STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION,	:	
Petitioner,	:	Case 182 No. 36791 MP-1840
vs.	:	Decision No. 23604-B
MILWAUKEE BOARD OF SCHOOL DIRECTORS,	:	
Respondent.	:	

Appearances:
Perry, First, Lerner & Quindel, S.C., by Ms. Barbara Zack Quindel, 1219 North Cass Street, Milwaukee, WI 53202-2770, appearing on behalf of the Complainant.
Mr. Stuart S. Mukamal, Assistant City Attorney, 800 City Hall, Milwaukee, WI 53202-3551, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Milwaukee Teachers' Education Association, having on April 10, 1986, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Milwaukee Board of School Directors has committed and continues to commit a prohibited practice in violation of Section 111.70(3)(a)5, Stats.; and the Commission having appointed Mary Jo Schiavoni, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in this matter as provided in Sec. 111.07(5), Stats.; and hearing on said complaint having been held on June 3 and August 6, 1986, at Milwaukee, Wisconsin; and the parties having completed their briefing schedule on November 10, 1986, after requests for extension of time to file said briefs; and the Examiner, having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Milwaukee Teachers' Education Association, hereinafter referred to as MTEA, is a labor organization with its offices located at 5130 West Vliet Street, Milwaukee, Wisconsin, 53208; that it is the exclusive bargaining representative of certain employes of the Board in a unit consisting of certified professionals hereinafter referred to as the teachers' bargaining unit; and that Barry L. Gilbert is an Assistant Executive Director of the MTEA and at all times material hereto is and has been an agent of the MTEA for all purposes herein.

2. That the Milwaukee Board of School Directors, hereinafter the Board, is a municipal employer with its principal office located at 5225 West Vliet Street, Milwaukee, Wisconsin, 53208; and that at all times material hereto the following individuals occupied the following offices or positions with the Board and were its agents authorized to act on its behalf:

Helen Harrison - Principal, Vincent High School
Donald Trythall - Vice Principal, Vincent High School
Raymond Williams - Assistant Superintendent, Division of Human Resources
Annie L. Weiland - Manager, Labor Relations

3. That David Molling, the subject of the instant complaint, has been employed as a teacher by the Board since 1972; that until his resignation on

November 27, 1985, 1/ he served as a business education teacher, first as a substitute and later in two high schools, South Division High School from 1973 until 1980 and Vincent High School from 1980 until 1985; that prior to 1985, he received no negative teaching performance evaluations nor had he received complaints from any agent of the Board regarding his performance or conduct as a teacher.

4. That at all times material herein, the MTEA and the Board have been parties to a collective bargaining agreement which provides as follows:

. . .

PART III - Section G

6. PROFESSIONAL ASSISTANCE PROCEDURE

a. In the event a member of the bargaining unit demonstrates a history of unsatisfactory classroom behavior which it is suspected may have been caused by mental or emotional disorders, the assistant superintendent, Division of Human Resources, shall notify the employe and the MTEA, and a conference will be held to determine whether appropriate professional assistance should be sought.

b. If the employe is found to be medically disabled by appropriate medical personnel, he/she shall be granted sick leave for necessary treatment. If the employe does not have sufficient sick leave, up to twenty (20) days of sick leave may be advanced which will be deducted from future accumulations.

c. If it is determined that the employe's performance is unrelated to any mental or emotional disorders, or the teacher refuses to participate in any program of appropriate medical treatment, the administration may proceed in accordance with the appropriate section of the contract, Part IV, Sections N or O. Where a principal has evaluated a teacher in a timely manner in accordance with Part IV, Section N of the contract, but has proceeded under Professional Assistance Procedure, the time limits referred to in Part IV, Section N (9) shall be extended by the amount of time utilized by the procedure.

. . .

