STATE OF WISCONSIN

BEFORE THE STATE BOARD OF PERSONNEL

Frieda Carlson, Appellant, vs. Wilbur J. Schmidt, Secretary, Department of Health and Social Services, Respondent. #328	MEMORANDUM DECISION

This case has presented unusual difficulties for the Board from the time the appeal was filed. The problem has been that of ascertaining what the Appellant was really appealing from and of analysis of the nature of the Appellant's termination from state service and how it came about.

Briefly stated, the jurisdictional facts are these:

Appellant was a permanent employe in the state's classified service. She was employed as a Building Maintenance Helper I at Central Colony. In June of 1969, she sustained a rupture of a hernia that had been the subject of previous surgery. She was hospitalized for observation and then, on July 2, 1969, underwent surgery. It is not controverted that a three month recuperation period was indicated.

She applied for a three month leave of absence without pay. The Respondent denied the request.

The Appellant, naturally, was placed in the position where she was absent without leave when she did not report for work. Early in the time, she was advised by the Respondent that she would not be allowed to return to work after her recuperation. Respondent has consistently adhered to that position right up to this moment.

Appellant has taken this appeal as an appeal from the denial of the leave without pay that she had requested.

The leave that she requested was leave denominated as "formal leave" which is contrasted with "administrative leave". Formal leave is required when it involves a time of more than one month.

Because of the basis of Appellant's request, there is no doubt but that she could have been legally granted the requested formal leave. Provision for such allowance is made by the Rules of this Board as contained in Wis. Adm. Code Pers. 18.05(1)(b). Such formal leave could have been granted on the recommendation of the appointing officer and the approval of the Director of the Bureau of Personnel. The rule says, "may be allowed". Hence, the allowance of such leave is not the employe's as a matter of right; it is discretionary on the part of the grantors. In this case the Respondent appointing officer did not recommend the allowance and, accordingly, the Director did not act on the request.

While all of this may appear rather esoteric in view of the Board's conclusions that follow, this Board is of the opinion that it has no jurisdiction to entertain any direct challenge of an appointing officer's refusal to recommend formal leave that has been requested.

s. 16.05(1) Wis. Stats. gives this Board jurisdiction to hear appeals from actions of the Director of the State Bureau of Personnel. The appeal could not be from an action of the Director, for in regard to Appellant's leave application, there was no recommendation on which he could act. s.16.05 gives this Board no authority to review any departmental action; there is no other statute that does.

So, regardless of how unreasonable, capricious, arbitrary or in bad faith a departmental action may be, an aggrieved employe cannot seek any relief from this Board. This Board cannot confer jurisdiction on itself when the Legislature has not done so.

It is for cases of challenge of departmental actions that the grievance procedures have been set up.

In fact, Appellant is really appealing her termination from employment and not the denial of formal leave. The question is, can she so do to this Board?

When Appellant did not report for work upon denial of her request for leave, she was, regardless that circumstances physically precluded her from so reporting, absent without leave.

Wis. Adm. Code Pers. 18.05(3) states:

> "Any absence of an employe that is not authorized under these rules shall be considered as an absence without leave. Such absence may be considered as a resignation or may be grounds for disciplinary action. Any employe who is separated from service on the basis of absence without leave may thereby be deemed to have forfeited his reinstatement eligibility". (Emphasis is ours).

It is obvious from the record that the Respondent has considered the Appellant's absence to be a resignation. He has taken no disciplinary action against the Appellant as is contemplated by s. 16.24(1)(a) Wis. Stats. There has been no notice of discharge with assigned reasons as that statute requires.

It is important to consider whether or not the Respondent could consider that the Appellant had "resigned". If he could so consider, the matter is closed. This Board has no power to review resignations.

If Pers. 18.05(3) is to be given a literal interpretation, the Respondent could consider that the Appellant's absence without leave. That is what the rule says.

However, this Board does not subscribe to a literal interpretation of its Rules. Because of the large and ever-changing sets of circumstances to which its Rules apply, we subscribe to the purposive interpretation; what did this Board intend by its rule.

The Board intended that an absence without leave could be considered as a "resignation" if the facts thereto were consistent with the employe's intent not to return to his job or his demonstration of lack of interest in diligent job performance. The Board never intended an absence without leave should be considered as a resignation when the facts thereto were inconsistent with an express or implied intent on the part of the employe not to return or to adequately perform his job.

Here, Appellant wanted her job. She expressed a desire to return to it; she never treated performance of her job as unimportant. She could not possibly have reported for work. Everything was entirely inconsonant with anything that could be construed as her affirmative act of resignation.

The Board concludes that Appellant did not resign either actually or constructively.

Hence, the Department is in the position where it could only have considered Appellant's absence without leave as grounds for disciplinary action. Sec. 16.43(1) Wis. State. delineates the procedure for discipline.

"In all such cases the appointing officer shall, at the time of such action, furnish to the subordinate in writing his reasons for the same".

This the Respondent has never done. The Board could at this point dispose of the case on the basis that the Appellant had not been discharged and should be permitted to return to her job.

To finalize the Board's conclusions, let us consider that she had been discharged in accordance with law and is appealing that action. The Board then has the task of deciding whether or not the discharge was for just cause. Because concededly there was nothing spurious about the Appellant's reason for requesting the leave, we have now come around to the position where the Board can consider indirectly in passing on just cause, what it could not consider directly. Was the Respondent's refusal to recommend the formal leave arbitrary and capricious?

As stated before, there was no alternative to formal leave for the Appellant. When it was denied, she just had to be absent without leave.

The record shows these reasons for the denial of the request for formal leave:

1. Appellant's attendance record was poor;

2. Based on medical advice they had, Appellant would not be able to perform the duties of her job at the end of three months;

3. Her job could not be kept open for three months.

Evidence indicates that Appellant's record does not reflect the best attendance. However, this does not appear to have concerned the

Respondent before June of 1969. An employe performance review made in March of 1969 of all areas of her performance rated her excellent in punctuality and attendance.

The Board believes that the conclusion made in July that she would at the end of three months be unable to perform her job was unwarrantedly premature. Under s. 16.29 Wis. Stats. the Board believes that no employe can be retired until inability has been demonstrated or the condition becomes a diagnosis and not a prognosis, under the statute, the subject employe is also entitled to a medical examination to determine fitness.

The argument that the job could not be held open for three months is refuted by the very fact that the job has not yet been filled.

The Board is of the opinion that there was no just cause for the discharge of the Appellant, even had she properly been discharged.

Appellant should be restored to her position at Central Colony without loss of any rights. However, she should not be paid for any part of the period she did not work up to and including the date of her physician's statement that she could return to work.

Counsel for the Appellant may draft Findings of Fact and Conclusions of Law consonant with this decision.

Dated this 10 day of Jan, 1970.

STATE BOARD OF PERSONNEL