STATE OF WISCONSIN STATE PERSONNEL BOARD

JOHN W. MCLIMANS,

Appellant,

v.

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

Respondents.

Case No. 73-53

OPINION AND ORDER

Before: JULIAN, STEININGER, WILSON and SERPE

OPINION

I. Nature of the Appeal

Appellant was receiving hazardous employment benefits under Section 16.31, Wis. Stats., after being injured in a riot while on duty at the Wisconsin State Reformatory at Green Bay. The issues are whether Appellant was entitled to carry-over his remaining 1971 vacation and personal holidays while he was receiving the Section 16.31 benefits; and whether the appointing authority's termination of the Section 16.31 benefits, effective May 25, 1973, was in accordance with the law.

II. Facts

Appellant began his state employment at Central State Hospital in 1946, where he was employed as a Psychiatric Officer for about ten years. He was subsequently transferred to Wisconsin State Reformatory at Green Bay and continued to serve there as a

Correctional Officer 6 until November 11, 1971, when Appellant was injured during the course of a riot of the inmates.

Appellant was hospitalized, due to the injuries, from November 11 until November 19, 1971, and his pay was continued under Section 16.31, Wis. Stats.. During his stay in the hospital, Appellant was attended by Dr. Wallace Mac Mullen. Dr. Mac Mullen has been Appellant's private physician since approximately 1969, and is a certified family practitioner.

Appellant's injuries were sustained while performing his duties as a Correctional Officer 6, Wisconsin State Reformatory at Green Bay. These duties included the supervision of inmates involved in various activities as well as relieving other line captains. Appellant was supervising the "chow hall" at the time of the riot.

Appellant had intended to use the accrued vacation time to go deer hunting over the Thanksgiving holiday period. As a result of his injury, he was not able to take the vacation at that time.

On June 22, 1972, by memorandum from Acting Warden Donald E. Clusen, Appellant was informed that he would not be permitted to carry over his 1971 vacation credits beyond July 1, 1972, because, according to the memorandum, they were not being carried over by reason of "work responsibilities." The memorandum went on to say that, therefore, seven days of vacation and a day and a half of personal holidays earned by Appellant in 1971 were thereby canceled.

Appellant filed step 1 of a grievance on June 27, 1972. This step and the subsequent steps were denied on the basis of an interpretation of the Wisconsin Statutes and Administrative Code.

Respondent Schmidt held that vacation could only be carried over beyond the first six months of the year in which the vacation accrued when the employee was unable to take time due to work responsibilities and that work responsibilities did not include time off for job related injuries. This position was adopted and supported by Respondent Wettengel in his decision dated April 12, 1973, affirming the denial of the vacation carry-over. Appellant appealed this decision in a letter received by this Board's office April 17, 1973.

By letter dated May 25, 1973, written by Donald E. Clusen, Acting Warden, Appellant was informed that his benefits under Section 16.31 would terminate effective May 25, 1973. This same letter also stated that his then physical condition was non-job related and that, therefore, he was ordered to return to work at 8:00 a.m. on Wednesday, May 30, 1973. Appellant received this letter May 29, 1973.

Appellant did not contact Mr. Clusen nor anyone else at the Reformatory in response to the May 25, 1973 letter nor did he report for work on May 30, 1973. He did, however, call his personal physician, Dr. Mac Mullen and his attorney, Richard Graylow. Mr. Graylow on behalf of Appellant filed an appeal from the decision to terminate Appellant's Section 16.31 benefits. This letter of appeal was received May 30, 1973.

Appellant retired after nearly 27 years of state service on June 30, 1973, one month after the day he was ordered to return to work. He used twenty-two days of accrued sick leave so that he did not return to work at all.

The medical testimony given at the hearing of this matter revealed a divergence of opinion as to whether or not Appellant could have returned to work at the end of May, 1973, when he was notifed his Section 16.31 benefits would cease and his presence at work would be required.

Dr. Mac Mullen's testimony was that Appellant's physical injuries and emotional problems precluded his return to work at that time. According to Dr. Mac Mullen, Appellant was experiencing most of the physical problems from his neck and back injuries. He was also experiencing extreme anxiety, which, according to the Doctor, was caused by the riot. Although Dr. Mac Mullen was fully aware of certain prior injuries Appellant had suffered, it was Dr. Mac Mullen's position that the inability to return to work in May, 1973, was the direct result of the injuries received during the riot of November 11, 1971.

The State's medical witness, Dr. Richard C. Oudenhoven, a neurosurgeon who examined Appellant in December, 1973, testified that he believed there had been no physical problem preventing Appellant's return to work in May, 1973, if not earlier. Appellant based this opinion on a single examination of Appellant which lasted approximately one hour.

The State also introduced a letter containing the findings of Dr. Wirka, a professor at the University of Wisconsin School of Medicine, in the Division of Orthopedic Surgery, whose own health problems at the time of the hearing prevented him from testifying. Dr. Wirka examined Appellant in January of 1973. Dr. Wirka's opinion was that Appellant's primary problem was the result of a severe degenerative disease, which preceded the injuries involved

here. Although Dr. Wirka thoughtthere might have been some aggravation of the problems, it was his belief that the aggravation had subsided. Dr. Wirka's written opinion indicated that at the time he examined him, Appellant was capable of returning to work in a supervisory capacity.

