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 BEN L. MARTIN,  
  
 Appellant,  
  
 v.  
  
 PATRICK J. LUCEY, Governor, State of  
 Wisconsin, PHILIP LERMAN, Chairperson,  
 Department of Industry, Labor and Human  
 Relations, and C. K. WETTENGEL, Director,  
 State Bureau of Personnel,  
  
 Respondents.  
  
 Case No. 74-12  
  
 \* \* \* \* \*

**OFFICIAL**

OPINION AND ORDER

Before: JULIAN, Chairperson, SERPE, STEININGER and WILSON, Board Members.

OPINION

I. Facts

Grievant is a permanent employe in the classified service. He works for the Department of Industry, Labor and Human Relations (hereinafter called the Department) as a Manpower Specialist 4.

Under Sections 16.30 (4) (a) (1), (6), and (9), Wis. Stats., State Offices are closed on January 1, December 25, and the afternoons of December 24 and 31. Except for provisional, emergency, and limited-term employes, state employes are entitled to these days among others as holidays.

In 1973 December 24 and 31 fell on consecutive Mondays. In November, 1973 Respondent Governor issued a directive (Subject: Energy Conservation Program for Wisconsin Government) to all State Department Heads. This directive stated in pertinent part:

All state office buildings, universities and other facilities except institutions, prisons, etc. will be closed all day December 24 and December 31 as a fuel conservation move.

. . .

State employes now are entitled to a half-day holiday on Christmas Eve and to another half-day on New Year's Eve. They will be asked to make up the extra day off by:

- A. Using 1973 vacation or personal holiday time.

- B. Using vacation or holiday time from 1974 if none is available from 1973.
- C. Working extra hours in 1974 to make up the time.

. . .  
A rough estimate is that the long period of lowered heat will mean a fuel savings of at least 8% a day, depending on the outside weather. Only building service engineers and the security force will be on duty. I am requesting the Department of Administration and other agencies operating buildings to carefully monitor this effort to determine its impact on statewide energy savings. (Board's Exhibit No. 5, p. 5b.)

In accordance with this directive the Department ordered that all its offices would be closed on the two mornings of December 24 and 31. Through a series of bulletins and letters the Department established its policy on the alternatives which the employees could use to record the time. The last and most complete letter dated December 11, 1973 stated in part:

A directive received today from the Department of Administration further details and corrects information on the closing of State Offices on December 24 and 31, 1973 as communicated in ESA Letter #71 dated December 3, 1973.

To cover the time off for the mornings of December 24 and 31, employees have the following options:

1. Use 1973 vacation or personal holiday time.
2. If no 1973 time is available, employees can use vacation or personal holiday time to which they will be entitled in 1974. Employees on probation can similarly borrow against 1974 vacation or holiday time.
3. Use any accrued compensatory time.
4. Make up the time. Make up time can only be allowed when the employer determines there is pressing work which must be processed during this period or when an employee shows conclusively that he/she cannot exercise any of the above alternatives. Such time must be made up during each of the two work weeks so that in neither week will the employee's paid work time exceed 40 hours.
5. Leave without pay may be taken by any employee who chooses not to exercise any of the above options.

Tom Dickraff, WIN/OJT-PSE Supervisor, and Grievant's supervisor, met informally with Grievant once prior to December 18, 1973 to explain the various options open to him regarding the closing of the State Offices. On December 18, 1973 a memorandum was issued by Mr. Dickraff to Grievant, requesting that Grievant notify the Secretary of WIN or Mr. Dickraff by 9:00 a.m. on Friday, December 21, 1973 of which option he chose. The memorandum further stated that failure to meet this deadline would mean that the eight hours involved would be recorded as leave without pay (Board's Exhibit No. 3, pg. 3e.)

Grievant had used all his 1973 vacation and personal holiday time. Furthermore, Grievant had no accrued compensatory time. Finally, Mr. Dickraff had determined that there was no pressing need for work to be done during those two weeks. Therefore, Grievant was informed that his only two options were to apply the eight hours against his 1974 vacation time or to record the time as leave without pay. Grievant chose neither of those two options but maintained his willingness to work on those two mornings.

The eight hours were recorded as leave without pay. Grievant filed the first step in his grievance on January 2, 1974. This step and the subsequent two were denied. On February 7, 1974 Grievant appealed the third step decision to the Personnel Board.

Respondent Lucey submitted a position paper to the Personnel Board on May 10, 1974. (See Appendix A.)

## II. Conclusions

### The Actions Of The Governor In Ordering The State Offices Closed During The Mornings of December 24 And December 31, 1973 Were Illegal

Article V. Section 4, Wisconsin Constitution, in part confers upon the Governor the following powers and duties:

He shall transact all necessary business with the officers of the government, civil and military. He shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws be faithfully executed.

