

STATE OF WISCONSIN

BEFORE THE PERSONNEL BOARD

Leonard Herringa,

Appellant

vs.

Wilbur J. Schmidt, Secretary
Department of Health & Social Services
and C. K. Wettengel, Director
State Bureau of Personnel,

Respondents.

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MEMORANDUM DECISION

This appeal was submitted on the briefs of the parties, accompanied by a stipulation as to the facts.

Appellant was scheduled for vacation (referred to in the Civil Service Law as "leave with pay".) from Tuesday, June 23, 1970 through Saturday, June 27. On Friday, June 26, another officer "called in sick" and Appellant was asked to work that officer's shift on that day. He was told by his supervisor that if he did work on that day, he would receive overtime pay for the hours worked. He did come in and worked eight hours on June 26. He would not have come in had the representation as to overtime pay not been made. Sometime during the day he was advised that he would not receive premium pay.

Appellant contends that in addition to the basic pay which continues during vacation, he is entitled to premium pay (time and one-half) for the eight hours worked on June 26, 1970. This contention presupposes that Appellant would not have a substitute vacation day for the one scheduled for June 26, 1970.

Respondents contend that because he worked on June 26, he was not on vacation that day and that he should be paid only at his basic rate and that the vacation pay he would have received for June 26 would simply be assigned to another day Appellant would select as a substitute vacation day.

Both opposing contentions make sense and arriving at a logical decision involves an analysis of the statutes and rules that pertain to arrive at legislative intent and an inquiry into what vacation pay really is.

s. 16.275 Wis. Stats. provides that each employe based on accumulated service shall be entitled to: 2 weeks of annual leave of absence with pay during the first five years; 3 weeks during the next ten years; 4 weeks during the next ten years; and 5 weeks after twenty-five years. The statute further provides that five-week people may work the fifth week and receive cash therefor. The statutes say nothing about premium pay for overtime.

The overtime provisions are in the Rules of the Personnel Board, Pers 5.09 Wis. Adm. Code, revised recently to bring the state into compliance with the Federal Fair Labor Standards Act. The rule defines "overtime" as the time that an employe works in excess of 40 hours per each seven consecutive calendar day period. The rule provides that premium pay for such overtime shall be at the rate of time and one-half.

The statutes and the rules do not contain any sanction of extra pay at even the basic rate for vacation days on which an employe may work. That such is not the intendment of the law is to be inferred by the specific reference to extra pay for five-week people for one week if they elect to work it and by the provision for lapse of unused vacation in s. 16.275(1)(d) Wis. Stats.

Factually, under the state's liberal vacation plan which for many employes provides more leave than is wanted or can be afforded, much vacation is allowed to lapse. Vacation provisions have been in the law in one form or another for many years. Never has an employe who has not used his full vacation been paid extra for the non-user. An administrative practice followed consistently in many cases over a long period should be accorded weight as an implementation of the law:

"Legislative history and long-standing administrative interpretation are significant aids in statutory construction when no ambiguity or absence of necessary administrative direction appears in the statute."
Beghin v. Personnel Board, 28 Wis.(2d) 422, 430 (1965)

While reference is often made to "paid vacations" and, as in our statute, to "leave with pay", an employe is not paid for vacation days. Vacation is a bonus for a whole year's work. It is additional pay for the days actually worked. That an employe may anticipate his annual vacation is immaterial.

"Vacation pay is deferred wages earned after required period of employment." Department of Labor, v. Unemployment Board of Review, 218A. 2d. 847, 207 Pa. Super. 506.

"Vacation pay provided for by collective bargaining agreement is not a gratuity or gift but is, in effect, additional wages for service performed." Livestock Feeds v. Local 1634, 73 So. 2d. 128, 221 Miss. 492.

"Vacation pay is not in the nature of compensation under Unemployment Compensation Law for calendar days it covers, but is more like contracted for bonus for whole year's work." Dickinson v. Unemployment Compensation Board. 211 A 2d. 51, 205 Pa. Super 468.

"Vacation pay is deferred compensation in lieu of wages earned each week the employee works, payable at some future time." General Tire and Rubber Co. v. Local 512, 191 Fed. Supp. 911.

The Board agrees with the Respondents that an employe must be in actual, literal work status far in excess of 40 hours in a seven consecutive calendar day period to become entitled to premium pay for overtime.

It is unfortunate that Appellant's supervisor mislead him. However, no superior from the Governor down can in any way legally or equitably bind the state to make illegal salary or wage payments.

Appellant contends that the instant denial of overtime is a violation of the collective bargaining agreement. This argument is made in the wrong forum. The Personnel Board has no concern with or interest in the interpretation

and enforcement of collective bargaining agreements. If there be merit in this contention, which we doubt, the matter should have taken the contractual grievance procedure route rather than the state-wide grievance procedure route.

Counsel for Respondent shall draft Findings of Fact and Conclusions of Law, consonant with this decision.

Dated September 15, 1971.

STATE PERSONNEL BOARD

James H. Miller
John Heize
W. J. Doherty
Mr. Clarke
William A. Brown