PART IV - Section O

O. ALLEGATIONS OF MISCONDUCT

1. No teacher shall be suspended, discharged, or otherwise penalized, except for "just cause." No teacher shall be involuntarily transferred, nonrenewed or placed on a day-to-day assignment as a disciplinary measure. In the event a teacher is accused of misconduct in connection with his/her employment, the accusation, except in emergency cases as referred to herein, shall be processed as follows:

a. The principal or supervisor shall promptly notify the teacher on a form memo that an accusation has been made against the teacher, which if true, could result in proceedings under Part IV, Section O, of the contract. The memo will also indicate that it will be necessary to confer on the matter and that at such conference the teacher will be allowed to be represented by the MTEA, legal counsel or any other person of his/her choice. This notice shall be

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1/ All dates refer to 1985 unless specifically so noted.

followed by a scheduled personal conference during which the teacher will be informed of the nature of the charges of alleged misconduct in an effort to resolve the matter. Resolution of "day-to-day" problems which do not have a reasonable expectation of becoming serious will not necessitate a written memo.

b. If the principal or supervisor decides on further action, he/she shall specify the charges in writing and then furnish them to the teacher and the MTEA and attempt to resolve the matter. The teacher and the MTEA shall have a reasonable opportunity to investigate and to prepare a response.

c. If the matter is not resolved in this manner, a hearing shall be held within ten (10) working days to hear the charges and the response before the assistant superintendent of the Division of Human Resources or his/her designee, at which time the teacher may be represented by the MTEA, legal counsel or any other person of his/her choosing. Within five (5) working days of the hearing, the teacher and the MTEA shall be notified of the decision relative to the charges in writing and the reasons substantiating such decision.

d. The superintendent shall, within five (5) working days, review the decision of the assistant superintendent of the Division of Human Resources and issue his/her decision thereon. The MTEA may, within ten (10) working days, invoke arbitration, as set forth in the final step of the grievance procedure in cases not involving a recommendation for dismissal or suspension. A teacher who elects to proceed to arbitration shall be considered to have waived the right to pursue the matter in the courts, except as provided in Chapter 788, Wisconsin Statutes.

e. 1) Where the superintendent, after review of the assistant superintendent's recommendation, recommends dismissal of a nontenure teacher or suspension of a teacher, the teacher may, within ten (10) working days of receipt of the decision of the superintendent, request a hearing before the Finance/Facilities and Personnel Committee which shall be held within forty-five (45) working days of the request. The Committee, after a full and fair hearing which shall be public or private, at the teacher's request, shall make a written decision specifying its reasons and the action and recommendations prior to the next full meeting of the Board.

2) **TENURE TEACHER.** In any case where the superintendent, after review of the assistant superintendent's recommendation, recommends dismissal of a tenure teacher, the matter shall be processed in accordance with the provisions of this section, except that the full Board, rather than the Finance/Facilities and Personnel Committee, shall conduct the hearing.

f. The MTEA may, within ten (10) working days, invoke arbitration, as set forth in the final step of the grievance procedure. A teacher who elects to proceed to arbitration shall be considered to have waived the right to pursue the matter in the courts, except as provided in Chapter 788, Wisconsin Statutes.

2. **EMERGENCY SITUATIONS.** When an allegation of serious misconduct, which is related to his/her employment, is made, the administration may conduct an administrative inquiry which would include ordering the teacher to the central office or authorizing him/her to go home for a period not to exceed three (3) days. Authority to order an employe to absent himself or herself from work shall be vested in the designee of the administration. The administration shall notify the MTEA as to the identification of its designees. In no case can the designee be a member of the bargaining unit. The MTEA shall be notified previous to the decision. No teacher shall be temporarily suspended prior to the administrative inquiry, nor without the opportunity to respond to the charges and have representation of his/her choice as set forth above. No teacher may be suspended unless a delay beyond the period of the administrative inquiry is necessary for one of the following reasons:

a. the delay is requested by the teacher;

b. the delay is necessitated by criminal proceedings involving the teacher; or

c. where, after the administrative inquiry, probable cause is found to believe that the teacher may have engaged in serious misconduct.

In the event the teacher suspended is cleared of the charges, he/she shall be compensated in full for all salary lost during the period of suspension, minus any interim earnings. At the conclusion of the adminstration's inquiry, hearings of the resultant charges, if any, shall be conducted in accordance with Part IV, Section O(1)(b).