The Governor then has the duty to see that the laws are duly executed and the legislative policies regarding those laws fully implemented. Chapter 16 of the Wisconsin Statutes is a law which the Legislature enacted and the Governor is to execute.

In Section 16.30 (4), Wis. Stats., the Legislature outlined the holiday and work time of State employes. Each employe except a provisional, emergency, or limited-term employe is entitled to seven and one-half days of holiday time. (Section 16.30 (4) (c).) Except for these holidays the State Offices shall be open each week Monday through Friday from 7:45 a.m. to 4:30 p.m. (Section 16.30 (1) and (4) (f).)

There are two exceptions to the above scheduled hours. These exceptions come into use only upon action of the Governor. First, in order "to relieve traffic congestion or as the needs of the service otherwise require," a department, upon the Governor's permission, may adjust the opening and closing hours. (Section 16.30 (4) (f).) In the instant case, the Governor directed that State Offices be closed. This was based on the needs of the State to conserve energy. However, he did more than adjust the opening and closing hours. The closing of the State Offices meant that Grievant was prohibited from working the two half days involved. Under Grievant's circumstances the wages for those hours were lost completely because no alternative except taking the time as leave without pay was open to him. Therefore, the Governor's actions did not fall within the scope of this exception.

The second exception when the Governor may change State hours is found under Section 16.30 (5). In this subsection during times of proclaimed national emergency, the Governor is empowered to "extend the work week and adjust the working hours to use the available manpower of any or all departments as he deems essential." Although there was a major concern about energy shortages, the condition had never been proclaimed a national emergency. Therefore, this subsection like Section 16.30 (4) (f) did not apply. Both these subsections are narrowly drawn, outlining specific conditions under which the Governor can alter the working hours of state employes. Respondent Lucey simply did not act within the scope of the exceptions.

In late 1973 a special session of the Legislature was called. A bill which is now Chapter 125, Energy Conservation, was introduced on December 17, 1973. It was signed on December 21, 1973 and became effective December 30, 1973. Upon the declaration of an energy emergency<sup>1</sup> the Governor may among other things "direct state participation under federal and state energy allocation and conservation programs" and "propose whatever corrective actions are needed to the state agencies, the legislature and the general public." (Section 125.02 (2) and (6).)

The legislative purpose of this statute as stated in Chapter 157 of the Laws of 1973 was to grant temporary assistance in time of energy crisis. This statute was first to be effective only until July 1, 1975. By Chapter 27, Laws of 1975, that date has been extended until July 1, 1977.

However, even under this Chapter, the Governor could not act as Respondent Lucey did in the instant case. No energy emergency existed or had been declared.

Therefore, we conclude that Respondent Lucey was not acting under statutory authority. As support for his action, Respondent Lucey cites only Section 15.001 (2), Wis. Stats. This subsection states:

As the chief administrative officer of the state, the Governor should be provided with the administrative facilities and the authority to carry out the functions of his office efficiently and effectively within the policy limits established by legislature.

The above language is very general. One of the important constitutional functions of his office is to faithfully execute the laws. The statutes involved in the instant appeal are clear and definitive. The Governor can only under limited circumstances change state office hours. None of those circumstances appeared in the facts of the instant appeal.

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<sup>1</sup>Section 340.01 (15s) defines this term as "a period of disruption of energy supplies which poses a serious risk to the economic well-being, health or welfare of the citizens of this state."

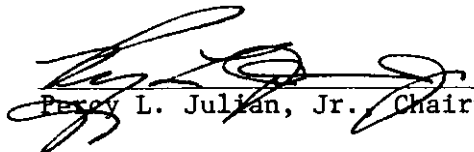
Therefore, although we find that the motives of Respondent Lucey were meritorious, we conclude that he was without authority to act as he did. It may be that the Governor should have the power to close State Offices under circumstances similar to the instant grievance, but we conclude he does not presently have such power. Grievant then is entitled to be paid for the two four hours periods on the morning of December 24 and 31, 1973. Furthermore, he is entitled to have expunged from any of his records any reference to his having taken such time as "leave without pay."

ORDER

IT IS HEREBY ORDERED that Respondents' decisions be rejected and this matter is remanded to Respondents for action in accordance with the above Opinion.

IT IS FURTHER ORDERED that Respondents report back to the Personnel Board within ten working days of the date of this Order the actions taken in compliance thereof.

Dated November 24, 1975. STATE PERSONNEL BOARD

  
Percy L. Julian, Jr. Chairperson



STATE OF WISCONSIN  
OFFICE OF THE GOVERNOR  
MADISON, WISCONSIN 53702

APPENDIX A

PATRICK J. LUCEY  
GOVERNOR

May 10, 1974

Mr. William Ahrens, Chairman  
Personnel Board  
244, One West Wilson Street  
Madison, Wisconsin 53702

Dear Mr. Ahrens:

Re: Martin vs. Lucey, Personnel Board Case No. 74-12

This letter is in response to the April 30, 1974, letter from Mr. Greenwald, Legal Counsel for the Personnel Board, informing me that I had been made a party to the above entitled appeal currently pending before the Personnel Board. This letter constitutes my reply to the matters at issue identified in Mr. Greenwald's letter.

