STATE OF WISCONSIN PERSONNEL COMMISSION

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*
RON PAUL, *
*
Appellant, *
*
v. *
* DECISION
Secretary, DEPARTMENT OF * AND
HEALTH AND SOCIAL SERVICES, * ORDER
*
Respondent. *
*
Case No. 81-323-PC *
*
* * * * * * * * * * * * * * * *

NATURE OF THE CASE

This is an appeal pursuant to §230.45(1)(d), Stats., of the denial of certain hazardous employment injury benefits. This case was held in abeyance by mutual agreement for a period of time pending the results of related litigation which turned out not to be dispositive. The parties, through counsel, have submitted this matter for decision on briefs, the material facts not being in dispute.

FINDINGS OF FACT

1. The appellant, while occupying an Officer 5 position in the classified civil service at Kettle Moraine Correctional Institution (KMCI) was on hazardous employment injury leave under §230.36, Stats., from October 1980 to April 1981.

2. During the aforesaid period, the respondent refused to permit the appellant to accrue any sick leave or vacation.

3. Subsequently, the respondent restored sick leave and vacation for the period after March 1, 1981.

4. The respondent's handling of this matter was based on the premise that prior to March 1, 1981, the Wisconsin Administrative Code did not permit an employe in the appellant's status to accrue sick leave and vacation, but, due to a change in the rules effective March 1, 1981, vacation accrual thereafter was provided for by §Pers 28.04(5), Wis. Adm. Code.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(d), Stats.

2. The respondent did not err in denying the appellant the accrual of sick leave during the aforesaid period.

3. The respondent erred in denying the appellant the accrual of vacation during the aforesaid period prior to March 1, 1981.

OPINION

In Loeffler v. DHSS, Wis. Pers. Commn. No. 81-376-PC (12/17/81), the Commission decided a very similar case. It included the following discussion of the legal provisions in the civil service code which govern this type of transaction:

> Section 230.36(1), Stats., provides that a covered employe
>
> "...shall continue to be fully paid by the employing agency upon the same basis as paid prior to the injury with no deduction from sick leave credits, compensatory time for overtime accumulations or vacation."
>
> Section Pers 28.04(5), Wisconsin Administrative Code (1975), which was effective until March 1, 1981, provided as follows:
>
> Benefits denied an employe while in non-work status include earning of vacation during the period of leave with pay...time off for legal holidays which occur during the period of approved leave with pay and accrual of sick leave.
>
> Revised section Pers 28.04(5), Wisconsin Administrative Code effective March 1, 1981, now provides:
>
> Employes on approved leave with pay under this section shall earn vacation and sick leave credits for the duration of such leave. Employes shall be denied legal holiday credits

> for holidays which occur during the period of absence from work while on an approved leave with pay under this section....

The Commission went on to hold that the earlier version of §Pers 18.04(5), Wis. Adm. Code, was in conflict with the statutes and hence invalid. The Commission considered and rejected the respondent's argument that it lacked the authority to determine that a rule conflicted with a statute and hence was invalid. The Commission relied in part on a decision of the California Supreme Court, Woods v. Superior Court of Butte County, 620 P.2d 1032, 1038-1039 (1981), that an invalid rule was vulnerable to attack at the administrative level.

In its brief filed in the instant appeal, the respondent's sole argument is that this commission lacks the authority to determine that the rule in question is invalid.

General statements concerning the implied powers of administrative agencies are set forth in American Jurisprudence 2d and Corpus Juris Secondum as follows:

> An express grant of powers will be deemed to include such other powers as are necessarily or reasonably incident to the powers granted. 1 Am Jur 2d Administrative Law §73.

> 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 provisions 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. 73 C.J.S. Public Administrative Bodies and Procedure §50. (emphasis added)

In Wisconsin, the Supreme Court addressed this issue in State ex rel Farrell v. Schubert, 52 Wis. 2d 351, 358, 190 N.W.2d 529 (1971), as follows:

> This court has not had the occasion to determine the scope of an administrative agency's implied power under a statute. The rule in other jurisdictions is 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.' Consistent with this rule is the proposition that any reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority. (emphasis added)

While the Court apparently has not provided a specific definition of the term "reasonable doubt," it is instructive to examine how this principle has been applied in practice.

