STATE OF WISCONSIN STATE PERSONNEL BOARD

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ROGER LUCKJOHN,

Appellant,

v.

SECRETARY, Department of Health and Social Services,

Respondent.

Case No. 75-110

* *

ORDER

Before: Morgan, Chairperson, Hessert and Morgan

The section, "Nature of the Case," contained in the proposed opinion and order of the hearing examiner is adopted by the board as a part of its final decision with the deletion from the third line of the word "stipulated." This word is deleted because it is not supported by the record.

The "Findings of Fact" contained in the proposed opinion and order of the hearing examiner are adopted by the board as a part of its final decision, with the deletion of the following sentence from page 2 of the decision because it is not supported by the record:

> "However, the language of the stipulation set forth under subparagraph 4, 're-employed . . . with salary and other benefits retroactive to August 28, 1975,' as well as the language in the stipulated issue 'fully reinstated,' implies that it was the intention of the respondent, whether arrived at unilaterally or pursuant to agreement with appellant, to reinstate fully the appellant with retroactive salary and benefits, and it is so found."

The board substitutes for the "conclusions of law" and "order" contained in the hearing examiner's proposed decision the following "conclusions of law" and "order." The board is of the opinion that the revised conclusions and order are mandated by the statutes cited hereafter:

Conclusions Of Law

The board can perceive no basis for subject matter jurisdiction over the issues set forth in paragraph 2 under "nature of the case." There is no basis for a conclusion that this case falls within Section 16.05(1)(e), stats.:

> "Hear appeals of employes with permanent status in class, from decisions of appointing authorities when such decisions relate to demotions, suspensions or discharges, but only when it is alleged that such decision was based on just cause. After the hearing, the board shall either sustain the action of the appointing authority or shall reinstate the employe fully."

There is no action of the director appealable under Section 16.05(1)(f), stats., and no other apparent statutory basis for jurisdiction. While the concept of ancillary jurisdiction may obtain in certain cases, it is concluded that on this record there is no basis for the exercise of ancillary jurisdiction.

Order

This appeal is dismissed for lack of subject matter jurisdiction.

Dated 10-12, 1977 STATE PERSONNEL BOARD

James R. Morgan

James Morgan, Chairperson

STATE OF WISCONSIN STATE PERSONNEL BOARD

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ROGER LUCKJOHN,

Appellant,

v.

Department of Health and Social Services,

Respondent.

Case No. 75-110

* *

PROPOSED
OPINION
AND
ORDER

Before:

Nature of the Case

This case involves the appeal of the termination of a probationary employe. Following the filing of the appeal the appellant was rehired and the matter went to hearing on the following stipulated issues:

1. Whether the Personnel Board has jurisdiction to enter an order granting the requested relief.

2. Whether Appellant who was terminated and then fully reinstated is entitled to:

   a) the payment of overtime hours which he would have worked but for the termination;
   b) the payment of health insurance premiums during the period after the termination until his reinstatement;
   c) the payment of other medically related bills which would have been covered by the state health insurance policy but for the termination; and
   d) the vacation time he would have accrued from August 28, 1975, to February 25, 1976, but for the termination.

Findings of Fact

The parties stipulated at a prehearing to the following facts which are incorporated as findings:

1. Appellant's last day of work for the Department of Health and Social Services was August 28, 1975.

2. Appellant began working again for the Department of Health and Social Services on February 25, 1976.

3. Prior to August 28, 1975, Appellant worked overtime hours.

4. On February 25, 1976, Appellant was re-employed by the Department of Health and Social Services with salary and other benefits retroactive to August 28, 1975.

The parties further stipulated at the hearing, and it is found, that the appellant began his employment at the Wisconsin State Prison, Waupun, on March 17, 1975, as a probationary correctional officer.

The record is cloudy as to the nature of the transaction involving appellant's re-employment on February 25, 1976, and as to what agreements, if any, related to this transaction. However, the language of the stipulation set forth under subparagraph 4, "re-employed . . . with salary and other benefits retroactive to August 28, 1975," as well as the language in the stipulated issue "fully reinstated," implies that it was the intention of the respondent, whether arrived at unilaterally or pursuant to agreement with appellant, to reinstate fully the appellant with retroactive salary and other benefits, and it is so found. It is further found based on testimony at the hearing that the appellant was re-employed on February 25, 1976, as an employe with permanent status in class.

During the period between appellant's termination and re-employment the number of overtime hours worked by correctional officers 1, 2, and 3 at the prison was about 37, 596. During this period the institution averaged 49 correctional officers 1, 85 officers 2, and 42 officers 3. The appellant was not paid for any overtime during this period. His base salary during this period was $4.033 per hour. Overtime was compensated at a rate of 1½ times the base rate.

