

APPEALS: The Personnel Advisory Board under the State Merit System Act has jurisdiction to hear an appeal from the order of the Merit System Council.

April 6, 1948



Honorable Ralph J. Turner
Director, Personnel Division
State Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Turner:

This will acknowledge your letter requesting an opinion from this department construing paragraph (b) and Subsection 8 of paragraph (c) of Section 2 of House Bill 162, Laws of Missouri, 1945, page 1157, l.c. 1158. The construction of the terms of said Section 2 of said House Bill 162, as contained in the paragraphs and subsection above mentioned, will require also, we think, a construction of the terms, meaning and effect of paragraph (e) of Section 38, Laws of Missouri, 1945, page 1177, l.c. 1178, as it relates to said paragraphs (b) and (c) of said Section 2 of said House Bill 162 respecting the rights of persons under what was formerly termed the Merit System Council and the Merit System for the Division of Health, Division of Employment Security and Division of Welfare relating to the procedure specified in such statutes in exercising the right of appeal from the order of the Merit System Council.

Your letter consisting of more than two closely typewritten pages requesting this opinion, is as follows:

"The question has arisen as to the construction to be given to Section 2(c)(8) of House Bill No. 162, enacted by the Sixty-third General Assembly, regarding the jurisdiction of the Personnel Advisory Board over Personnel Actions that were taken immediately prior to July 1, 1947, by agencies that were previously under the Merit System Council, the agency responsible for administering the Merit System until July 1, 1947.

"The Merit System Council was the agency that administered the Merit System for the Division of Health, Division of Employment Security, and Division of Welfare up until July 1, 1947, at such time the Personnel Division and Personnel Advisory Board assumed jurisdiction of these agencies so

far as the Merit System was concerned, in accordance with Section 2(b) and 2(c)(8) of House Bill No. 162.

"The effective date of House Bill No. 162 was July 1, 1946. However, all employees who had been selected on the basis of merit and fitness were exempt from the provisions of the act for one year, as is so stated in Section 2(c)(8), which reads as follows:

'All positions and appointments in divisions of the service subject to this act which have been heretofore required to be filled upon the basis of merit and fitness; provided, however, that one year after this act becomes effective this exemption shall cease and determine and thereafter the selection, appointment, pay, tenure and removal of persons to or from all such positions shall be governed by the provisions of this act; and provided further that all persons now or hereafter appointed or employed in divisions of the service on the basis of merit and fitness as heretofore required, shall be entitled, after their exemption from the provisions of this act ceases, to continue as employees in said divisions of the service and shall have all the rights and privileges in such employment as are provided for persons appointed and qualified under this act.'

"Specifically, an appeal has been filed with the Personnel Advisory Board by an employee, the situation being as follows: The said employee had merit status under the Merit System Council. On June 24, 1947 the said employee was notified by an agency that effective June 30, 1947 he would be transferred to a different position. This action resulted in the employee registering a protest both to the Merit System Council and the Personnel Advisory Board to the effect that such action was not a transfer, but was in fact a demotion. On June 30, 1947 the Merit System Council determined that in its judgment the action was a transfer and not a demotion.

As this protest was also filed with the Personnel Division, which took over the functions of the Merit System Council on July 1, 1947, the Personnel Division, in accordance with House Bill No. 162, surveyed the duties that the individual was performing and found that they were of such nature that they called for a lower classification than the employee held on June 30, 1947. Such action is interpreted to be a demotion in accordance with Section 29, House Bill No. 162, which reads as follows:

'* * *Any change of an employee from a position in one class to a position in a class of lower rank shall be considered a demotion and shall be made only in accordance with the procedure prescribed by Section 37 for cases of dismissal. An employee thus demoted shall have the right to appeal to the Board under Section 38 of this Act.'

"Section 2(c)(8) of the act provides that after the exemption from the act ceases, such persons 'shall have all the rights and privileges in such employment as are provided for persons appointed and qualified under this act'. One of such rights is set forth in Section 38(e) which reads as follows:

'Any regular employee who is dismissed or demoted, or suspended, may appeal in writing to the Board within thirty days after the effective date thereof, setting forth in substance his reasons for claiming that the dismissal, suspension or demotion was for political, religious, or racial reasons, or not for the good of the service. Upon such appeal, both the appealing employee and the appointing authority whose action is reviewed shall have the right to be heard and to present evidence at a hearing which, at the request of the appealing employee, shall be public. At the hearing of such appeals, technical rules of evidence shall not apply. After the hearing and consideration of the evidence for and against a

suspension or demotion the Board shall order the reinstatement of the employee to his former position and the payment to the employee of such salary as he has lost by reason of such suspension or demotion.* * *

"The appellant in this case filed the appeal within the thirty-day period which naturally extended into July, at such time as the Personnel Advisory Board and the Personnel Division had jurisdiction under the act, and the individual was no longer under the jurisdiction of the Merit System Council. Therefore, the question is whether or not the Personnel Advisory Board has the power to hear the appeal and make findings in accordance with Section 38(e) previously cited. Another question is if the Personnel Advisory Board does not have power to act in this case, what right does the affected employee have?

