STATE OF WISCONSIN

PERSONNEL BOARD

* *

GERHARD W. KELM, SR.,

Appellant,

v.

WILBUR J. SCHMIDT, Secretary, Department of Health and Social Services,

Respondent.

Case No. 19

* *

1974 APR 23 PM 3 51

OPINION

AND

ORDER

Before AHRENS, Chairman, SERPE, JULIAN, and STEININGER.

JULIAN, writing for himself, and Board Members AHRENS, SERPE, and STEININGER.

OPINION

Background Facts

In July, 1967, the Appellant commenced his employment at Kettle Moraine Boys School, a correctional institution for boys at Plymouth, Wisconsin. In 1970, he was employed in the permanent classified position of Youth Counselor II and performed duties involving the supervision and disciplining of boys at the School. His salary was $632 per month. He was 47 years of age.

For many years prior to his employment with the State, the Appellant had been receiving medical treatment for diabetes and hypertension. He also had an anomaly in the structure of the arteries in the back of his head. These conditions made him susceptible to a cerebral vascular accident or stroke.

On August 28, 1970, Appellant was called to restrain a boy at the School who was attempting to kill himself. Appellant had to sit on the boy to subdue him. After the incident, Appellant developed symptoms of dizziness and double vision and was hospitalized. Upon his return to work in late October 1970,

Appellant was called upon again to restrain boys at the School. On November 1, 1970, Appellant broke up a knife fight between two boys and shortly thereafter collapsed. Some days later, he was hospitalized and there suffered a stroke.

Sometime about February 15, 1971, the Appellant's wife reported to Stephen H. Kronzer, the Personnel Manager at the School, that her husband continued to be unable to report to work. She attached a statement by the Appellant's physician, Dr. John C. Swan, bearing that date, stating that Appellant had suffered a "full blown cerebrovascular accident and permanent complete disability."

On the basis of Dr. Swan's statement, the Respondent terminated Appellant's medical leave and discharged him effective February 25, 1971. The Respondent did not notify the Appellant that he had been discharged and that he had the right to appeal his discharge to the Board.

On June 15, 1972, the Board in a Memorandum Decision found that the Appellant had been injured in the performance of his duties and was entitled to full pay under Section 16.31, Wis. Stat., 1969, which provides that where an employee at the School in Appellant's classification suffers an injury in quelling an act of violence or in restraining boys, he shall be entitled to full salary while unable to work as a result of the injury. In its Memorandum Decision, the Board noted that the medical testimony was in conflict. Dr. John C. Swan, the Appellant's family physician, testified on behalf of the Appellant, that emotional stress and physical exertion can produce increases in blood pressure which cause a cerebrovascular accident or stroke. He testified that Appellant's activities in restraining boys on the job caused his stroke. Dr. Richard C. Oudenhoven, a neurosurgeon, testified on behalf of the Respondent, that such stress and exertion do not cause strokes and that Appellant's stroke was unrelated to the two incidents. The Board accepted the view of Dr. Swan

as more consistent with common understanding regarding the danger of hypertensive persons being placed in stressful situations and that the timing of the job incidents and the stroke was more than coincidence. Since Appellant was injured in hazardous employment he was entitled to full pay.

On September 13, 1972, Mr. Kronzer was advised by the Central Personnel Office of the Department of Health and Social Services in Madison that the Appellant had been incorrectly terminated, since he had not been advised of his discharge and of his appeal rights. Neither Mr. Kronzer nor the Superintendent contacted the Appellant concerning whether he had recovered from his stroke, his employment skills or the kind of work he felt he was capable of performing. They did not request him to submit to a medical or physical examination to determine his fitness for employment. Mr. Kronzer considered the Appellant for duty as a youth counselor on the third shift, but decided that it still posed the hazard of a reoccurrence of incidents such as those causing the Appellant's stroke. He further considered that the Appellant could perform work as a Building Maintenance Helper II or Stock Clerk I, which would require less arduous duties, but none were available either on a full-time or a part-time basis. Appellant was not transferred to either the Building Maintenance Helper II or the Stock Clerk I position. No consideration was given to the possibility of transferring the Appellant to a less arduous position in the Department of Health and Social Services or elsewhere in the State service. The Superintendent, after reviewing the Appellant's personnel file with Mr. Kronzer, sent Appellant the following letter:

> Because your personal physician indicated to us that you were totally disabled and would be unable to return to work, we terminated you from employment on February 25, 1971, however we failed to terminate you for total disability under Wisconsin Statutes 16:29(4). Therefore, we are now terminating you because of total disability according to Wisconsin Statutes 16:32(2). This action is effective September 13, 1972.