In State ex rel Farrell v. Schubert, the Court cited two cases for the proposition "that any reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority." The more significant of the two cases was City of Newark v. Civil Service Commission, 115 N.J.L. 26, 29, 177 Atl. 868, 870 (N.J. 1935). That case involved a review of a decision by the civil service commission in a case involving the discharge of a Newark police officer. Following a hearing, the Commission found that there was misconduct but ordered the officer reinstated without back pay. This had the effect of modifying the discharge to an extensive suspension. The statute under which the Commission acted contained the following grant of authority:

> If, on such hearing, the Civil Service Commission shall disapprove of such order of removal, discharge, fire or reduction the same shall be and remain of no effect. The Civil Service Commission may, if in its opinion the provisions of this act have not in the matter of such order for removal, discharge, fire or reduction been fully complied with, or if an affidavit that they have been violated shall be presented, of its own motion direct such hearing and approve or disapprove, as the case may be, such order of removal, discharge, fire or reduction.... (emphasis supplied)

After having made the statement that "Any reasonable doubt of the existence of any particular power in the Commission should be resolved against the exercise of such authority," and having set forth the provisions of the aforesaid statute, the Court held:

> This provision, fairly and reasonably construed, does not include the power to modify a judgment lawfully rendered by the departmental head, where, as here, it was within his power and is supported by good and sufficient cause ... no such discretion is vested by the statute in the civil service commission, in the event of the statutory inquiry by that body; and none can be reasonably implied as incident to the express grant of authority in the premises. (emphasis supplied)

It seems to this Commission that what the Court in that case did to determine whether there was a "reasonable doubt" as to the existence of an implied power was to go through a normal process of statutory construction to determine whether such implied power was included within the statute, "fairly and reasonably construed," or could be "reasonably implied as incident to the express grant of authority...." Since the Court could not so conclude, there was a "reasonable doubt" as to the existence of the implied power. Pursuant to this approach then, an implied power can only exist under a reasonable statutory construction or implication, as contradistinguished, presumably, from an unreasonable or strained construction or implication. This is consistent with the general rules cited above.

The position taken by the respondent on the instant appeal goes beyond the principle stated by the Court in State ex rel Farrell v. Schubert, which relied on City of Newark v. Civil Service Commission. See respondent's brief, p. 2:

> ...there is no subsection or phrase that even hints at the notion that the Commission has the jurisdiction to declare personnel rules invalid. Since neither section [§§230.44, 230.45] grants to the Commission jurisdiction to declare the Bureau of Personnel's administrative rules invalid, there is at the very least a doubt as to that authority. Accordingly, as required by the above-referenced decisions of the Wisconsin Supreme Court, the Commission does not have the authority.

This approach implies that if a particular authority is not express, there is a doubt as to that authority, and that that doubt must be resolved against the existence of the authority. Carried to its apparent extreme, there would be few, if any, implied powers in Wisconsin administrative agencies. The reported cases in Wisconsin are not consistent with this position.

In State ex rel Farrell v. Schubert, the Court analyzed the statutes in question and found no basis upon which to infer the implied power the special review board had been exercising:

> The only express power granted the special review board is to recommend to the department that a sex deviate is 'capable of making an acceptable adjustment in society.' In carrying out this express power, the special review board has the implied power to hold hearings and make investigations to the department. These are implied powers under the express statutory grant. 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 department's parole board manual of procedures and practice. 52 Wis. 2d at 358-359.

In State (Department of Administration) v. ILHR Dept., 77 Wis. 2d 126, 252 N.W. 2d 353 (1977), the court considered whether the Director of the Bureau of Personnel had the implied authority to have promulgated Ch. PERS 27, Wis. Adm. Code, which authorized the establishment of exceptional employment lists limiting eligibility for application to certain positions to certain "occupationally disadvantaged" persons. After citing the "reasonable doubt" rule from State ex rel Farrell v. Schubert, the Court spent approximately four pages analyzing the relevant statutes before concluding that there was no such implied grant of authority. The Court's analysis included the following language:

> Not only is a legislative grant of power to implement absolute preferences not necessarily implied, neither is such a grant of power fairly implied....
>
> * * *

> We conclude a grant of power to implement absolute preferences based upon sex or race is not implied by the language of sec. 16.08(7) or because the appellants claim such preferences are the only feasible method to accomplish the legislative purpose. Furthermore, other statutes contain statements which are clearly not consistent with the grant of such a power, and therefore there is at a minimum a reasonable doubt of the existence of implied power to implement the drastic procedures of absolute preferences. Where such a reasonable doubt exists, that doubt must be resolved against the implied grant. 77 Wis. 2d at 138, 140. (emphasis supplied)

It seems clear from the Court's approach in this case that a "reasonable doubt" is by no means equivalent to "any possible doubt," as is inferred by the respondent. The court only reached the conclusion that there existed a reasonable doubt after it had carefully analyzed the relevant statutes, had determined that the authority was neither necessarily nor fairly implied, and that the claimed implied authority "would clearly be in direct conflict with the statement in sec. 227.033." 77 Wis. 2d at 140. The manner in which the Court dealt with the implied power question in this case is consistent with the analysis in City of Newark v. Civil Service Commission where the court only found a "reasonable doubt" after determining that the implied power could neither be "fairly and reasonably construed" nor "reasonably be implied as incident to the express grant of authority."