During the period of his termination the only compensation received by appellant was $137 (net) for farm labor plus unemployment compensation in an unspecified amount.

Appellant's state health insurance was terminated effective November 1, 1975, and reinstated effective March 1, 1976. During the period of his non-coverage (November 1975 - February 1976) his employe contribution would have been $6.47 per month. During the period he was not covered by this insurance, appellant had no other medical insurance in force. He incurred during this period medical bills in the amount of $661.10.

Conclusions of Law

Jurisdiction

The jurisdictional question in this case is confusing. The original appeal, coming from a probationary employe, ordinarily would not be cognizable under Section 16.05(1)(e), stats., or any other provision conferring jurisdiction on this board. However, the appellant alleged and made a colorable argument that his termination was ineffective and that he had attained permanent status in class more or less by default through the operation of Section 16.22(2), stats.: "An employe gains permanent status unless terminated prior to the completion of his probationary period." Had this theory been borne out,[1] the appellant then apparently would have been appealing a discharge of an employe with permanent status in class. However, before there was any determination concerning this matter the appellant was reinstated, as an employe with permanent status in class, accompanied by some dispute as to whether he was entitled to certain benefits, including the payment of medical bills accrued while appellant was unemployed following his termination and before his re-employment.

Now, if all the facts concerning appellant's employment, termination, and re-employment were present but appellant had not filed his original appeal but rather had filed a direct appeal here of the agency's refusal to make additional

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[1]The respondent never replied to appellant's brief in support of jurisdiction which contained this argument, the parties at this point having entered into negotiations.

payment on his re-employment it seems clear that there would be no jurisdiction, since the agency action would be neither a personnel transaction under Section 16.05(1)(e), stats., nor an action or decision of the director (either delegated or direct) pursuant to Section 16.05(1)(f), stats.[2] Looking at this matter from another hypothetical viewpoint, if following the filing of the original appeal the appellant had not been re-employed by the agency and if the board had determined to assume jurisdiction, the appellant, or the respondent, would have been able to ask the board clearly within the appropriate exercise of its jurisdiction to make a determination as to the extent of the benefits to which appellant would be entitled if the board decided to order reinstatement pursuant to Section 16.05(1)(e), stats.: "After the hearing, the board shall either sustain the action of the appointing authority or shall reinstate the employe fully." (emphasis supplied).

The actual facts of this case of course fall into neither hypothetical. As set forth above, however, based on the stipulations in the record it was found that:

> "it was the intention of the respondent, whether arrived at unilaterally or pursuant to agreement with appellant, to reinstate fully the appellant with retroactive salary and other benefits . . . ."

On this record it is concluded that the board has jurisdiction to determine the various stipulated issues relative to the incidents of appellant's reinstatement as an exercise of the board's implied powers or ancilary jurisdiction. See 73 C.J.S. Public Administrative Bodies and Procedure, Section 50, Implied Powers.

> "As a general rule, however, in addition to the powers expressly conferred on them by organic or legislative enactment, such officials and bodies, in the absence of restricting limitations of public policy or express prohibitions. or express provision as to the manner of exercise of the powers given, have such implied powers, and only such implied powers, as are necessarily inferred or implied from, or incident to, or reasonably necessary and fairly appropriate to make effective, the express powers granted to, or duties imposed on them."

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[2] The agency action might have been grievable or appealable to the director pursuant to Section 16.03(4), stats., and possibly ultimately appealable to the board, but not by the direct route discussed above.

We are mindful of the proposition set forth in State ex rel Farrell v. Schubert, 52 Wis. 2d 351, 358, 190 N.W. 2d 529 (1971): "any reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority." However, the court also held that this proposition was consistent with the general rule that:

> "'. . . a power which is not expressed must be reasonably implied from the express terms of the statute; or, as otherwise stated, it must be such as is by fair implication and intendment incident to and included in the authority expressly conferred.'"

In that case the question was whether the special review board, which had the express authority only to recommend parole, had the implied power to recommend the forfeiture of good time. The court held:

> "The power to recommend forfeiture of good time is not incident to and included in the authority to recommend parole. The functions are separate. They are separate in the parole statute, they are separate in the departments' parole board manual of procedures and practice." 52 Wis. 2d at 358-359

In the case at hand, the determinations requested by appellant are exactly the determinations the board would be called on to make following reinstatement by board order. When the case is before the board, and when following the filing of a colorable argument in support of jurisdiction but before a response to that argument is made and before a final decision on jurisdiction, the respondent purports to "fully" reinstate the appellant, we conclude that the board has the authority to make a determination as to whether there indeed was a "full" reinstatement.