III. Conclusion

Appellant Is Entitled To Carry Over Remaining Vacation Time While Receiving Section 16.31 Benefits.

Generally, vacation time must be taken during the year in which it accrued. Section 16.275 (1) (d), 1969 Wis. Stats.,[1] states:

> 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 employee 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.)

In Rosenberger v. Schmidt, Case No. 501, June 15, 1972, the appellant was a permanent employee whose position was classified an Aide I at Wisconsin Central Colony. In June, 1970 she contracted hepatitis as a result of exposure during the care of patients and received Section 16.31 benefits. She was unable to use her vacation time earned during 1970. She requested that the annual leave be carried over pursuant to Section 16.275 (1) (d).

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[1]The Laws of 1971 renumbered this subsection to Section 16.30 (1) (d) and amended it so that the carry-over of unused annual leave was subject to the rules of the Director instead of the Personnel Board and the period in which such leave could be used was extended from within the first six months to within the first year following the one in which the leave was earned. These changes became effective April 30, 1972 and do not effect this appeal.

This request was denied and she appealed. This Board in affirming the denial stated:

> 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. (supra, at page 3.)

Today we overrule the Rosenberger case. 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.

Although Appellant is entitled to the vacation benefits which were wrongfully cancelled, the fact that Appellant was prevented from using earned holidays during 1971, by reason of his work responsibilities would not entitle him to the carry-over

of such unused holiday benefits since no provision is made by statute for such carry-over. In fact, Section 16.275 (1) (f)[2] clearly states that personal holidays are noncumulative with no exceptions.

Therefore, we conclude that Appellant was improperly denied the carry-over of his unused earned 1971 annual leave. Since Appellant has retired from State service he should be paid by Respondent the pecuniary equivalent of seven vacation days.

Respondents Improperly Terminated Appellant's Section 16.31 Benefits.

There is no dispute that Appellant sustained injuries while in performance of his duties and that he was initially properly entitled to Section 16.31 benefits. Nor is there any dispute concerning the high degree of quality with which Appellant performed his duties until the time of his injuries. The question is whether Appellant had sufficiently recovered so as to be able to return to work.

The medical testimony was in conflict. Appellant's personal physician, Dr. Mac Mullen, who had treated him since about 1969 testified that Appellant was neither physically nor mentally ready to return to work.

Respondent had had Appellant examined by only one doctor between November, 1971 and the time of termination. This doctor, Dr. Wirka, was unable to testify at the hearing because he was seriously ill. He had developed a malignant brain tumor and had had an operation for its removal (craniotomy). His written report

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[2]This subsection was renumbered Section 16.30 (1) (f) in the Laws of 1971. The effective date of change was April 30, 1972. There were no amendments to this subsection.

was received into evidence subject to the objections of Appellant's counsel that it was hearsay and that it may not be very credible due to the type of illness the doctor developed and its proximity to his examination of Appellant.

Respondent had Appellant examined a second time by Dr. Oudenhoven, a neurosurgeon. This second examination was held for about an hour on December 11, 1973, five months after Appellant retired.

The Board finds the testimony of Dr. Mac Mullen to be more reliable in this case, and, therefore, finds Appellant incapable of returning to work on May 30, 1973, as a consequence of the injuries sustained during the riot in November, 1971. Dr. Mac Mullen had the greatest opportunity to observe Appellant and determine his capabilities both mental and physical as of the time in question.

Furthermore, Appellant's benefits under Section 16.31 were terminated without notice. It is true that Dr. Wirka examined him some five months before his termination date. But Appellant was not notified that his benefits were being terminated until the very date they were terminated. The least Respondent Schmidt should have done was to inform Appellant of the purpose of the examination and of the results and conclusions reached by Dr. Wirka.

The letter sent to Appellant terminating the benefits, which he received one day before he was due to appear, required his appearing at the Reformatory either for work or for applying for a formal leave of absence. He was given no alternative only

an ultimatum. There was no preceding informal contact to determine if Appellant were even available on this date.

Finally, since there was some conflict in the medical opinion of the capability of Appellant to return to work, some personal contact should have been made to find out exactly what was still wrong and what possible solution was available. If Appellant were capable of some work but perhaps not as a Correctional Officer 6, then Respondents were under a duty to find him a position which he could perform. (Section 16.32, Wis. Stats.)

Therefore, we conclude that Appellant was incapable of returning to work on May 30, 1973 as he was ordered by letter of May 25, 1973. And even assuming he were capable, he was not required to appear under the circumstances. There was no real notice of the termination of these rights nor was there any personal contact with Appellant other than the examination by Dr. Wirka to determine what Appellant was capable of performing.

We do not condone, however, Appellant's lack of contacting the Reformatory after he received the notice terminating his benefits. At the same time he called his doctor and his attorney, he should have called the reformatory to inform Mr. Clusen, Acting Warden, that he would not appear for work and why.

Therefore, Appellant should be reimbursed for the sick leave time he used for the interim between the date of the attempted termination and his retirement. According to Section 16.30 (2m) such reimbursement should come in the form of premiums paid on his health insurance policy.

ORDER

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.

Dated August 29, 1975.

STATE PERSONNEL BOARD

Percy L. Julian, Jr., Chairperson