"We would appreciate very much receiving an opinion from you in order that the questions outlined herein may be resolved. Should you desire a clarification of any points set forth, please feel free to contact the undersigned."

On page 2 of your letter is a quotation of some of the language and provisions of said paragraph (e) of said Section 38 of House Bill 162, Laws Missouri, 1945, l.c. 1178. The quotation used would appear to make said paragraph (e) of Section 38 mandatory to compel the Board to reinstate any demoted or discharged employee.

Your quote from said Section 38 is only one of three alternative orders which the Board may make after a hearing on appeal.

Since there is no break-down of the continuous text of said Section 38 to correlate different parts of the text of said Section by asterisks, we think it is necessary to have all of the text of said paragraph (e) before us in the consideration of its relationship to said paragraph (b) and (c) of said Section 2 of said House Bill 162. Therefore, we will quote all of paragraph (e) of said Section 38 of House Bill 162, Laws of Missouri, 1945, l.c. 1178, which is as follows:

"Any regular employee who is dismissed or demoted or suspended, may appeal in writing to the Board within thirty days after the effective date thereof, setting forth in substance his reasons for claiming that the dismissal, suspension or demotion was

for political, religious, or racial reasons, or not for the good of the service. Upon such appeal, both the appealing employee and the appointing authority whose action is reviewed shall have the right to be heard and to present evidence at a hearing which at the request of the appealing employee, shall be public. At the hearing of such appeals, technical rules of evidence shall not apply. After the hearing and consideration of the evidence for and against a suspension or demotion the Board shall approve or disapprove such action and in the event of a disapproval the Board shall order the reinstatement of the employee to his former position and the payment to the employee of such salary as he has lost by reason of such suspension or demotion. After the hearing and consideration of the evidence for and against a dismissal the Board shall approve or disapprove such action and may make any one of the following appropriate orders. (1) Order the reinstatement of the employee to his former position and the payment to the employee of such salary as has been lost by reason of such dismissal. (2) Sustain the dismissal of such employee, unless the Board finds that the dismissal was based upon political, social, or religious reason, in which case it shall order the reinstatement of the employee to his former position and the payment to the employee of such salary as has been lost by reason of such dismissal. (3) Except as provided above the Board may sustain the dismissal, but may order the name of the dismissed employee returned to an appropriate reinstatement register, or may take steps to effect the transfer of such employee to a comparable position in another department. The board shall establish such rules as may be necessary to give effect to the provisions of this section."

The right of appeal is purely statutory in Missouri. 3 C.J. Section 29, page 316 states the text on the origin and present status of the right of appeal as follows:

"The proceeding by appeal was entirely unknown to the common law. It is of civil-law origin, and

was introduced therefrom into courts of equity and admiralty. Consequently, the remedy by appeal in actions at law, and in this country in equity also, is purely of constitutional or statutory origin, and exists only when given by some constitutional or statutory provision. * * * *"

The same work, same volume, section 464, page 616 states again, on the right of appeal, the following text:

"* * * On the other hand, although the right of appeal is wholly statutory, it is available to any party who comes within the statute granting the right, and cannot be denied or abridged by the courts except as authorized by the statute.* * *"

Our Supreme Court in the case of Thomas et al. v. Elliott et al. 215 Mo. 598, l.c. 602, 603, on the right of appeal said:

"* * * Right of appeal is given by statute and unless the person who feels aggrieved by the action of the trial court is given the right of appeal by the statute he has no such right. The General Assembly is not compelled to give such right; it may give or withhold it as in its discretion may seem best. * * *"

Our St. Louis Court of Appeals in the case of Bussiere v. Sayman, 171 Mo. App. 11, l.c. 14, made the following pronouncement on the right of appeal:

"Though the right of appeal is purely statutory, it is available to every party who prosecutes one within the terms of the statute authorizing it.* * *"

The effective date of H.B. 162, now found in Laws of Missouri, 1945, page 1157, was July 1, 1946. Exemptions were granted in subsection 8 of paragraph (c) of Section 2, Laws of Missouri 1943, l.c. 1159 from the terms of said act to all persons who were appointed upon the basis of merit and fitness under the former Merit System Council for the period of one year. Said subsection 8, in the second proviso thereof, directs that after such exemptions from the provisions of said H.B. 162 had ceased said employees should continue as employees in said divisions of this service and shall have all the rights and privileges in such employment as are provided for persons appointed and qualified under the Act. (H.B.162). The exemptions granted the persons formerly employed under the previous

Merit System Council ceased on July 1, 1947.