Another case, of particular interest since it involved a question of this Commission's authority under the statutes, is Basinas v. State, 104 Wis. 2d 539, 312 N.W. 2d 483 (S. Ct. 1981). The Commission in that case decided that it lacked subject matter jurisdiction over an appeal of a reassignment of a career executive employe to a job in a lower pay range. This decision was based on the theory that §Pers 30.10(1), Wis. Adm. Code, stated that the reassignment of a career executive did not constitute a demotion, and therefore the matter was not appealable as a demotion

pursuant to §230.44(1)(c), Stats. This decision was affirmed by the Dane County Circuit Court and the Court of Appeals, see Basinas v. State, 99 Wis. 2d 412, 299 N.W. 2d 295 (1980).

In reversing, the Supreme Court set forth the following analysis of the applicable statutes, 104 Wis. 2d at 550-551:

> The draftsmanship of sec. PERS 30.10, Wis. Adm. Code, leaves something to be desired. However, the section may be interpreted so as not to nullify any of its provisions. Rather than interpreting sec. PERS 30.10(2) and (5) as permitting appeals to the Commission for other than demotions, the whole section may be viewed as a definition of demotion insofar as appeals to the Commission under sec. 230.44(10(c), Stats., are concerned. Under this interpretation, sec. PERS 30.10(1) first states as a general proposition that reassignments to jobs in lower pay ranges are not demotions, but then sec. PERS 30.10(2) and (5) declare that reassignments for disciplinary purposes, or those which constitute an unreasonable and improper exercise of discretion, are, in fact, demotions appealable to the Commission. Subsections (2) and (5) do not confer jurisdiction on the Commission in excess of that set forth in secs. 230.44 and 230.45, Stats., but merely reinstate a portion of the appealable matters which were removed by subsection (1).
>
> This reading of sec. PERS 30.10, Wis. Adm. Code, does not require that we abrogate certain portions of the rule, as was done by the lower courts. Neither does our interpretation expand the Commission's jurisdiction beyond the parameters set out in secs. 230.44 and 230.45, Stats. We view sec. PERS 30.10 in its entirety to define demotion for career executive employees, rather than interpreting sec. PERS 30.10(1) as defining demotion and viewing the other subsections of that rule as pertaining to something else.
>
> This view of sec. PERS 30.10, Wis. Adm. Code, in its entirety as a definition of demotion, is supported by other subsections of that rule. Sec. PERS 30.10(3) refers to the "just cause" standard which applies to demotions of classified employes under both sec. 16.28(1)(a), Stats. 1975, and sec. 230.34(1)(a), Stats. 1977. Sec. PERS 30.10(4) expressly defines a reassignment to a position in pay range seventeen or below as a demotion.
>
> Furthermore, interpreting sec. PERS 30.10, Wis. Adm. Code, to permit appeals of demotions only if brought for disciplinary purposes or if they constitute an unreasonable and improper exercise of discretion, may facilitate the easy transferability of career executives goal set forth in sec. 230.24(1), Stats., yet not cause a disparity between the rights of career executives and other classified employes which would discourage entry into the career executive program. The convoluted language used in sec. PERS 30.10 may also represent an attempt to facilitate such transferability by removing the pejorative connotation associated with the term "demotion" from reassignments of career executives

> jobs in lower pay ranges. Because sec. PERS 30.10, Wis. Adm. Code, does not, insofar as it applies to reassignments to lower pay ranges, exceed the Commission's jurisdiction as set out in secs. 230.44 and 230.45, Stats., there is no reason to negate any of its provisions.

In its analysis of the extent of the Commission's authority, the Court did not hesitate to look at the entirety of §PERS 30.10 as well as other statutory provisions, and to consider the policy ramifications of particular constructions. The Court's approach is not consistent with some kind of quasi-presumption against the existence of non-explicit administrative authority.