The Appellant filed a timely appeal.

We find the foregoing facts to be true and to constitute the background facts material to the matters at issue. Additional findings of fact will be made hereafter in connection with other matters material to the resolution of the matters at issue.

Issue

The issue on this appeal is whether the Respondent complied with Section 16.32(2), Wisconsin Statutes, 1971, in terminating the Appellant.

Burden of Proof

The parties have agreed that the Respondent has the burden of proof in showing compliance with the statute and that the standard of proof is that the material facts are proven to a reasonable certainty, by the greater weight of the credible evidence.

Proof of Disability

At the hearing, neither the Respondent nor the Appellant offered any medical testimony. However, the parties stipulated that the transcript of the hearings in the proceedings before the Board on Appellant's claim for hazardous employment benefits, be admitted into evidence. At the earlier hearing, which was held January 13, 1972, Dr. Swan testified for the Appellant and Dr. Oudenhoven testified for the Respondent. Most of their testimony related to the question of whether the Appellant's stroke was precipitated by incidents at work; some testimony related to the question of Appellant's disability for employment.

Dr. Swan testified that January 9, 1972 was the last date on which he examined the Appellant. He testified that the Appellant's basic problem is loss of coordination and balance. This resulted in a little bit of a gait, an inability to move rapidly and a loss of confidence. He testified that Appellant has to use a cane to walk. He testified that the biggest part of the Appellant's

disability is the fear he will suffer another stroke. He testified that he regarded the Appellant's disability for employment purposes as total, unless he could find a generous, tolerant employer and just the right kind of job with no pressures and simple activities. He testified that the Appellant couldn't hold up under the pressures of competitive employment. He testified he believed this disability to be permanent, because it had not changed in the last six months. He testified he did not think Appellant should return to the School because of the possibility of emergency situations developing, which would result in incidents such as those that precipitated his stroke.

On September 20, 1971, Dr. Oudenhoven examined the Appellant. Dr. Oudenhoven testified the Appellant had sustained permanent total disability for employment purposes. However, he qualified that by adding that the healing period would continue for two years from the date of his stroke, which would be November 1972. Dr. Oudenhoven was asked if he was of the opinion that the Appellant should not return to work at the School. He answered that he didn't say that. He testified he didn't think the School would take the Appellant back. He testified that he thought "anything is going to be bad for the man" as far as he was concerned.

The testimony in the record which was the basis of the Board's determination on the Section 16.31 claim amply supports the finding that the duty of a Youth Counselor involved intervention in crisis situations, that such events can cause a person suffering diabetes, hypertension, obesity, and having an anomaly of the arterial structures in the back of the head, such as Appellant, to have a stroke.

Dr. Swan was of the opinion that this condition was permanent and that if the Appellant returned to work as a Youth Counselor and became involved in similar situations he might suffer another stroke. We find on the basis

of the earlier findings and the supporting record that Appellant could not act in emergency situations in the Youth Counselor II position in the manner required because of the fear of injury to himself and that the State might reasonably decline to assign such work on the grounds that he is physically unable to perform such work without subjecting himself to grave risks to his own health and well being.

The question remains as to whether the Appellant is disabled to perform other less arduous work. Mr. Kronzer appears to have conceded that the Appellant was sufficiently able bodied to perform the duties of Stock Clerk I or Building Maintenance Helper II. Dr. Swan testified that the Appellant could perform a simple job with no pressures. We find that, in the least, the Appellant was not physically disabled from performing the duties of the position of Stock Clerk I or Building Maintenance Helper II either on a full-time or a part-time basis.

Infirm Employees Must Be Employed at Less Arduous Work, Demoted to Less Arduous Work, or Employed Part Time, Before, As A Last Resort, Being Discharged.

