

WISCONSIN DEPARTMENT  
EMPLOYMENT RELATIONS,

Petitioner

v.

AMENDED ORDER

85 CV 3022

WISCONSIN PERSONNEL  
COMMISSION,

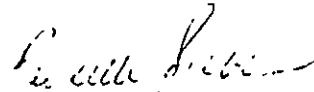
Respondent

ORDER

For the reasons stated in my Memorandum Decision of December 27, 1985, the Final Decision and Order of the Wisconsin Personnel Commission in the Kent Klepinger appeal is REVERSED. The matter is remanded to the Personnel Commission with orders to dismiss Kent Klepinger's appeal before said Commission.

Dated at Madison, Wisconsin this 29 day of January, 1986.

BY THE COURT:



Paulette Siebers, Judge  
Circuit Court Br. 4

cc: Kent Klepinger  
AAG Robert Vergeront  
Atty. Michael Perino

WISCONSIN DEPARTMENT OF EMPLOYMENT  
RELATIONS,

Petitioner

MEMORANDUM DECISION  
and ORDER

JAN 07 1986

-vs-

WISCONSIN PERSONNEL COMMISSION

Personnel  
Commission

Case No. 85 CV 3022

Defendant

BACKGROUND

This is an appeal by the Wisconsin Department of Employment Relations (DER) of a decision of the Wisconsin Personnel Commission (WPC), filed under sec 227.16, Stats. The only issue in this review is the effective date of a classification of a state service position held by Kent Klepinger pursuant to the classification scheme set out in the Wisconsin Administrative Code, Ch. ER-Pers 3.01, "Position Classification Actions".

The following facts, which are not in dispute, are derived from the record. Klepinger has held the position, Director of Research, DNR, since June 1, 1981. This position was formerly classified as Natural Resources Administrator 3, pay range 1-18. (NRA 3, PR 1-18). Klepinger's predecessor in the position, Cyril Kabat, believed this classification was incorrect, and following a survey and reclassification in 1979 which left the classification of his position essentially unchanged, Kabat appealed.

While his appeal was pending, Kabat retired, but continued to press the appeal. Klepinger succeeded to the Kabat position on June 1, 1981. On June 1, 1982, Klepinger filed a request for reclassification of the position; he also believed the NRA-3, PR 1-18 classification was too low.

At the time of Klepinger's reclassification request, a second survey was under way. This survey, completed sometime in

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1983, was assigned an effective date of June 12, 1983. The survey concluded that the position held by Klepinger should be reallocated upward to NRA-4, PR1-19.

On July 7, 1983, the Division of Personnel (DOP) entered into a settlement agreement with Kabat. Pursuant to the terms of the settlement agreement, Kabat withdrew his appeal, and DOP agreed to "reallocate the position...from Natural Resources Administrator 2 (PR1-18) to Natural Resources Administrator 3 (PR1-19), effective August 26, 1979"<sup>1</sup> (Emphasis added). On August 17, 1983, WPD dismissed Kabat's appeal pursuant to this settlement agreement, however, the order of dismissal was not made part of the record in this case.

On July 20, 1983, petitioner (DER)<sup>2</sup> issued notice to Klepinger that the position had been reallocated, but the effective date of that reallocation notice was June 12, 1983, the effective date of the second survey. The record reveals that DER Secretary Fuller had signed both Klepinger's and Kabat's reallocation notices on July 15, 1983, one reallocating Klepinger's position as of June 12, 1983; the other reallocated Kabat's position as of August 26, 1979.

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<sup>1</sup> The parties all agree that the settlement agreement had a typographical error; it should reflect a change from NRA-3 to NRA-4.

<sup>2</sup> It should also be noted that on July 1, 1983, the Department of Employment Relations (DER) assumed authority over classification matters from DOP.

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Klepinger then filed an appeal, asserting that the earlier date of reallocation, that issued to Kabat, should apply to him. In the meantime, DER unilaterally rescinded its reallocation notice to Kabat. After hearing the appeal, the hearing examiner proposed that June 12, 1983 was the proper date of reallocation for this position but WPC in part rejected this conclusion and held that the August 26, 1979 date applied to Klepinger. DER then filed this appeal of the WPC decision.

The only issue in this review is the proper date of the re-allocation of the position now held by Klepinger. For the reasons set out below, the decision of the WPC is reversed in part.

OPINION

WPC adopted "part A" of its hearing examiner's proposed opinion. The conclusion of Part A is that "irrespective of any settlement agreement between Mr. Kabat and the respondent, [DER] the correct effective date for reallocating Mr. Kabat's position was June 12, 1983." (Proposed Opinion and Order, p.5, emphasis added.) The examiner reached this conclusion in a well reasoned opinion in which he applied the provisions of ER.Pers 3, Wisconsin Administrative Code, and sec. 230.09(2)(a m), Wis. Stats., to his findings of fact. He concluded, and WPC agreed, that the position reallocation was a result of the second survey (effective June 12, 1983), and thus could not pre-date that survey. I concur and adopt the reasoning and conclusion of the examiner that the correct effective date of the reallocation of the position is June 12, 1983.