This Commission has the express authority and responsibility to hear and decide appeals, such as this, of denials of hazardous employment benefits, see §§230.36(4) and 230.45(1)(d), Stats. In order to execute that statutory obligation, certain authority may be considered to have been implied by the legislature.

For example, nowhere in the statutes does it say that the Commission has the authority to interpret the civil service statutes and rules. Yet certainly such authority must be implied or the Commission could not very well carry out its function of hearing and deciding appeals.

It also is the case, as pointed out by the respondent, that nowhere in the statutes does it say that the Commission has the authority to determine whether a personnel rule is in conflict with a statute. The question then is whether such authority "can be reasonably implied as incident to the express grant of authority..." to hear and decide appeals, see City of Newark v. Civil Service Commission, 177 Atl. at 870.

As an initial proposition, it seems clear that the Commission has at least some authority to determine that rules conflict with statutes. This is because the civil service statutes are changed by the legislature from time to time, with the effect of superseding rules that may have been promulgated in reliance on earlier statutory provisions, but the rule-making process is such that substantial periods of time may elapse before the rules can be amended to conform to the new statutes. In the meantime, it would make little sense for the Commission to continue to apply the rules, in violation of the newly-enacted statutes, on the theory that it lacked the authority to do otherwise.

In the case of a rule that is not deemed superseded by a recently-enacted statute, but still is deemed in conflict with an existing statute, the Commission is faced with a similar problem. If the Commission upholds the transaction because it feels it lacks the authority to conclude that the rule is in conflict with the statute and hence should not be followed, it then is in the seemingly anomalous position of approving a violation of the statute. In such a case, perhaps the employe might be heard to say "Nowhere in the statutes does it say that the Commission has the authority to countenance a violation of a statute because the transaction in question was pursuant to a rule."

In any conflict between a statute and a rule, the statute must control. See, e.g., 2 Am Jur 2d Administrative Law §289: "Whatever force and effect a rule or regulation has is derived entirely from the statute under which it is enacted, and a regulation in conflict with the statute is without force and effect." In the Commission's opinion, this is the key factor in determining whether it has the authority to conclude that a rule is in conflict with a statute. If it cannot make this determination, than it must in effect condone a violation of the statute. Such an intent cannot be ascribed to the legislature.

One of the policy implications of a conclusion that the Commission lacks the authority to determine that a rule is in conflict with a statute is that an employe adversely affected by an administrative transaction such as the kind here appealed would have no effective administrative remedy. Presumably the employe would have to file suit directly in circuit court. This would circumvent the evident legislative intent in enacting §§230.36(4) and 230.45(1)(d), Stats., of providing a third party administrative forum to resolve disputes about hazardous employment injury benefits.

With respect to the merits of this appeal, the Commission has reviewed the decision it reached in Loeffler v. DHSS, and has determined that its rationale for the conclusion that the prior version of §Pers 28.04(5), Wis. Adm. Code, conflicted with §230.35, Stats., was erroneous.

In the Loeffler case, the Commission's opinion contained the following:

> Section 230.35(1), Stats., provides in subsection (a) that appointing authorities are to grant their employes "annual leave of absence without loss of pay" (vacation) based on "accumulated continuous state service." Subsection (g) states in part:
>
> > The continuous service of an employe eligible for annual leave shall not be considered interrupted if the employe either:
> >
> > 1. Was on an approved leave of absence, included but not limited to military leave, leave to serve in the unclassified service, leave for absence due to injury or illness arising out of state employment and covered by ch. 102 [workers compensation].... (emphasis supplied)
>
> Approved leave due to a hazardous employment injury under §230.36(1) falls within the category of leave set forth in §230.35(1)(g)1., which is not to interrupt continuous service for accumulation of vacation time. Therefore, vacation credits should continue to accrue during such leave, and the provision of § Pers 28.04(5), Wisconsin Administrative Code (1975) to the contrary should be considered invalid....