. . .

PART VII - Section K

K. DISCRIMINATION CLAUSE

The MTEA and the Board agree that it is the established policy of both parties that they shall not discriminate against any employe on the basis of sex, race, creed, national origin, marital status, political affiliation, physical handicap, or union activities.

The Board agrees that where women and minorities are concerned, the principle of equality of treatment shall be maintained.

Grievances involving this section shall be presented to the Board. If the matter is not satisfactorily resolved within thirty (30) days of being filed with the Board, the MTEA may proceed in the following manner. Alleged violations of this section shall not be arbitrable. The only [illegible] violation) pursuant to Section [illegible] 70(3)(a)(5) Wisconsin

6. That the Board takes the position that the Examiner has no jurisdiction to consider the instant grievance pursuant to Part VII, Section K because Molling resigned; and that the MTEA contends that said grievance is properly before the Commission pursuant to Section 111.70(3)(a)5, Stats., and Part VII, Section K of the agreement.

7. That Molling first began to experience problems with alcohol and depression in 1982 but that he did not seek treatment until April of 1984.

8. That in April of 1984, Molling sought in-patient rehabilitation at DePaul Rehabilitation Center for 17 days for depression and problems related to his consumption of alcohol; that the principal of Vincent High School at that time, a Mr. Bauman was aware of his hospitalization having called Molling to inquire about his providing grades for students' report cards and being assured that grades would be delivered to the school; and that Molling checked himself out without completing the program against medical advice.

9. That following his release from DePaul after eight months of sobriety, Molling's drinking problem became progressively worse; that by the fall of 1985, Molling was drinking almost a liter of hard liquor per day; that in September of 1985, Molling sought the services of Dr. Milo G. Durst, a board-certified general psychiatrist; that Dr. Durst, after a psychiatric examination on September 7, initially diagnosed Molling as suffering from a cyclothymic disorder, i.e. moderately severe, neurotic mood swings and alcohol abuse, episodic; that Durst later in November changed his diagnosis to depression and secondary alcohol dependency disorder.

10. That Durst saw Molling approximately four times in the late fall of 1985; that Molling was trying to avoid dealing with his alcohol consumption; that around November 20, Molling's sister contacted Durst expressing concern about his mood swings and his repeated telephone calls; that she claimed his absences were due to alcohol consumption rather than illness; that Molling went to Durst's office on November 20, 1985; that at that time he had mild tremors and refused to agree to the inpatient hospitalization being urged by Durst; but that he orally agreed he would reduce his alcohol input while taking L-tryptophon, a medication prescribed by Durst.

11. That Helen Harrison, the principal of the school in which Molling taught was aware in late September of 1985 that Molling had a history of alcoholism and that he had been in various treatment programs; that Harrison in the previous year and that September mentioned the Employee Assistance Program to the professional staff and to Molling in very general terms but never specifically spoke with Molling on this subject; and that Harrison was aware that Molling's absenteeism was due to inebriation during the fall of 1985 because she had frequent, up to a dozen, phone conversations with Molling while he took sick days wherein he would ramble and become incoherent.

12. That on two occasions in November of 1985, on or about November 18 and then again on November 25, Molling reported for work in an intoxicated state although he himself did not feel intoxicated; that on the first occasion, Molling reported to school in a distraught frame of mind, very upset, emotional and vociferous with alcohol detectible on his breath; that Assistant Principal Donald Trythall arranged for him to be driven home by a fellow teacher; that on the second occasion, Harrison and Trythall found Molling's class unattended and when Molling appeared, again detected alcohol on his breath; and that Harrison asked Molling to leave work at that time.

13. That as a result of his initial appearance at school intoxicated, Harrison commenced misconduct proceedings as provided by the parties' collective bargaining agreement; that she handed him a letter on November 20, upon his return to school from a two-day absence scheduling the misconduct hearing for Wednesday, November 27, the day before Thanksgiving.