WPC then, however, went further and held that the Kabat settlement agreement, which set the earlier date of reallocation, had a res judicata effect in the Klepinger appeal; the August 26, 1979

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date of the settlement agreement therefore was ultimately found to apply to Klepinger. In sum, having first determined that the proper date of the position reallocation should have been June 12, 1983, WPC then applied the earlier reallocation date (8/26/79), that from the Kabat settlement, in order to resolve the Klepinger appeal.

The application of the doctrine of res judicata is a question of law on review. De Pratt v. West Bend Mutual Ins. Co., 113 Wis.2d 306, 310, 334 NW 2d 883. Similarly, enforcement of the Kabat settlement agreement, at least insofar as it involves WPC's authority to do so, is a question of statutory interpretation. "[A]pplication of a statute to a particular set of facts is a question of law."

Bucyrus-Erie Co. v. ILHR Department, 90 Wis 2d 408, 280 N.W.2d 142 (1979). Where material facts are not in dispute, and the only issue is one of law, the Court may substitute its judgment for that of the agency. Frito-Lay, Inc. v. LIRC, 95 Wis.2d 395, 290 N.W. 2d 55, (Ct.App., 1980). "The court shall set aside...the agency action if it finds that the agency has erroneously interpreted a provision of law..." Sec. 227.20(5), Wis. Stats. Although due weight should be accorded to agencies acting in their special area of competence, "no special deference is required when this court is as competent as the...agency to decide the legal question involved." Boynton Cab Co. v. ILHR, 96 Wis.2d 396, 406, 291 N.W. 2d 850 (1980). Here, I will not accord "special deference", but rather substitute my judgment to resolve the legal issue.

It is wholly inconsistent for WPC to determine the "correct" date of the position reallocation and then, in the same breath, go on to

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apply the incorrect date to resolve the issue here in dispute. In order to reach this incongruous result, WPC applied the doctrine of res judicata. Its application here is misplaced.

Although the doctrine of res judicata has been increasingly recognized as a viable doctrine in administrative law, (see, generally, Cooper, State Administrative Law, ch.XV, p.503), this view has not yet been sanctioned by the Wisconsin Supreme Court. The most recent statement rings clear: "Wisconsin rejects the application of the doctrine of res judicata to the proceedings of an administrative agency". Board of Regents v. Wisconsin Personnel Commission, 103 Wis.2d 545, 552, 309 N.W.2d 366 (Ct.Apps, 1981), citing City of Fond du Lac v. DNR, 45 Wis.2d 620, 625, 173 N.W. 2d 605, Sup Ct, (1970).

Moreover, even if I concluded that application of the doctrine of res judicata was appropriate in this administrative law context, its application here would require the WPC to take on an enforcement role, that is, enforcing the Kabat settlement. As the hearing examiner pointed out in his proposed opinion, it is unclear if WPC is granted such power under ch. 230, Wis.Stats. Sec. 230.44(4)(c), Wis.Stats., states in part:

After conducting a hearing on an appeal under this section, the commission shall either affirm, modify or reject the action which is the subject of the appeal. If the commission rejects or modifies the action, the commission may issue an enforceable order... Any action brought against the person who is subject to the order for failure to comply...shall be brought and served within 60 days...

The various provisions of Sec. 230.45, Wis.Stats., which enumerate the powers and duties of WPC, however, limit WPC's power to only "hear appeals." That section does not empower WPC to enforce anything, particularly not contracts entered in a different case. Thus,

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enforcement actions referred to in sec. 230.44(4)(c) are to be brought only in circuit court. Where there is "...any reasonable doubt of the existence of an implied power of an administrative body [it] should be resolved against the exercise of such authority." State ex rel Farrel v. Schubert, 52 Wis.2d 351, 358, 190 N.W.2d 529, (1971). This compels a single conclusion; WPC lacks legal authority to enforce the Kabat settlement agreement.

WPC contends that it is not enforcing the settlement agreement (Final Decision and Order, p. 1-3). I find this view to be an erroneous application of the law. Since WPC concluded in its decision that "irrespective of any settlement agreement...the correct effective date for reallocating Mr. Kabat's position was June 12, 1983," there is little doubt that the only legal basis for applying the August 26, 1979 reallocation date to Klepinger is by WPC's giving force and effect to the Kabat settlement agreement. I conclude as a matter of law that WPC lacked jurisdiction to enforce Kabat's settlement agreement. Sec. 230.45, Stats.

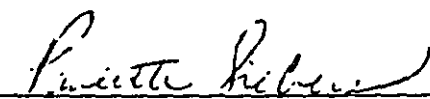
ORDER

For the above stated reasons, the decision of the Wisconsin Personnel Commission is REVERSED. Because WPC lacked legal authority to enforce the Kabat Settlement agreement, the June 12, 1983 reallocation date must apply to Klepinger. Pursuant to Sec. 227.20(5), Wis.Stats. the appeal therefore is DISMISSED.

Dated at Madison, Wisconsin this 27 day of December, 1985.

BY THE COURT:

cc: Kent Klepinger  
Atty. Michael Perino  
AAG Robert Vergeront  
P. Scott Hassett

  
Paulette Siebers, Judge  
Circuit Court Br. 4