

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 EDWARD HILL,  
                     Appellant,  
 v.  
 Secretary, DEPARTMENT OF  
 NATURAL RESOURCES,  
                     Respondent.  
 Case No. 82-111-PC  
 \* \* \* \* \*

DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.45(1)(d), stats., of the denial of certain payments under §230.36(1), stats. (hazardous employment pay). At the prehearing conference held on June 24, 1982, the parties agreed to submit this matter for decision on briefs, "reserving their rights to an evidentiary hearing if the briefs and any documents submitted reveal that there are any material facts in dispute." The parties also agreed that the following issue was presented on this appeal."

"Whether the appellant should be entitled pursuant to §230.36, stats., to payment for four hours each week, which alternatively have been characterized as overtime pay or supervisory pay, during the period of time which the appellant is paid under §230.36."

The parties have filed briefs on this issue and neither has requested evidentiary hearing. The following findings are based on matters which appear to be undisputed.

FINDINGS OF FACT

1. The appellant began employment with the respondent in 1976 in the position of District Warden in the classified civil service, in a certified collective bargaining unit.

2. Effective June 4, 1978 the appellant's position was reallocated to Conservation Warden-Management, an unrepresented position.

3. Effective January 1, 1978, the then Secretary of DNR had initiated a new compensation policy for supervisory and management wardens, as set forth in a memo dated December 20, 1977, from the Secretary to the District Directors, which included in pertinent part the following language:

As you know, the 1977-79 labor contract with WSEU provides that department field wardens may convert up to 200 hours of compensatory time to cash, for hours worked on their unassigned days that conform with guidelines dated November 11, 1977.

In an attempt to maintain balance and equity in compensation between field wardens on the one hand and supervisory and management wardens on the other, it is necessary to provide similar recognition for hours worked on their unassigned days. Accordingly, effective with the payroll period beginning January 1, 1978 the following salary adjustments for supervisory/management wardens will be made:

1. Each supervisory/management warden will receive four hours per week extra pay at this hourly rate in recognition for hours worked on his unassigned days. However, a supervisory/management warden will not receive four hours for those weeks when he is on annual leave, sick leave, or personal holidays or any combination thereof for three or more days.
2. Compensatory time for supervisory/management wardens will be discontinued except for unusual and special circumstances when compensatory time may be approved by the Law Enforcement Bureau director or district director.

The chief objective of this new arrangement is twofold: a) to maintain balance, equity and parity between wardens so that disincentives to field wardens becoming supervisory/management wardens does not occur, and b) to recognize the fact that supervisory/management wardens, in the performance of their supervisory duties, work on their unassigned days (6th and 7th days).

4. In November, 1981, the appellant was injured in the line of duty while pursuing a deer poacher and thereafter the respondent approved benefits under §230.36(1), stats.

5. Prior to the aforesaid injury, the appellant had been paid on a continuing basis the sum of \$1,138.46 (gross.) His "State of Wisconsin Employee Earning and Leave Statement," or check stub, during this period reflected "REG HOURS" as 88, and "REG PAY" as \$1,138.46, with nothing printed in the boxes for "O.T. HOURS" and "O.T. PAY."

6. The appellant's salary paid under §230.36(1), Wis. Stats., by the respondent has been based on a 40 hour week and an 80 hour bi-weekly pay period.

#### CONCLUSIONS OF LAW

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

2. The appellant has the burden of proving that he should be entitled pursuant to §230.36, stats., to payment of four hours in excess of 40 each week, during the time he is paid under §230.36.

3. The appellant has sustained his burden of proof.

4. The appellant is entitled pursuant to §230.36, to the payment of four hours in excess of 40 each week, during the time he is paid under §230.36.

#### OPINION

Section 230.36(1), stats., provides in part as follows:

"If a conservation warden ... suffers injury while in the performance of his or her duties ... the employe shall continue to be fully paid by the employing agency upon the same basis as paid prior to the injury with no deductions from sick leave credits, compensatory time for overtime accumulations or vacation. The full pay shall continue, while the employe is unable to return to work as the result of the injury, or until the termination of his or her employment upon recommendation of the appointing authority."

Section Pers 5.06(1), Wis. Adm. Code, provides the following definition of "overtime":

"(a) Overtime hours - time that an employe (except for law enforcement personnel, security personnel at correctional institutions and fire protection personnel) works in excess of 40 hours per workweek."

Section 5.06(2)(c), Wis. Adm. Code, provides:

"Additional pay for overtime work shall not be considered as a part of an employe's base pay."

Section Pers 5.06 (4), Wis. Adm. Code, provides in part as follows:

"PROVISIONS FOR EXEMPT EMPLOYEES. (a) The pay rates for exempt employes are generally intended to compensate for the total responsibility assigned the position.

(b) Compensation in cash or time off up to a straight time basis for work hours assigned beyond those normally required in par. (a) above may be granted at the discretion of the appointing authority."