14. That Molling mailed the following letter to Durst postmarked November 21, 1985:

Milo G. Durst, M.D.
A Brilliant Man
759 North Milwaukee
Milwaukee, WI 53202

Dr. Durst,

Sobriety with L-tryptophan (e?)?

Tough love? - maybe "self-hate"

"projected" unto the family . . ?!

Sibling rivalry? - "Catholic"

Family therapy? Maybe . . .

Abused childre? How horrible!

Is honesty so unique . . .?

Thanks, teacher!

With much respect,

Dave Molling

P. S. Falwell . . . to HELL with him!

15. That on Tuesday evening, November 26, Molling typed up his resignation having been under the influence of alcohol during the day on both November 25 and November 26.

16. That on Wednesday, November 27, in the morning, Molling approached Harrison and urgently asked to speak with her; that he asked permission to bring a fellow teacher, Harland Ristau, to the meeting and brought Ristau to Harrison's office where they were met by Trythall and Harrison; that upon arriving Molling submitted his resignation and read the following letter to Harrison:

The Milwaukee School Board
P.O. Drawer 10K
Milwaukee, WI

Ladies/Gentlemen:

How shortsighted our school system is. The pressure placed upon teachers are excessive and those pressures ultimately affect the teaching process.

In light of the above, I formally submit this letter of resignation.

I feel I have been a good teacher.

Respectfully submitted,

David M. Molling /s/
Business Education Teacher

17. That Molling then asked Harrison whether she would write a letter of recommendation should it be necessary; that he handed Trythall another letter and an accompanying tape to be read and played to his students; that said letter and tape contained words to the effect that he, Molling, enjoyed being their teacher

but would pursue other endeavors, and was accompanied by music which Molling selected and quotes from the Bible; that Molling had alcohol in his system at the time he tendered his resignation, but that he himself did not feel that he was intoxicated; and that Molling may have appeared to be sober and lucid to Harrison and Trythall, but that his mental state was such that his judgment was significantly impaired at the time he resigned.

18. That Harrison was aware of the emotional difficulties Molling was experiencing but that she nevertheless accepted the resignation and informed Molling that the misconduct hearing would be cancelled without suggesting that he think about it or consult with anyone else; that she did not try to talk Molling out of resigning; that she personally delivered the resignation to the Board's Central Office, the Department of Human Resources on the same day.

19. That the Board considers letters of resignation to become effective upon submission; that when a resignation is received, the Board is informed through a report from the superintendent and secretary/business manager; and that payroll and benefit departments are notified.

20. That Molling failed to appear at Durst's office for a scheduled appointment on November 29; that Durst spoke to Molling by telephone on December 2, wherein he was informed that Molling quit his job "due to pressure;" that Durst told Molling that "that's the worst thing he could have done;" that Durst advised Molling to request reinstatement and informed him that he "would back his condition of poor judgment if Molling (agrees to go) into the hospital as absolutely without question, it is indicated."

21. That on December 4, Molling contacted Barry Gilbert an Assistant Executive Director of MTEA, to inquire how to rescind his resignation claiming that he was very upset, depressed, and was under the influence of alcohol when he resigned; that Gilbert advised Molling he would pursue the matter with Ray Williams, Assistant Superintendent of the Division of Human Resources; and that Gilbert also said he would try to persuade the Board to place Molling on a medical leave of absence effective November 27; that Molling had sixty full days of accumulated sick leave which he could use if he were in employe status; and that Gilbert advised Molling to have his doctor fill out a special form for sick leave verification.

22. That on the same day, Gilbert contacted Williams and requested that the resignation be rescinded; that Williams initially responded that he was not inclined to rescind it but would like to discuss the matter with the superintendent; that he later called back asking for a doctor's statement as to the nature and seriousness of Molling's illness; that Durst on December 6, 1985 filled out the following sick leave verification form:

Date 12-6-85

I hereby certify that David Molling has been under my care on account of (state nature and seriousness of illness or injury) depression and secondary alcohol dependency (Due to illness pt. displayed poor judgment in resigning position and has been unable to perform his regular duties as public school teacher for the period from 11-27-85 19 to 1-2 19 86, inclusive.

