

calendar year 1971. This request was denied by her appointing officer whose decision was sustained by the Director.

The issue thus is, was it improper for the carry-over request to be denied when Appellant was ill and under s. 16.31 leave and unable to avail herself of vacation in 1970?

The statute that controls is s. 16.275(1)(d), Wis. Stats.:

"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 six 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 is ours.)

This statute is a 1969 revision. Prior thereto it read:

"Annual leaves of absence shall not be cumulative, except that unused annual leave may, subject to the rules of the personnel board, be carried over the first six months of the year following the one in which it was earned." (Emphasis ours.)

The rule of the personnel board adapted to implement the 1969 statute is Wisconsin Administrative Code, Pers 18.02:

"(7) When Annual Leave May Be Taken. In determining annual leave schedules the appointing officers shall respect the wishes of eligible employes as to the time of taking their annual leave insofar as the needs of the service will permit. Annual leave allowance shall be taken during the calendar year except as follows:

(a) Employes who are required by their appointing officers to defer all or part of their annual leave for a calendar year shall be permitted to take it within the first six months of the ensuing calendar year.

(b) However, employes who are unable to take unused annual leave as provided in (a) above due to their work responsibilities shall be granted additional time in which to use such annual leave. Any such extension shall be on forms prescribed by the director."

Even though "work responsibility" might be construed as another way of saying "required to defer," we cannot subscribe to the inclusion within "work responsibility" of an illness that may be service connected. To construe "work responsibility" beyond "work status" is too strained to be acceptable.

Appellant indicates that s. 16.275(1)(d) Wis. Stats. containing the wording "shall. . . . be carried over the first 6 months" is an absolute right of the employe that the board cannot limit by rule. She supports this thesis by the fact that prior to the 1969 change from "may be carried over the first six months" We submit that "shall be carried over the first 6 months" is out of context. The first omission is "subject to the rules of the personnel board." "Subject to" means "conditioned upon." We believed at the time the statute was adopted, and believe now, that, by rule this board could limit the right of an employe to carry over vacation. We did not feel it appropriate for an employe to have the carryover right if he could not take his vacation within the current calendar year because he was already on leave with or without pay or simply because he did not elect to take it. We chose to state the proposition in the direct way, "required by their appointing officer to defer", rather than to endeavor to state the limitations.

We do not believe that the 1969 change from "may" to "shall" effected the right to limit. The words "subject to the rules of the personnel board" were retained. If the legislature intended that there should be no ability to limit the phrase should not have been retained.

We are of the opinion that the word "may" was changed to "shall" was done to eliminate an appointing officer from exercising his own judgment within the rule.

The judgment of the appointing officer and the Director is sustained.

Dated: _____, 1972.

STATE PERSONNEL BOARD

BY