The first issue relates to the jurisdiction and authority of the Personnel Board to issue an order to the Governor of the State of Wisconsin. I wish to indicate that I do not in any way challenge or question the Personnel Board's authority in this matter. It is my intention to participate completely in the hearing through my authorized representative and to comply with any lawful order of the Personnel Board. I have designated Mr. Edward Main, Legal Counsel for the Department of Administration, as my representative.

The second issue relates to burden of proof. I have no opinion on the question of where the burden of proof lies or whether or not there was any violation of law by either the Department of Administration or the Department of Industry, Labor and Human Relations in implementing the closing of state offices. I presume that determination will be made by the Board based on the factual data supplied to the Board by the two departments involved.

The primary issue addressed to me relates to the legality of the closing of state offices on the mornings of December 24 and December 31, 1973. The question is whether or not the closing of state offices by me was a violation of Section 16.30 (4)(a)9 of the Wisconsin Statutes. The statute states "The office of the departments of state government shall be kept open on all days of the year except Saturdays, Sundays, and the following holidays..." This sentence is followed by a listing of the holidays when the offices must be closed. The mornings of December 24 and 31 are not included in this statutory provision; however, the afternoons of both days are. To have

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pursued this schedule precisely would have resulted in the following pattern on both of two consecutive weeks: offices closed on Saturday and Sunday, offices open for four hours on Monday morning, offices closed on Monday afternoon and all day Tuesday, offices opened on Wednesday morning. We examined that pattern during the period when we were identifying all possible ways to respond to the energy crisis, particularly the shortages of fuel oil and gasoline. In my opinion, the severity of the energy crisis created an unusual and unforeseen situation which is not addressed by the statutes and which necessitated the implementation of unusual actions.

Section 15.001 (2) of the Wisconsin Statutes provides that "The Governor should be provided with the administrative facilities and the authority to carry out the functions of his office efficiently and effectively within the policy limits established by the legislature." When Chapter 15 was enacted by the Legislature, one of the goals was to make government more responsive to the problems created by our modern society. The energy crisis was such a problem.

As a result of the closing of state offices on the mornings of December 24 and December 31, 1973, building superintendents have documented that the equivalent of more than 80,000 gallons of fuel oil was saved. This occurred because the temperatures in such buildings as the Madison Hill Farms, Wilson Street, Capitol and General Executive Facility #1 buildings, together with the state-operated Milwaukee office building and the University of Wisconsin-Madison campus were reduced much lower than would be normally attainable over a weekend because they could retain the lower temperatures for a total of four days during the two consecutive weeks. Substantial savings of electricity were also realized, as well as gasoline which would have been required for state employes to commute on the two Mondays. If I had not made the decision to close state offices, the savings would not have occurred.

Paramount in my approval of the closing was my concern that employes would not be adversely affected. Consequently, they were offered five possible alternatives in which to make up the time lost by the closing of the offices. These were outlined in Informational Bulletin A-187 as follows:

1. Use 1973 vacation or personal holiday time.
2. If no 1973 time is available, employes can use vacation or personal holiday time to which they will be entitled in 1974. (Employes on probation would similarly be able to "borrow" against 1974 vacation or holiday time.)



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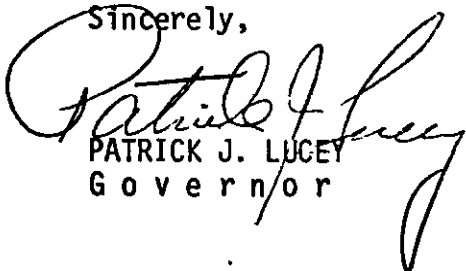
3. Use any accrued compensatory time.
4. When an employer determines that there is pressing work which must be processed during this period or when an employe shows conclusively that he cannot exercise any of the above alternatives, the employer may arrange for the employe to "make-up" the eight hours during the work weeks of December 24 and December 31. Such make-up work must be assigned during each of the two work weeks so that in neither week will the employe's paid work time exceed 40 hours, if work in excess of 40 hours would force him to be compensated at time-and-one-half, since time-and-one-half compensation for this purpose will not be allowed.
5. Leave without pay may be taken by any employe who chooses not to exercise any of the above options.

The alternatives offered included every practical and feasible possibility to assure that employes would not lose wages for the eight hours involved.

During times of emergency, every citizen should be willing to make some sacrifice. State employes in particular should be willing to set an example for others. In my opinion, the inconvenience or disruption caused to state employes or the public by this closing of state offices was very minimal compared to the significant savings in fuel which were achieved.

Please advise me if I can provide further information in this matter.

Sincerely,



PATRICK J. LUCEY  
G o v e r n o r