(Recommend EAP involvement in this case)

Signed Milo G. Durst, M.D.
Address 759 N. Milw. St. Ste. 504, 5320

23. That in early and late December of 1985, Molling checked himself into two or three separate inpatient alcohol programs, two at Good Samaritan Hospital; and one at Ivanhoe Treatment Center; that he left the programs against Durst's medical recommendations; that the hospital tests dated December 13 demonstrate evidence of elevated liver enzymes which according to Durst would indicate evidence of liver damage consistent with alcoholism over a significant period of time; and that Durst testified that in his opinion Molling was an alcoholic.

24. That Gilbert later received the following statement from Durst on January 2, 1986:

> Dear Mr. Gilbert:
>
> I am a psychiatrist who has been attempting to treat Mr. David Molling since he first consulted me on September 7, 1985. He is a very sick man. He has been displaying increasing signs and symptoms of depression since the Spring of 1985. He has been using increasing amounts of alcohol in order to escape from his feelings, but this makes his mood swings only worse and his behavior more erratic and his judgment abysmaly poor. He has many unresolved conflicts and hates himself for these. He is on a very self-destructive course. It was in such a state of diminished capacity that he resigned from his job in late November 1985.
>
> I have repeatedly attempted to get him to accept in-patient treatment, as out-patient treatment is of little avail in this type of situation. Two weeks ago he did admit himself to Good Samaritan Medical Center's chemical dependency unit, but left against medical advice within 24 hours admission.
>
> Due to the fact that he is ill, albeit his insight in this regard is very poor, I would recommend that his job resignation - made when his judgment was highly diminished - be rescinded upon the requirement that he commit himself to a full course of in-patient treatment for at least a 30 day period. Currently he remains disabled.
>
> Please do not hesitate to telephone me if you wish to discuss the situation.

which he provided to Williams.

25. That Gilbert spoke with Williams by phone on the next day; that Williams indicated the Board would not be rescinding the resignation but would offer Molling employment as a substitute teacher; that Williams at the time he informed Gilbert of his final decision regarding the recission of Molling's resignation had reviewed Molling's personnel file including his absenteeism and the letter Gilbert provided on January 2 from Durst; and that Williams' stated reasons for not permitting Molling to rescind his resignation and approving a medical leave were based upon his attendance record and his appearing at school intoxicated on two occasions.

26. That Molling accepted employment as a substitute and has worked in that capacity until the date of hearing; and that Molling is still drinking alcohol.

27. That Molling did not tender a valid resignation from his position because he did not possess the mental capacity or emotional state to be responsible for such decision.

28. That because Molling did not tender a valid resignation, the Examiner has jurisdiction to determine whether the Board's action with respect to his continuing employment, violated Part VII, Section K of the parties' collective bargaining agreement.

CONCLUSION OF LAW

That Molling suffers from a physical handicap within the meaning of Part VII, Section K of the parties' collective bargaining agreement; that by failing to permit Molling to rescind his resignation and to convert it into a medical leave, the Board discriminated against Molling on the basis of his handicap(s) and has violated Part VII, Section K of the parties' collective bargaining agreement, thereby committing a violation of Section 111.70(3)a 5 and 1, Stats.

Based upon the above and foregoing Findings of Fact, and Conclusion of Law, the Examiner makes and issues the following

ORDER 2/

IT IS ORDERED:

It is ordered that the Board cease and desist from violating the proscription of Part VII, Section K regarding discrimination against any employe on the basis of physical handicap.

It is further ordered that the Board restore Molling's employment status to the status quo prior to his resignation.

It is further ordered that the Board recognize David Molling as possessing employe status and for all purposes, including the granting of the requested medical leave, the commencement of misconduct proceedings and the granting of other contractual benefits, treat him as any other employe similarly situated; i.e., as he would have been treated but for his resignation.