The difficulty with the foregoing is that §230.35(1)(a) does not provide that vacation is to be granted based solely on "accumulated continuous state service." Rather, the statute provides:

> ...appointing authorities shall grant to each person in their employ ... based on accumulated continuous state service, annual leave of absence without loss of pay at the rate of:
>
> 1. Eighty hours each year for a full year of service during the first 5 years of service.
>
> 2. One hundred twenty hours each year for a full year of service during the next 5 years of service.... (emphasis supplied)

Thus, vacation is not based just on "accumulated continuous state service," but rather on "accumulated continuous state service," which determines the rate at which vacation is earned (80 hours per year, 120 hours per year, etc.) and on each "year of service" the employe serves. Thus, an employe with 6 years of "accumulated continuous state service" earns 120 hours for his or her sixth full year of service, because the employe is in his or her "next 5 years of service" after "the first five years of service." However, such an employe would not earn 120 hours vacation in the next year unless he or she had "a full year of service." If such an employe were on, for example, military leave in that next year of employment, presumably he or she would not earn 120 hours of vacation, but upon return to state service at the end of that year, pursuant to §230.35(1)(g)1., Stats., there would be no interruption in the employe's continuous state service, so that the employe would not thereafter have to start over again as if in the first 5 years of service earning at the rate of 80 hours each year as set forth in §230.35(1)(a)1., Stats.

While §230.35(1)(g), Stats., provides that an employe's "continuous service" shall not be considered interrupted on account of "leave for absence due to injury or illness arising out of state employment," it does

not address the question of whether such absence is to be considered part of the "full year of service" referred to in §230.35(1)(a), Stats.

The statutory interpretation utilized in the Loeffler case ignores the provision that the employe serve a "full year of service" as a prerequisite to vacation pay. That interpretation could lead to absurd results, as can readily be seen by looking at some of the circumstances set forth in §230.35(1)(g)1., Stats. For example, that subsection refers to "leave to serve in the unclassified service." Under the Loeffler decision, such employes would continue to earn vacation as set forth in §230.35(1)(a), Stats. Yet many of such employes are entitled to vacation at different rates as a consequence of service in their unclassified position. See §230.35(1m)(a), Stats.

Section 230.35(1)(a), Stats., which utilizes the term "full year of service," which is the controlling factor under the statute on the question of whether an employe is entitled to earn vacation time during hazardous employment injury leave under §230.36(1), Stats., does not define this term, nor is it defined elsewhere in the statutes.

While the statutes do not provide a specific definition of the term "full year of service," Black's Law Dictionary, Revised Fourth Edition, gives a number of definitions of "service," which include:

> The being employed to serve another; duty or labor to be rendered by one person to another, the former being bound to submit his will to the direction and control of the latter... The term is used also for employment in one of the offices, departments, or agencies of the government; as in the phrases 'civil service,' 'public service,' 'military service,' etc...

Based on this definition, it would seem that the question of whether an employe who is on hazardous employment injury leave is engaged in "service" pursuant to §230.35(1)(a), Stats., is at least open to some

argument. "Service" could be considered as either the status of being employed or the actual rendition of service to the employer. The personnel rules, specifically §Pers 28.04(5), Wis. Adm. Code, address this question.

The first version of the rule, which was in effect at the time the appellant commenced his hazardous employment injury leave, provided that vacation was among the "benefits denied" to an employe on hazardous employment injury leave. The amended version, which took effect March 1, 1981, provides that such employes "shall earn vacation" during such leave.

It seems clear that the rule in question is an interpretation of §230.35(1)(a), Stats. The two versions of the rule are exactly opposite in their treatment of vacation accrual during hazardous employment injury leave. It is difficult to perceive how both can be considered to be consistent with the underlying statute, §230.35(1)(a). Under these circumstances, a retroactive application of the new rule is indicated, see 73 C.J.S. Public Administrative Bodies and Procedure §109:

> ...where an administrative regulation which purports to interpret a statute but is out of harmony therewith is amended so as to correctly apply such statute, such amendment has been held not subject to the objection of being retroactive, since it is in fact the first correct application of the law.

Another way of looking at this is that the initial rule was in conflict with the statute and hence void. 2 Am Jur 2d Administrative Law §289.

Therefore, the Commission is of the opinion that the appellant should have been credited with vacation for the period of time that he was on hazardous employment injury leave prior to March 1, 1981.

With respect to the question of the accrual of sick leave, the Commission reiterates what was set forth in the Loeffler case:

> The subject of sick leave is covered in §230.25(2), Stats., which provides that 'it shall be regulated by rules of the administrator.' Therefore, it was up to the administrator to determine by rule whether sick leave credits would accrue during

a leave of absence pursuant to §230.36(1), and the treatment of sick leave by §Pers 28.04(5), Wisconsin Administrative Code (1975) cannot be said to contradict or be inconsistent with any statutory provision.

ORDER

The action of the respondent is affirmed in part and rejected in part and this matter is remanded for action in accordance with this decision.

Dated: October 19, 1983 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

AJT:jmf

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

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