



State of Wisconsin \ PERSONNEL COMMISSION

December 28, 1981

Mr. Thomas Loeffler
1625 Rapids Dr.
Racine, WI 53404

Mr. Donald Percy
663, 1 W. Wilson St.
Madison, WI 53702

Mr. David Whitcomb
622, 1 W. Wilson St.
Madison, WI 53702

Mr. Charles Grapentine
149 E. Wilson St.
Madison, WI 53702

RE: Loeffler v. DHSS
Case No. 81-376-PC

Dear Sirs:

The Decision and Order that was mailed to each of you on December 21, 1981 includes a typographical error within the Order. The corrected Order reads as follows:

ORDER

So much of respondent's action that denied appellant the accrual of vacation time during his period of s.230.36(1) leave is reversed, and so much of respondent's action that denied appellant the accrual of sick leave during his period of s.230.36(1) leave is affirmed, and this matter is remanded to the respondent for action in accordance with this decision.

This correction reflects the minutes of the meeting at which the Commission made its decision in this matter.

Sincerely,

Donald R. Murphy
Chairperson

DRM:ers

Room 803
131 West Wilson Street
Madison, Wisconsin 53702
(608) 266-1995

Gordon H. Brehm
Commissioner

Donald R. Murphy
Commissioner

Charlotte M. Higbee
Commissioner

* * * * *

THOMAS LOEFFLER,
 Complainant,

v.

SECRETARY, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 Respondent.

Case No. 81-376-PC

* * * * *

DECISION
 AND
 ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.45(1)(d), stats., of the denial of certain hazardous employment benefits under §230.36(1), stats. Inasmuch as there does not appear to be any dispute as to the facts, the Commission directed in an order dated September 23, 1981, that the matter be submitted on briefs on the following statement of issue:

Whether the current provisions of § Pers. 28.04(5) are to be applied retroactively to require the accrual of sick leave and vacation time for an injury suffered during the course of hazardous employment prior to March 1, 1981. A subissue is whether the original version of § Pers. 28.04(5) was inconsistent with §230.36 and therefore invalid.

By order dated December 2, 1981, the Commission added the additional issue of whether the rule contradicted or was inconsistent with any statutory provision in Subch. II of Ch. 230, stats.

FINDINGS OF FACT

1. On July 27, 1981, the Commission entered an order in Case No. 80-367-PC rejecting the respondent's denial of appellant's request for hazardous employment benefits as a result of an injury that occurred in October, 1980, and remanded the matter for action in accordance with the decision.

2. Upon remand, the respondent restored to the appellant the time that previously had been deducted from his sick leave and vacation accounts as a result of the denial of hazardous employment benefits, but refused to credit him with sick leave or vacation time that would have accrued during his period of leave with pay if he had been regularly employed.

3. The appellant filed a timely appeal of respondent's said refusal.

CONCLUSIONS OF LAW

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

2. The current provisions of § Pers. 28.04(5), Wisconsin Administrative Code were effective on March 1, 1981, and may not be applied retroactively to an employe in non-work status, due to a hazardous employment injury, before March 1, 1981.

3. The original version of § Pers 28.04(5) (1975) conflicted and was inconsistent with §230.35(1)(g), stats., and hence invalid, to the extent that the rule denied the accrual of vacation time to an employe in non-work status due to a hazardous employment injury. The remainder of the rule did not conflict with and was not inconsistent with any statutory provision.

4. The respondent acted erroneously and in violation of §230.35(1)(g), stats., when it refused to credit appellant with vacation time for the period he was in non-work status due to his hazardous employment injury.

OPINION

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, effec-
tive March 1, 1981, now provides:

Employes on approved leave with pay under this section
shall earn vacation and sick leave credits for the dur-
ation 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 appellant's position is that the statute requires accrual of
vacation and sick leave during the period the employe is on non-work,
or leave with pay, status, and that the earlier version of
§ Pers 28.04(5) is void because it conflicts with the statute.

Section 230.36(1), stats., states in part 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 vacations." (emphasis added). Thus, the statute emphasizes that the
employe is to be paid exactly the same as prior to the injury, or in

other words, as if no injury had occurred. The statute also makes clear that there is to be no deduction from accrued sick leave, compensatory time off, or vacation. This language is intended to ensure that the employer will not use such accrued credits to cover time off due to a covered injury.

Thus, the statute provides that the pay or salary is to continue and that there is to be no deduction from accrued sick leave and vacation, but does not state whether the employe in covered status shall continue to earn non-salary fringe benefits such as vacation and sick leave. However, these matters are covered by other sections of the statutes.

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. See, *Plain v. Harder*, 268 Wis. 507, 511, 68 N.W. 2d 47 (1955).

The respondent questions the authority of this Commission to make a determination that a rule is in conflict with a statute. He cites s.227.05(1), stats., which provides in part: "... the exclusive means of judicial review of the validity of a rule shall be an action for declaratory judgment as to the validity of such rule brought in the circuit court for Dane County." (emphasis supplied). However, this provision by its terms refers only to the exclusivity of the declaratory judgment proceeding as a judicial review, and does not speak to the question of administrative review.

The Commission is authorized by s.230.45(1)(d), stats., to hear appeals of denials of hazardous employment injury determination under s.230.36(1), stats., and this necessarily implies the review of determinations by appointing authorities which are based on administrative rules covering the subject. The policy implications of a holding that the Commission could not rule on a conflict between a rule and a statute in the course of such an appeal are substantial. The employe would be required to litigate his or her claim in the courts in the first instance, thus burdening both the court and the parties to the litigation, in conflict with the policies underlying the principles of administrative exhaustion. These policy considerations are discussed in Woods v. Superior Court of Butte County, 620 P. 2d 1032, 1038-1039 (s. Ct. Cal. 1981), a case holding that an invalid administrative regulation is vulnerable to attack at the administrative level.

The subject of sick leave is covered in s.230.35(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 s.230.36(1), and the treatment of sick leave by s Pers 28.04(5), Wisconsin Administrative Code (1975) cannot be said to contradict or be inconsistent with any statutory provision.

Inasmuch as respondent denied the appellant vacation time accrual on the basis of an invalid rule provision, and in violation of a statutory requirement, upon remand the appellant is entitled to credit for vacation time for the period that he was on s.230.36(1) leave.

ORDER

So much of respondent's action that denied appellant the accrual of vacation time during his period of s.230.36(1) leave is affirmed, and this matter is remanded to the respondent for action in accordance with this decision.

Dated: Dec. 17, 1981

STATE PERSONNEL COMMISSION


DONALD R. MURPHY
Chairperson

Parties:

Thomas Loeffler
1625 Rapids Drive
Racine, WI 53404

Donald Percy
663, 1 W. Wilson St.
Madison, WI 53702