It is further ordered that the Board notify the Wisconsin Employment Relations Commission in writing within twenty days from the date of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 3rd day of April, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By: Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner

2/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Positions of the Parties

According to the MTEA, Molling did not voluntarily quit or resign from his employment. Relying primarily upon the medical evidence adduced at hearing, it argues that Molling's impulsiveness was the direct product of the disease from which he was suffering and that this mental impairment establishes that he did not "voluntarily" resign. MTEA claims that the contractual prohibition against discrimination based upon handicap embodies the State Fair Employment Act, FEA, and that Molling is handicapped within the meaning of the FEA. Arguing in the alternative, MTEA maintains that even if its contention that the contractual prohibition against discrimination based upon "handicap" is not broad enough to encompass the FEA, Molling meets the definition of physically handicapped as set forth in the collective bargaining agreement.

MTEA contends that the Board's refusal to permit Mr. Molling to rescind his resignation discriminated against him on the basis of handicap and was a failure to accomodate his handicap. It stresses that the Board cannot avail itself of any exception to the FEA and that there is no basis for extraordinary relief in the way of remedy to be granted to the Board.

The Board argues that the Examiner has no jursidiction to consider the matter because Molling knowingly and voluntarily quit his employment. This fact, it stresses, is sufficient to mandate dismissal of the Complaint. This contention is the underlying premise upon which the Board relies in making its auxiliary arguments. It stresses that Molling's conduct at work and the events leading up to his resignation establish the "voluntary" nature of his "quit." It maintains that no "past practice" exists between the parties with regard to the rescission of voluntary resignations. According to the Board, Molling was not constructively discharged.

The Board also maintains the decision to refuse to permit the rescission of his resignation was not discrimination based upon "physical handicap." In this respect it makes several secondary arguments. First, it argues that Molling did not suffer from a legally-recognized "physical handicap" at the time of his resignation. Second, it claims that even if Molling suffered from such a legally-recognized handicap, no discrimination exists because his condition prevents him from performing his teaching responsibilities. Third, it maintains that MTEA has not met the requisite burden of proof with respect to its allegations of handicap discrimination. Fourth, it argues that whatever its duty to accomodate Molling's alleged "handicap," the Board has amply fulfilled its duty.

The Board contends that evidence of Molling's post-resignation employment should be disregarded and request(s) extraordinary relief from MTEA under the facts presented in the instant case.

Discussion:

The Examiner agrees that the first issue to be determined is whether or not she has jurisdiction to hear the instant case pursuant to the parties' collective bargaining agreement. The Board is correct in its contention that if Molling is found to have knowingly and voluntarily quit, the Examiner has no jurisdiction to consider the matter further.

Much of the Board's brief deals with the facts and incidents leading up to Molling's resignation. It is clear from the evidence adduced at hearing that Harrison was aware that Molling's behavior was erratic and abnormal during the fall of 1985. Molling had informed Harrison in September of 1985 that he was an alcoholic, albeit a recovering one. By her own admission, Harrison conceded that during the fall of 1985, she received frequent phone calls, many on the same day, from Molling when he was reporting off on sick leave. She admits that during these calls Molling sounded overly emotional, rambled and frequently lapsed into incoherence. At times he would ask her to listen to a record or to something he was playing on the piano. Harrison, through her own personal observations as well

as those of Vice-Principal Trythall in his report with respect to the first incident of intoxication, was aware of Molling's emotional state during the two occasions when he reported for work intoxicated.

Although it is fair to conclude that she and any other agents of the Board were unaware of Molling's rambling letter to Dr. Durst, it should have been clear to Harrison and Trythall that Molling was experiencing great emotional difficulties culminating in his resignation on November 27. The urgency with which he approached her demanding the morning meeting, the tenor of his resignation letter, and the fact that he left taped music and messages for the students, when combined with the previous events described in the paragraph above, are some indication of the mood swings and erratic behavior from which he was suffering.

