completely appropriate, we could not concede that the respondent has any rational basis for its steadfast refusal to change its designation upon learning the particular hardships the transfers imposed upon the appellants. The imposition of such hardship was neither reasonable nor necessary and was particularly difficult to understand in light of the availability of the alternatives mentioned in finding 13 above. In the opinion of the Commission, these transfers violated the spirit, if not the letter, of §230.01(2), Stats., which provides in part:

"...It is the policy of the State to ensure its employees opportunities for satisfying careers and fair treatment based upon the value of each employee's services."

While the Commission's decision in these appeals is based on the record of events that occurred up to the time of the decision appealed, the Commission does note that at the hearing, the appellants introduced persuasive evidence that the transfers were no longer necessary. Despite the evidence

that new developments had opened for them alternative courses of action, the respondent continued to defend the transfer decision.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter in this case pursuant to §230.45(1)(c), Stats.

2. The standard of judgment is whether or not the respondent, through incorrect interpretation or unfair application, has violated the Civil Service Statutes or Administrative Rules.

3. "Unfair application" in the context of this case means not just; not impartial; biased; inequitable.

4. The burden of proving by the greater weight of credible evidence that the respondent's transfer decision was an "unfair application" was on the appellants and they have sustained that burden.

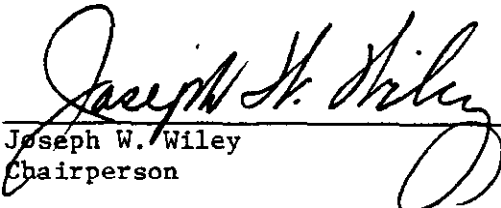
5. The findings in this case support a conclusion that: a) Kinsey's involvement in designating transferees from a class that included his wife; and b) the ordering of involuntary transfes under the circumstances herein described, were unfair applications of the Statutes and the Administrative Rules.

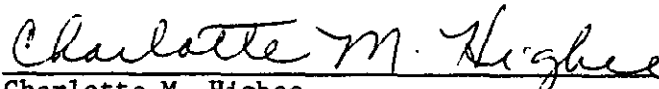
ORDER

IT IS HEREBY ORDERED that the respondent's decision on these  
grievances is REJECTED, and this matter is remanded to the respondent  
for action in accordance with this Decision.

Dated: Feb 15, 1979.

STATE PERSONNEL COMMISSION

  
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Joseph W. Wiley  
Chairperson

  
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Charlotte M. Higbee  
Commissioner