Section Pers 29.01(1), Wis. Adm. Code, provides as follows:

"(1) DEFINITION. The terms 'basic pay' and 'base pay' mean the pay rate excluding any overtime or supplementary compensation."

Section Pers 28.04(3), Wis. Adm. Code, provides in part:

"Upon approval of the employe's claim [under §230.36], the employe shall receive full pay from the date of inability to work ..."

The respondent points out that the extra pay authorized for management wardens by the December 20, 1977, memo was "... in recognition for hours worked on his unassigned days," and that such pay was not received when the warden was "... on annual leave, sick leave, or personal holidays or any combination thereof for three or more days."

The respondent in his brief asserts as follows:

"In summary, the 8 hours that was tacked on the Appellant's 80 hour week was in recognition of the Appellant's work on unassigned days. Failure to work on unassigned days would result in a reduction in the 8-hours payment. Conse-

quently, the Respondent asserts that the appellant is not entitled to this 8-hour payment under the provisions of §230.36(1), Stats."

However, the Secretary's directive does not by its terms require a reduction in pay in every case of "failure to work on unassigned days." A reduction is only required with respect to "... those weeks when he is on annual leave, sick leave or personal holidays or any combination thereof for three or more days."<sup>FN</sup> A warden unable to work because of injury who is on leave pursuant to §230.36 (1) clearly is not on "annual leave, sick leave, or personal holidays."

Furthermore, even if the directive could be interpreted as containing a blanket requirement that an employe actually had to be working on unassigned days to qualify for the extra pay, it still does not follow that the extra pay would not be included in the employe's hazardous employment benefits. Obviously, an employe who is covered by §230.36 is not able to work, so he or she certainly is not able to work on unassigned days. However, the purpose of this statute is to put the employe in the same status with respect to salary as he or she would have been had there been no injury at all.

The statutory language says that a covered employe "... shall continue to be fully paid by the employing agency upon the same basis as paid prior to the injury ..." (emphasis supplied).

Taking this statutory language at its face value, an injured employe should be paid after the injury as if he or she had never been injured,

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<sup>FN</sup> It might also be noted that a warden could be eligible for extra pay in a week where he or she worked less than 40 hours, as for example where two vacation days were taken.

subject to the provisions of §Pers 28.04, Wis. Adm. Code, "Injury while on an hazardous duty," which does not specifically mention overtime. That is, employe working half-time would continue to be paid for 20 hours per week, just as a full-time employe would be paid on a 40 hour per week basis. An employe being paid a supervisory add-on before the injury would continue to be paid it after the injury. There does not appear to be any reason to treat an employe who regularly works, or is considered by the employer to work, 44 hours per week any differently.

Certainly if the legislature had wanted to restrict \$230.36 payments to "base pay," which excludes overtime and supplementary compensation, see §Pers 29.01(1), Wis. Adm. Code, it could have used that term rather than the language "... fully paid ... upon the same basis as paid prior to the injury ...". Similarly, if the administrator had construed \$230.36 to refer only to base pay, this term could have been used in §Pers 28.04(3), Wis. Adm. Code, instead of "full pay."

Essentially this approach was taken in the collective bargaining agreement between the State and AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO, Blue Collar and Non-Building Trades, Technical and Security and Public Safety Bargaining Units, December 30, 1981 - June 30, 1983, of which the Commission takes official notice. Article XIII, Section 16 E, para. 286, provides in part that: "Employes on approved leave under this Section [Hazardous Employment Status] shall be entitled to full base pay plus any unitwide pay increases and personal holidays." (emphasis added)

The Commission recognizes that the stated intention of the December 20, 1977, memo from the Department Secretary was to "attempt to maintain balance and equity in compensation between field wardens on the


one hand and supervisory and management wardens on the other ..." However, the memo did not address at all the issue of hazardous employment pay, and, even if it had done so and used the type of language utilized in the contract as set forth above, the effect of this would be questionable in light of the cited language found in the statutes and the administrative code. It appears that the goal of achieving "equity" between represented and unrepresented wardens with respect to hazardous employment pay would require a change in the language of the statutes or administrative code.

ORDER

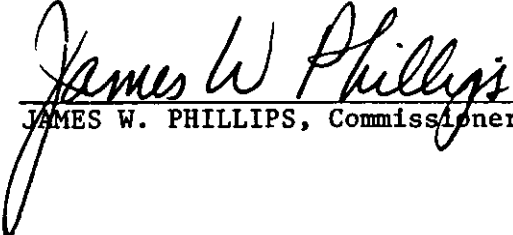
The action of the respondent denying the appellant \$230.36 hazardous employment pay for the 8 hours per pay period in excess of 80 is rejected and this matter is remanded to the respondent for action in accordance with this decision.

Dated: December 8, 1982

STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Chairperson

  
LAURIE R. McCALLUM, Commissioner

  
JAMES W. PHILLIPS, Commissioner

AJT:ers

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