Both Trythall and Harrison testified that at the time of Molling's resignation, he appeared rational, sober, and in control of his mental faculties. This testimony is not conclusive as it is a layman's observation, especially in light of the extensive medical evidence presented by Durst which the Board has failed to rebut. Durst testified:

> A. That, based upon the increasing problem with the display of amnestic phenomenon that I had seen previous to that, the letter of the strange quality that I had received which had a manic kind of quality to it, and knowing that he was continuing to be under the influence of alcohol, and knowing that he was experiencing these wide mood swings between excitement and pleasure down to the pits of depression, I believed his judgment to be significantly impaired throughout the whole period, including during the time which he wrote the -- the letter of resignation. Tr. 69
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> . . .
>
> Q. Now, Doctor, do you have an opinion as to whether on November 27th Mr. Molling was suffering from any type of mental disorder?
>
> . . .
>
> THE WITNESS: Yes. His diagnoses are continuous. They don't -- you know, it's not there one minute and not the next.
>
> Q. So that diagnosis being the one that you gave us as your initial diagnosis?
>
> A. Regardless of what the date would be in record, which I don't recall at what point the change was made from abuse to dependency, he was clearly alcohol dependent and experiencing the mood disorder at the same time, both negatively potentiating each other for the worst.
>
> Tr. 70-71.

Even after extensive cross examination, Durst's medical opinion remained firm. Moreover, the Board failed to call a medical expert of its own to establish contrary medical evidence.

The parties have correctly cited the applicable arbitral precedents in cases dealing with the voluntariness of a "quit" where the grievant suffered from some mental infirmity. Notwithstanding decisions such as Potash Co. 3/ Reynolds Metal Co., 4/ and Kellogg Co., 5/ all of which are distinguishable on their facts from the instant case, more recent arbitration awards have found mental incompetence sufficient to render a resignation invalid.

3/ 42 LA 1106 (Ray, 1964)

4/ 59 LA 64 (Weld, 1972)

5/ 71 LA 494 (Hon, 1978)

In Potash Co., the arbitrator held that there was insufficient evidence to establish that the grievant did not have the mental capacity to tender a valid resignation. Moreover, the grievant in that case was told by the Personnel Director that he did not have to quit and was urged to reconsider. The Personnel Director suggested the grievant might feel better in some other department to which the grievant replied he still wanted to quit. The Reynolds case involved a situation wherein the grievant's own treating psychiatrist did not substantiate his claim of mental incompetence and incapacity. Additionally, the grievant waited a substantial period of time, approximately six months, before requesting the rescission of his resignation. These facts are clearly distinguishable from the instant case wherein Molling's physician substantiates his mental incapacity at the time of the resignation and Molling sought to rescind the resignation within a week from the date he tendered it. Kellogg, like Potash, involved a situation where the employer's representatives attempted to disuade the grievant from resigning and even inquired as to whether the grievant needed additional time off. In Kellogg, the employer's representatives, cognizant of grievant's mental history, even called in the chief shop steward to discuss the grievant's resignation plans with him. In the instant case, although Trythall and Harrison were or should have been aware of Molling's emotional difficulties, they did nothing to dissuade him. At no time prior to his resignation or at the time of his resignation did Harrison refer Molling to the Professional Assistance Program.

The instant case more closely resembles the facts set forth in Standard Slag Co. 6/ and Crown Cork & Seal Company, Inc. 7/. In Standard Slag, the arbitrator found that the professional opinion of an attending physician is entitled to great weight, particularly where no conflicting evidence is presented. Because no other competent physician rebutted the treating physician's professional opinion, it was credited. In Crowne Cork & Seal Company, Inc., the arbitrator also credited the opinion of the treating psychiatrist over lay observation. He found that he was not in a position to dispute the psychiatrist's evaluation or to disregard it.

In evaluating the sum of the testimony and evidence on this crucial issue, it must be concluded that Molling was not competent to make such a decision to resign at the time he tendered his resignation. It is further concluded that Harrison accepted the resignation at face value without attempting to dissuade Molling or to channel him into the Professional Assistance Program. She is chargeable with knowledge of his condition because she was aware or should have been aware of his increasingly eccentric conduct.