The Statute provides protection for employees who become infirm and cannot perform their normal duties. Section 16.32(2), Wisconsin Statutes, 1971, provides as follows:

> When an employee becomes physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his position by reason of infirmities due to age, disabilities, or otherwise, the appointing authority shall either transfer him to a position which requires less arduous duties, if necessary demote him, place him on a part-time service basis and at a part-time rate of pay or as a last resort, dismiss him from the service.

> The appointing authority may require the employee to submit to a medical or physical examination to determine his fitness to continue in service. The cost of such examination shall be paid by the employing department. In no event shall these provisions affect pensions or other retirement benefits for which the employee may otherwise be eligible.

The purpose of the statute is to fully utilize the capabilities of partially disabled employees. It is to provide continued employment for disabled employees at some job they are capable of performing even if the position they are capable of performing is lower in classification and even if the employee cannot work a normal work week. It is to retain in employment an employee who is disabled, but who, at the same time, can perform some duties. Such policy avoids discontinuing the employee's income from earnings altogether and throwing him upon his own savings or causing him to be dependent upon others or the public. The statute provides that as a last resort, the employee may be dismissed.

The statute requires that the disabled employee shall be transferred to less arduous work before being dismissed. It does not say that he shall be transferred to such work, if it is available. The language of the statute is without exception. The statute requires that the transfer shall be, first of all, to less arduous duties in the employee's present classification. In the instant case, the demands of the Youth Counselor II job and the nature of the Appellant's disability preclude his assignment to that position. If no such assignment is sufficiently less arduous, as here, the appointing authority must demote the employee. If work in the lower classification proves too arduous, the appointing authority must then place the employee on a part-time schedule and only if the employee is still too disabled to perform the job satisfactorily, must he be dismissed. We read the statute as a command to agencies to give disabled employees job preference to the extent that they

are employable rather than forcing them into the labor market where their infirmities of age and disability will mean that they have substantial difficulty competing with younger, able-bodied persons for jobs.

We believe that such an interpretation is supported by the policy expressed in other statutes relative to the employment of handicapped persons by the State, the State program of vocational rehabilitation for the handicapped and the laws prohibiting discrimination in employment against the handicapped. Section 16.08(7), Wis. Stat., 1971, provides:

> The director shall provide, by rule... for other exceptional employment situations such as to employ the mentally handicapped, the physically handicapped and the disadvantaged.

Pers 27.03(1), Wisconsin Administrative Code provides that the director may authorize a "plan to employ persons who, because of severe occupational handicaps, would not otherwise be able to compete in the labor market." The Respondent supervises the Department of State government which administers the Wisconsin Rehabilitation Law, which in Section 55.01(1), Wis. Stats., 1971, declares that the State assents to and accepts the 1920 Act of Congress providing "for the promotion of vocational rehabilitation of persons disabled in industry or otherwise and their return to civil employment." The statute provides for the counselling of the handicapped, the promotion of schools and workshops for their rehabilitation, aid in securing employment and arranging for physical examinations and therapeutic treatment for the handicapped. Sections 55.01(6)(a)(b)(c)(d)(f), Wis. Stats., 1971. Section 111.31(3), Wis. Stats., 1971, declares "the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their...handicap..."

The Respondent Did Not Comply With
The Requirements of Section 16.32(2).

In the instant case, the Respondent has failed to comply with the purposes of the statute, which calls for the discharge of disabled State employees only "as a last resort." After the Appellant's wife advised the School that the Appellant was unable to return to work and attached Dr. Swan's statement that Appellant's emergency rescue of a student of the School had resulted in permanent complete disability, the School simply discharged him. It did not require that the Appellant submit to an examination to determine if he might recover and be able to perform some work. If it had done so and if Dr. Oudenhoven had examined the Appellant, as he subsequently did because of the Appellant's benefit claim, Dr. Oudenhoven would have advised the Respondent that stroke patients such as the Appellant have a two-year healing period so that it was far too early to rate Appellant's permanent disability. Moreover, the Respondent did not advise Appellant that he was discharged, let alone concern itself with transferring him to less arduous work. On February 25, 1971, the Respondent discharged Appellant as the first resort.

