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STATE OF WISCONSIN

CIRCUIT COURT

STATE PERSONNEL BOARD
DANE COUNTY

WILBUR J. SCHMIDT and
C. K. WETTENGEL,

Petitioners,

Case No. 148-246

vs.

STATE OF WISCONSIN PERSONNEL
BOARD (John W. McLimans),

MEMORANDUM DECISION

Respondent.

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is a proceeding by petitioners Secretary of Department of Health and Social Services and Director of State Bureau of Personnel under ch. 227, Stats., to review a decision of respondent State Personnel Board (hereafter the Board) labeled "Opinion and Order" dated August 29, 1975, entered in an appeal by John W. McLimans from decisions of petitioners.

STATEMENT OF FACTS

The Board in the opinion portion of its decision set forth a detailed statement of facts, and the petitioners' brief states that no exception is taken to the facts so found by the Board. The statement of facts which follows is taken from those findings.

McLimans was a state employee for approximately 27 years, entering state service in 1946 and retiring therefrom effective June 30, 1973. For about the first ten years he was employed at Central State Hospital and then was transferred to the Wisconsin State Reformatory at Green Bay and continued to serve there as a correctional officer until November 11, 1971, when he was injured in a riot of the inmates. He was hospitalized for his injuries from November 11 to November 19, 1971, and his salary was continued pursuant to sec. 16.31, Stats., until ordered on May 25, 1973, to report to work on May 30, 1973. McLimans did not so report but elected to retire as of June 30, 1973.

The medical evidence presented before the Board was in dispute on the issue of whether his injuries received on November 11, 1971, prevented him from returning to work on May 30, 1973, which conflict the Board resolved by concluding that McLimans was incapable of returning to work on May 30, 1973.

When injured on November 11, 1971, McLimans had seven days of unused vacation due him for the year 1971. He had planned to use this vacation time to go deer hunting around Thanksgiving time but his injuries prevented him from doing so. Petitioner Wettengel ruled that these seven days of vacation could not be carried forward beyond the first six months of the year 1972.

McLimans also had 22 days of accrued sick leave due him as of June, 1973, which he was required to utilize that month because of the discontinuance of his Section 16.31 pay by the Department of Health and Social Services as of May 30, 1973.

THE BOARD'S ORDER

The order portion of the Board's decision provided:

"IT IS HEREBY ORDERED that Respondent shall pay Appellant the pecuniary equivalent of seven vacation days which were earned but not used in 1971.

"IT IS HEREBY FURTHER ORDERED that Respondent restore to Appellant twenty-two (22) days of sick leave which were utilized by Appellant as a result of the termination of his Section 16.31 benefits and apply credit for such sick leave to the payment of health insurance premiums as provided by Section 16.30 (2m), Wis. Stats. In the event such credit cannot be utilized under Section 16.30 (2m), Wis. Stats., Respondent shall pay the pecuniary equivalent thereof to Appellant."

The word "Respondent" in this order apparently refers to petitioner Wilbur J. Schmidt, Secretary, Department of Health and Social Services.

THE ISSUE

The issue to be resolved is the correctness of the Board's order made with respect to the carryover of the vacation time and the remedy imposed with respect to the sick leave pay found due McLimans.

THE COURT'S DECISION

A. Carry Over of Vacation Credit

Section 16.275 (1) (d), Stats. 1969, provided:

"(d) Annual leaves of absence shall not be cumulative except under par. (a) 4 and except that unused annual leave shall, subject to the rules of the personnel board, be carried over the first 6 months of the year following the one in which it was earned, but no employe shall lose any unused annual leave because his work responsibilities prevented him from using such unused annual leave during the first 6 months of the year following the year in which it was earned." (Emphasis added.)

The crucial question is whether the "work responsibilities" of McLimans prevented him from using the unused portion of his annual vacation during the first six months of 1972. An employee who is absent from his regular duties under sec. 16.31, Stats., continues in a pay status of continuous employment. See Sec. Pers 18.02 (2) (e), Wis. Adm. Code. Such continued pay is commonly referred to as "sec. 16.31 pay". Thus his situation was analagous to a state employee who was required to work by his employing unit during all the first six months of the ensuing year following the year in which the unused vacation credit had accrued.

The Board in the opinion portion of its decision stated:

"An employee who suffers injury as defined under Section 16.31 (2) is prevented from using any unused vacation time because of work responsibilities. The phrase work responsibilities must not only encompass the actual duties required to be performed but also any results which are a foreseeable outgrowth from the performance of those duties. An employee who is on duty during a prison riot is certainly exposed to danger and it is completely foreseeable that he may be injured.

"Appellant was on duty at the time of his injuries. As a result of responding to his work assignment to quell the riot, Appellant suffered injuries which made it impossible for him to use his vacation benefits which he clearly intended to use during the year in which they were earned. Indeed, Appellant's work responsibilities and his injury in the riot prevented him from using those vacation benefits at any time during his active employment with the State."

The Court is impressed with the reasonableness and logic of this argument advanced by the Board for the interpretation of the statute it adopted in reaching its conclusion. The Court is not required in this

instance to defer to the Board's interpretation of sec. 16.275 (1) (d), Stats., 1969, even though it is a rational one, because it was an innovation on its part to adopt such interpretation. It had adopted a conflicting interpretation of this statute in its decision in Rosenberger v. Schmidt, Case No. 501 (June 15, 1972), which decision it overruled in its instant decision.

