

OFFICIAL

STATE OF WISCONSIN

PERSONNEL BOARD

HAROLD E. COWAN,

Appellant,

v.

WILBUR J. SCHMIDT, Secretary,
Department of Health & Social
Services,

Respondent.

Case No. 73-117

OPINION

AND

ORDER

Before AHRENS, Chairman, JULIAN and STEININGER.

OPINION

Background Facts

The Appellant, Harold E. Cowan, has been employed by the State of Wisconsin as a Correctional Officer at the Wisconsin State Reformatory in Green Bay for approximately twenty years. The Appellant is also a member of the United States Naval Reserve which requires an annual period of active duty training.

During February of 1973, the Appellant received notice that his training session for 1973 would begin on Saturday, March 4 at 4:00 in the afternoon. He was to report at this time to a ship berthed in Norfolk, Virginia. The Appellant's training was to last for fourteen consecutive calendar days.

The Appellant elected to travel from Green Bay to Norfolk by Greyhound Bus. The Appellant testified that he had also taken the bus to Norfolk on previous occasions and he admitted that the reason he did so was that he did not feel safe on planes.

The Appellant left Green Bay on March 1. He took a bus to Chicago, and then from Chicago to Norfolk, arriving there on March 3. It is uncontraverted that the Appellant took the most direct bus route possible and took the bus which was most likely to get him to Norfolk by 4:00 p.m. on March 4, without an excessive amount of spare time. The Appellant's return trip from Norfolk to Green Bay was also by the same route and took approximately the same length of time.

The present dispute involves Wis. Stat. 16.30(3)(a) 1971 which provides that the State must continue to pay a State employee at his regular rate during the time he is on temporary duty in the armed forces subject to certain limitations. Its major provisions are as follows:

"Officials and employees of the state who have permanent status and who are members of the national guard, state guard, or any other reserve component of the military forces of the United States or this state...are entitled to leaves of absence without loss of time in the service of the state to enable them to attend military schools and annual field training or annual active duty for training, and any other state or federal tours of active duty, except extended active duty or service as a member of the active armed forces of the United States which have duty ordered but not exceeding 15 days excluding Saturdays, Sundays, and holidays enumerated in sub.(4) in the calendar year in which so ordered and held. There shall be no deduction or interruption in the pay from the state for the time spent in such attendance..." Wis. Stats. 16.30(3)(a), 1971.

It is the Appellant's claim that under 16.30(3)(a) he would be entitled to his regular pay for the days of March 1, 2, 18 and 19, which were his normal work days, on which he had been traveling to or from Norfolk. The Appellant does not ask to be paid for the days of March 3 and 20, when he was also traveling because these were his regularly scheduled days off. However, the Appellant was paid by the State for March 3 even though this was a regular day off. In addition the Appellant seeks to obtain his pay from the State for March 5, on which he was in Norfolk and on active duty but was not paid by the Department of Health & Social Services because the

Department considered this to be a regular day off. The period between March 6 and 17, while the Appellant was on active duty in Norfolk, is not in contention. During this time, the Appellant received his normal pay from the State except for March 12 and 13 which both parties agree were the Appellant's regular days off.

The Appellant stated that in the past he had been paid for all days which he spent traveling to and from his Naval Reserve assignment. Before the Appellant left for his March 4 assignment, he was told by Eunice Simms, a secretary for the State Bureau of Personnel, that his travel schedule would not result in the loss of any of his vacation time, holidays, or days off or, in other words, that he would continue to receive his pay from the State. There is also some evidence that the Appellant was aware that his travel schedule did not have the full approval of his supervisors at the Green Bay Reformatory. The Appellant's immediate supervisor, Captain Sterk, had told him that he was taking too much time for travel. The Personnel Director at the Reformatory, Mr. Lucas, also made some statements, although somewhat vague, which indicated his disapproval of the Appellant's travel plan.

Upon returning from his period of active duty, the Appellant found that the Department of Health & Social Services considered him to have taken "excess travel time," and he was paid only for eleven of the days he was absent rather than the fifteen which he requested. It is this action which the Appellant appeals.

Six Days Was Excessive Travel Time

Employees are entitled to leave with pay to enable them to attend annual training, but they are not entitled to any more time off than is reasonably necessary for that purpose. The statute, heretofore set forth,

provides for leaves of absence "to enable" employees to attend annual training without loss of pay. The statute does not specifically provide for pay for travel time. It states that an employee will not lose pay for "time spent in such attendance." It further places a limitation on the number of days an employee may be away from his job for military leave. We infer the words "to enable" found in the statute and from the purpose of the statute, which is to aid reserve members of the military to attend such training sessions, that such leaves of absence necessarily cover travel time. We infer further from the statutory language "time spent in such attendance" and the limitation with regard to the time spent away from the job, that the amount of time spent in travel must be reasonable to qualify for pay.