Merits

The stipulated issue carries with it the questions of whether full reinstatement carries with it entitlement to payment of overtime hours to which the appellant would have worked but for the termination, the payment of health insurance premiums during the period after termination and until reinstatement,

the payment of medical bills which would have been covered by the state health insurance policy but for the termination, and the vacation time he would have accrued during the period of time between termination and reinstatement. There is a paucity of state law on this subject but the federal court system has developed a substantial body of precedent in interpreting the National Labor Realtions Act and specifically 29 United States Code Section 160(C), which provides, in part, that the NLRB may reinstate employes with or without back pay. Section 16.05(1)(e), stats., provides that unless the decision of the appointing authority is sustained, the board "shall reinstate the employe fully." The federal precedent appears to be useful to the resolution of the issues presented in this case.

The United State Sixth Circuit Court of Appeals has held:

> "In computing back pay awards the NLRB should seek to restore the employe to the status quo he would have enjoyed if the discriminatory discharge had not taken place. Moss Planing Mill Co., 110 NLRB 933, enforced as modified, NLRB v. Moss Planing Mill Co., 256 F. 2d 653 (4th Cir. 1958); Nabocs v. NLRB, 323 F. 2d 686 (5th Cir. 1963), cert. denied, 376 U.S. 911 (1964), NLRB v. Revlon Products Corp., 144 F. 2d 88 (2d Cir. 1944)." NLRB v. U.S. Air Con. Corp., 336 F. 2d 275, 277 (6th Cir. 1964).

The application of this principle leads to the conclusion that appellant is entitled to vacation benefits he would have accumulated between August 28, 1975, and February 25, 1976. See Republic Steel v. NLRB, 114 F. 2d 821, 822 (3d Cir. 1940):

> "We think it was the intention of the Board, as it was of this court, to provide that upon reinstatement the employes were to be treated in all matters involving seniority and continuity of employment as though they had not been absent from work (and) are entitled to the benefits of Republic's vacation plan . . . upon a basis of continuity of service computed as though they had actually been at work . . . ."

It is further concluded that appellant is entitled to payment of a sum equal to the amount of the medical bills which would have been covered by his state health insurance policy, less a deduction of the amount of employe contributions toward health insurance premiums he would have had to have made during the period

of his termination. See NLRB v. Rice Lake Creamery Company, 365 F. 2d 888, 893 (D.C. Cir. 1966):

> "The question is whether the hospital and medical expenses should be included to make these employes whole. Since they would have received the expenses except for the unfair labor practice, the loss is one which the Board validly included in the amounts required to make them whole, after deducting an amount equal to the premium the employe would have been required to pay."

It is also concluded that appellant is entitled to the payment of overtime pay which he reasonably could be expected to have worked but for the termination. This formula was approved in the Rice Lake Creamery Company case:

> ". . . the average number of straight time and overtime hours worked by all full-time employes who performed production work during the back pay period and multiplying this average by the appropriate hourly wage rate for each discriminatee this formula may not reach the exactly correct figure, but there is no suggestion of a formula that could, since the discriminatees did not actually work during the period. The formula used is a reasonable and legal basis for computation of gross amounts, and has had approval in court decisions. NLRB v. Brown & Root, Inc., 311 F. 2d 447 (8th Cir.). NLRB v. East Texas Steel Castings Co., 255 F. 2d 284 (5th Cir.).

Therefore, it is concluded that the appellant is entitled to the following:

(1) The vacation benefits he would have earned had he been regularly employed during the period of his termination, August 28, 1975 - February 25, 1976.

(2) The payment of a sum of money equal to the medical bills incurred as set forth in the findings ($661.10), less the amount of the employe contributions he would have made during the period his insurance was not in force ($25.88) less any amount of the total charges that would not have been covered by appellant's policy had it been in force.

(3) The payment of a sum of money equal to the compensation appellant would have received from the state had he worked 213.6 hours of overtime[3] during the aforesaid period of termination, less $137 and less unemployment compensation received during this period, unless these sums have already been offset against some other payment made by respondent to appellant relative to the period of termination.

Order

This matter is remanded to the respondent for action not inconsistent with this decision. The respondent is to serve and file a statement concerning what

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[3]This is a prorated figure.

actions he has taken not later than 15 working days after the date of service of this order.

Dated_____, 1977 STATE PERSONNEL BOARD

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James Morgan, Chairperson