In the recent case of Milwaukee v. WERC (1976), 71 Wis. 2d 709, the Wisconsin Supreme Court stated that in a situation where there had been no history of a longstanding interpretation of a statute by the administrative agency (at p. 714):

" . . . this court is not bound by the interpretation given to a statute by an administrative agency. Nevertheless, that interpretation has great bearing on the determination as to what the construction should be."

In the later case of Beloit Educational Assoc. v. WERC (1976), 73 Wis. 2d 43, the Supreme Court in a similar situation equated the "great bearing" standard as being the equivalent of a "due weight" standard. Upon giving the Board's instant interpretation of sec. 16.275 (1) (d), Stats., 1969, due weight this Court approves the same.

The petitioners' brief points out that there is no statute which requires the state to pay for vacation time where an employee is required to work in lieu of taking vacation. However, the statutory words "no employe shall lose any unused annual leave because of his work responsibilities" would be meaningless as applied to the facts of this case under the Board's interpretation of the statute unless McLimans were compensated for his lost unused vacation time. The continuance of his salary under sec. 16.31, Stats., was not intended to, and did not, compensate him for unused vacation time.

B. Remedy With Respect to Sick Leave Time

The petitioners' brief raises no issue with respect to the Board's determination that McLimans was incapable of returning to work on

May 30, 1973. Under this determination the Department of Health and Social Services wrongly terminated his section 16.31 pay, and therefore when he retired as of June 30, 1973, he had coming 22 days of sick leave.

The issue raised by petitioners' brief is that it was error for the Board to provide in its order that in the event the credit for the 22 days of sick leave could not be utilized under sec. 16.30 (2m), Stats., for the payment of health insurance premiums, the department should pay the pecuniary equivalent thereof to McLimans.

Sec. 16.30 (2m), Stats., provides in part as follows:

"An employe of the state who as a result of long and faithful service has accumulated unused sick leave under sub. (2), shall at the time of retirement or death receive full conversion credit at his current basic pay rate for those days. The conversion credit shall be recorded and used on behalf of the employe or surviving spouse to offset the cost of health insurance program under s. 40.16 (3) . . ."

Inasmuch as the legislature has specified no alternative method of compensating an employee who retires from state service for accumulated unused sick leave other than that specified in sec. 16.30 (2m), the Board was in error in providing the alternative method specified in its order.

C. Judgment to be Entered Herein

On August 29, 1975, sec. 16.05 (1) (f), Stats., provided that after hearing the "board shall either affirm or reject the action of the director and, in the event of rejection, may issue an enforceable order to remand the matter to the director for action in accordance with the board's decisions." Therefore the Board's order should have remanded the matter to petitioner director with directions instead of directly ordering the petitioner secretary of the Department of Health and Social Services to do the things required by the Board's order. However, petitioners' brief has not raised this issue, and the Court does not deem it is required

to consider the same. Therefore the judgment to be entered herein will modify the Board's decision by striking from the second paragraph of the order portion thereof the sentence:

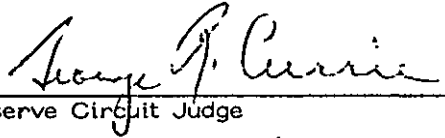
"In the event such credit cannot be utilized under Section 16.30 (2m), Wis. Stats., Respondent shall pay the pecuniary equivalent thereof to Appellant."

and affirm the Board's decision as so modified.

Let judgment be entered accordingly.

Dated this 11th day of October, 1976.

By the Court:


Reserve Circuit Judge

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

WILBUR J. SCHMIDT, Secretary,
Department of Health and Social
Services, and C.K. Wettengel,
Director, State Bureau of Personnel,

Petitioners,

v.

JUDGMENT

Case No. 148-246

STATE OF WISCONSIN PERSONNEL BOARD
(John W. McLimans),

Respondent.

BEFORE: Hon. George R. Currie, Reserve Circuit Judge

The above entitled review proceeding having come on for determination by the court on the 4th day of October, 1976, at the City-County Building in the City of Madison, Wisconsin; the petitioners having appeared in this proceeding by Edward D. Main and Barbara S. Yaffe, their attorneys; respondent having appeared by Robert J. Vergeront, Assistant Attorney General; and the employe John W. McLimans having appeared by Lawton and Cates, by Richard V. Graylow, and the attorneys for all parties having waived oral argument; and the court having reviewed the briefs filed by counsel and the pleadings and administrative record returned for review, and having filed its Memorandum Decision dated October 11, 1976, with directions for the entry of judgment:

Now, on motion of Robert J. Vergeront, Assistant Attorney General, attorney for the respondent;

IT IS ORDERED AND ADJUDGED that the order and decision of the State Personnel Board dated August 29, 1975, be and hereby is modified by striking from the second paragraph of the order portion thereof the sentence, to-wit:

"In the event such credit cannot be utilized under Section 16.30 (2m), Wis. Stats., Respondent shall pay the pecuniary equivalent thereof to Appellant."

and, as so modified the order and decision of the State Personnel Board dated August 29, 1975, be, and hereby is, affirmed.

Dated this _____ day of November, 1976.

BY THE COURT:

Reserve Circuit Judge