The Respondent did not comply with the statute when he discharged the Appellant on September 13, 1972. Up until that date, Respondent was of the belief that the Appellant had not been in the School's employ since February 25, 1971 when he was dropped from the payroll. Sometime that day, Mr. Kronzer was advised by the Department's Central Personnel Office that the Appellant had been incorrectly discharged because he had never been notified of the discharge or of the right to appeal. He and the Superintendant reviewed the Appellant's personnel file which did not include any recent

medical statements regarding Appellant's condition. It consisted only of Dr. Swan's original statement dated February 15, 1971 and another certificate by Dr. Swan made a few weeks thereafter. Both such statements had been made a year and a half earlier shortly after the Appellant's stroke. The Respondent did not require the Appellant to submit to a medical or physical examination as the statute provides for. Neither did he contact the Appellant for the purpose of discussing with him his medical condition and his vocational plans. The Respondent at the hearing, indicated he relied in part on the statement in the Board's Memorandum Decision that Appellant will never return to his work at the School. "His work" would refer to his position as a Youth Counselor, but it did not mean he could not be transferred to less arduous work as the law requires. The same day the School Administration learned that they had not discharged the Appellant successfully over a year and a half earlier they discharged him again. The discharge letter itself reveals the close connection between the two discharges. It states that on the basis of Dr. Swan's rating of total disability, the Appellant was discharged on February 25, 1971. It goes on to state that the School Administration had failed to discharge the Appellant under Section 16.29(4), Wis. Stats., 1969, which was amended by Chapter 270, Laws of 1971, in a manner not material here, and renumbered Section 16.32(2), Wis. Stats., 1971. It is the same section that permits the discharge of a disabled State employee only as a last resort. The letter goes on to say that the Appellant was that day being discharged under the latter statute for total disability. The "last resort" was quickly implemented before the day was out without a meeting with the Appellant, without a current medical opinion concerning the extent of his disability, and without first transferring the employee to less arduous work. We conclude that the Appellant was discharged in violation of Section 16.32(2), Wis. Stats., 1971.

The Respondent did not transfer the Appellant to less arduous duties as required by law. The only evidence introduced by the Respondent in the instant proceedings relative to less arduous jobs the Appellant might be able to perform was that Mr. Kronzer had given some consideration to the Building Maintenance Helper II and the Stock Clerk I positions. No further evidence was adduced as to what these jobs involved and whether they were of the sort that Dr. Swan was of the opinion the Appellant was physically able to perform. Consideration was ended on the basis the positions were filled. No consideration was given to giving the Appellant a job preference to any less arduous job he was capable of performing.

The statute, here involved, requires the appointing authority to transfer a disabled employee to less arduous work. In the instant case, the appointing authority is Wilbur J. Schmidt, the Respondent in the case, and the Secretary of the Department of Health and Social Services. The School Administration did not give any consideration to the complete range of positions within the Department where suitable less arduous work might be available to the Appellant. Nor did the Respondent consider the availability of placement to any other Department in the State service. The burden of proof on the issue of compliance with the statute in on the Respondent. The Respondent has not shown that there was no less arduous work the Appellant could have performed anywhere within the Department of Health and Social Services or elsewhere in State service.

We find that the Respondent discharged the Appellant without first transferring him to some less arduous position on a full-time or a part-time basis before discharging him.

ORDER

IT IS HEREWITH ORDERED that the Respondent immediately reinstate the Appellant to his former position, without any loss of seniority or other benefits and with full back pay from the date of his discharge to the date of his receipt of Respondent's written directive to report to work.

This Order shall not preclude the Respondent from, upon Appellant's reinstatement, immediately transferring him to less arduous duties or otherwise complying with Section 16.32(2), Wis. Stats., in a manner consistent with this Opinion and Order.

IT IS FURTHER ORDERED that, within 10 days of the date of the Order, the Respondent shall advise the Board in writing what steps he has taken to comply herewith.

Dated April 23, 1974

By the

STATE PERSONNEL BOARD

Percy L. Julian, Jr., Vice Chairman