Appellant might reasonably have used a full days travel time traveling to Norfolk, rather than three days, and similar travel time on his return. We do not use as a basis for our decision the military policy which pays military personnel for only one day total travel time for such a trip, since we believe that the Appellant could not travel by air from Green Bay to Norfolk in less than a day. We find that reasonable travel time for the trip here involved is one day each way or two days travel time. We do not feel that it is unreasonable to expect the Appellant to use the most efficient means of transportation available, which in this case is the airplane. The use of the airplane as a means of transportation has become so commonplace that a refusal to fly in a plane can hardly be considered as reasonable conduct. The State should not be required to go to extra expense due to an employee's unreasonable fear of flying. Another possible factor to be examined is the possibility that air travel might result in an undue financial burden on the Appellant. The Appellant testified that the mileage

allocation given by the Armed Services would be sufficient to cover a round trip plane ticket. There is no evidence that a state policy which favors the use of airplane transportation would produce an undue financial burden on the Appellant. We conclude that Appellant is entitled to pay for one additional day for travel on his military leave.

The Appellant's request for pay for March 5 is completely without merit. According to the duty roster of the Green Bay Reformatory, March 5 was a day off for the Appellant. The statute provides that an employee's pay shall not be diminished or interrupted for time spent attending military training. Since Appellant would not have worked on this particular day he would not have received pay for such day. No deduction or interruption in pay was caused by the Respondent not paying him for that day. On the other hand, where the Appellant was scheduled to work Saturdays or Sundays, he was paid for those days. Therefore, since March 5 was a day off for the Appellant, he is not entitled to pay from the State for that particular day.

Equitable Estoppel

The Appellant has made the claim that the doctrine of equitable estoppel should prevent the State from denying him the additional travel time he claims. The Appellant cites, as a basis for this claim, the State's action in continuing his salary during all of his travel time in years previous to 1973 and the fact that he had been informed by the State Bureau of Personnel that the State would continue to pay him for his travel time. He previously travelled by bus.

The doctrine of equitable estoppel in Wisconsin had been clarified by Gabriel v. Gabriel, 57 Wis. 2d 424 (1972), where it was stated that:

"The tests for applicability of equitable estoppel as a defense derive from the definition by this court of such estoppel to be: '...action or nonaction on the part of the one against whom the estoppel is asserted which induces reliance thereon by another, either in the form of action, or nonaction, to his detriment...' Three facts or factors must be present: (1) Action or inaction which induces (2) reliance by another (3) to his detriment."

The Appellant must, therefore, show that there was some action or inaction on the part of the State in regards to the payment in the past for his travel time, which he relied upon to his detriment. The action on the part of the State is clear. During previous years, the State had paid the Appellant for his travel time, and the State Bureau of Personnel had notified the Appellant that the policy in regards to payment for travel time in 1973 would be the same as in the past. We do not feel that the statement made by the Appellant's supervisor, Captain Sterk, in regards to the Appellant's travel time being excessive was sufficient to put the Appellant on notice that the State policy of continuing an employee's pay during his travel time to and from military service would be changed.

The major question thus becomes whether or not the Appellant actually relied on the State's position to his detriment. We feel that he has not. It is the Appellant's own admission that he does not care to fly. When asked why he didn't fly to Norfolk, the Appellant stated:

"Because I don't fly. I never fly. I feel safer with two feet on the ground than 2 or 3 thousand above the surface whether it's water or air."

There is every reason to believe that the Appellant would have taken the bus, regardless of what the State's interpretation of 16.30(3)(a) had been. The Appellant could not claim that he relied upon the State's position that he would be paid regardless of the length of his travel time and thus decided

to forego using the airplane as a means of transportation, because all evidence points to the fact that under no circumstances would the Appellant have taken an airplane.

There was, therefore, no evidence of reliance on the part of the Appellant, and the doctrine of equitable estoppel does not apply.

Conclusion

We conclude that the Appellant should be paid one additional days pay for his travel time for his military leave. Section 16.30(3)(a), Wis. Stats., 1971, requires only that the Appellant be paid for reasonable travel time and we hold this to consist of two days pay. The Appellant has already been paid for one of these days when he was paid for March 3, and is entitled to one additional day. The Appellant's claim for pay on March 5 is without merit because March 5 was one of his regular days off. The doctrine of equitable estoppel does not apply to this case. The Appellant has not relied to his detriment on any actions of the State.

ORDER

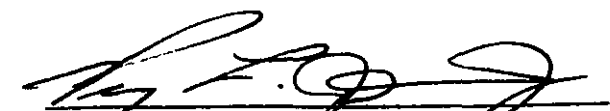
IT IS ORDERED that the Respondent immediately pay to the Appellant one additional days pay, at the appropriate rate of pay, for his 1973 military leave.

IT IS FURTHER ORDERED that the Respondent, within ten (10) days of the date of this Order, advise the Board in writing what steps have been taken to comply herewith.

Dated July 3, 1974

STATE PERSONNEL BOARD

BY


Percy L. Julian, Jr., Vice Chairman