Among the "rights and privileges" to be possessed and exercised by such employees or appointees of the former Merit System Council after the removal of such exemptions and which continue to be held by them by continuing them as employees in the division of service set up by said H.B. 162, under said subsection 8 of paragraph (c) of said Section 2, aforesaid, was, and is, under paragraph (e) of Section 38, Laws of Missouri 1945, pages 1177 and 1178, the right of appeal by any employee, who is dismissed or demoted or suspended, by setting forth in writing to the Board, within thirty days after the effective date thereof, his reason for claiming that the dismissal, suspension or demotion was for political, religious or racial reasons, or not for the good of the service. The Personnel Division and Personnel Advisory Board assumed jurisdiction for the administration of the Merit System Act, under the terms of House Bill 162, as now found in Laws of Missouri, 1945, page 1157, as we are advised in your letter requesting this opinion, on July 1, 1947. It is further stated in your letter that an employee having a merit status under the former Merit System Council was notified by that agency on June 24, 1947 that as of June 30, 1947 he would be transferred to a different position. This action, it is said, resulted in the employee protesting to both the Merit System Council and the Personnel Advisory Board that said employee interpreted the said transfer to a different position to be a demotion rather than a transfer. On June 30, 1947, it is further related, the Merit System Council determine that, in its judgment, the action was a transfer and not a demotion. It is further stated that the protest of the employee--and by this we understand the protest to mean a written protest--was filed with the Personnel Division under the new Act, House Bill 162, on or about July 1, 1947, and that the said employee, so transferred or demoted, as the case might terminate, still protesting, and, in the assertion of his rights under said paragraph (e) of said Section 38 of said H.B. 162, filed his written appeal within the thirty day period after June 30, 1947, the date of the rendition of the judgment of the Merit System Council. But it was held by the Merit System Council that the change in the employee's status was a transfer and not a demotion. The said thirty day period of time for the appeal extended over into July 1947 when and after which the Personnel Advisory Board and the Personnel Division had complete jurisdiction over the administration of the Act known as said H. B. 162, including matters of appeal.

It appears from your letter that the said employee prosecuting his appeal from the order of the Merit System Council, took steps

to perfect his appeal immediately after the decision of the Merit System Council of which he complains, as being a demotion instead of a transfer. This was one year after the effective date of H. B. 162. All persons concerned in the administration of the Act as officers in the performance of their duties under the Act, or as employees, must have been aware of the terms of the Act, among which was the right of appeal. It would appear that the said employee lodged his written appeal with the Personnel Advisory Board and the Personnel Division within the time prescribed and in the manner prescribed in H. B. 162. As we have observed hereinabove the employee under discussion had the statutory right under said paragraph (e) of Section 38 of said H. B. 162 to appeal since he had the same status as any other regular employee under said Act. As we observe the terms of said H. B. 162 the appeal of the employee now being prosecuted by him was lawfully lodged with the Personnel Advisory Board and the Personnel Division within the time and in the manner prescribed by law, and that the said Personnel Advisory Board has the power to hear his appeal and make its findings in accordance with said paragraph (e) of said Section 38 of said House Bill 162.

Having concluded that the Personnel Advisory Board may hear and determine the appeal of said employee, the further status of said employee as inquired of in the last sentence of the second to last paragraph in your letter need not be considered.

CONCLUSION

It is therefore, the opinion of this department that under the facts given in the letter submitted by you requesting this opinion, and under the terms of said H. B. 162, now found in Laws Missouri, 1945, page 1157, and other authorities cited, the Personnel Advisory Board, provided for in said H. B. 162, has jurisdiction to hear and determine the appeal of an employee of the former Merit System Council from its order demoting or transferring him, as is provided under the terms of paragraph (e) of Section 38, Laws of Missouri, 1945, pages 1177 and 1178.

Respectfully submitted,

APPROVED:

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