Having concluded that Molling did not have the mental capacity to "quit" and did not effectively tender his resignation, the next issue to be considered must be whether the District's actions violated Part VII, Section K. The Examiner is, by the express terms of this grievance, strictly limited to consideration of the District's actions under Part VII, Section K of the agreement. She has no authority to review its actions in any other context and expressly limits her review to the subject for which she has contractual jurisdiction.

The Board argues that the contractual language in Part VII, Section K is narrower that the analogous language of the Wisconsin Fair Employment Act, and by definition excludes discrimination based upon "non-physical" (i.e., mental) handicap from coverage under the agreement. The Board asserts that this language precludes the Examiner from considering Molling's mental diagnosis and the non-physical components of Molling's alcohol abuse. According to the Board, the Examiner is not vested with jurisdiction to determine whether a violation exists pursuant to the Wisconsin Fair Employment Act. Rather, she is limited to addressing discrimination on the basis of "physical handicap" only, the term "physical handicap" excluding conditions such as "depression" and at least some dimensions of "alcoholism."

MTEA, on the other hand, strenuously asserts that Part VII, Section K embodies the principles of the Wisconsin Fair Employment Act and applicable federal law. MTEA points out that its interpretation of this language is supported by a decision in a previous case, Milwaukee Board of School Directors

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6/ 57 LA 446 (Duff, 1971).

7/ 74 LA 980 (Kaufman, 1980).

(known as Wilkerson), 8/ wherein the examiner noted that "in Part VII, Section K, the parties have agreed not to discriminate on the basis of physical handicap. The Section does not specify what discrimination on the basis of physical handicap is, but the parties agree that the Section incorporates the principles of the Wisconsin Fair Employment Act and of federal law." 9/ Because the facts in Wilkerson actually involved a physical handicap in the narrowest sense of that term and the parties have not cited additional cases where this language was applied to instances of mental or combined mental/physical handicap, the undersigned is reluctant to accept the examiner's broad conclusion in Wilkerson as definitive evidence in and of itself of the parties' intent as applied to the instant case.

This Examiner, however, does take administrative notice of the entire proceeding in the Wilkerson case, including the transcript. That transcript reflects the following discussion by the parties over the scope of Section K:

> EXAMINER MCLAUGHLIN: We'll go back on the record. For my own information, having heard one opening statement and not to get the benefit of the other until the presentation of the Board's case, am I to understand that in the non-discrimination clause that's set forth in the Complaint, that what the parties -- is there any dispute that what the parties were incorporating by the use of the word "discriminate" was of the principles of the Fair Employment Act?
>
> MR PERRY: There should be no dispute that what they agreed to ban was all discrimination under federal or State law, both under the Fair Employment Act, until Title 7, and broader. Union activity, for example, is not under either of those, and political affiliation is a First Amendment concept. It was co-extensive but broader. In other words, if you had a circle, it was within -- the ERB would be within the circle, but it was broader.
>
> . . .
>
> EXAMINER MCLAUGHLIN: As I hear it, in terms of this particular case with the allegations specifically regarding Mr. Wilkerson's situation, as I hear your answer, this standard then incorporates not just the Fair Employment Act, but perhaps federal law beyond.
>
> MR. PERRY: Not perhaps. Definitely and broader even than that.
>
> . . .
>
> EXAMINER MCLAUGHLIN: Mr. Sigel, same question.
>
> MR. SIGEL: I'll defer to the labor director of the Milwaukee Board of School Directors who was our labor negotiator who's been there for many, many years.
>
> . . .
>
> MR. SIGEL: In response to the Examiner's question, it's the Board's position that the non-discrimination clause is intended by the parties to cover the State fair employment policies enunciated Subchapter 2 and the federal law of discrimination.
>
> Tr. 26-28

8/ Dec. No. 21315-A (McLaughlin, 8/84).

9/ Ibid at p. 10.

In the light of the above testimony, it must be concluded that the parties' intended for Section K to be co-extensive with the Fair Employment Act and federal law. Thus, the Board's contention that this clause is to be read more narrowly is rejected. Where, as here, the parties' have fashioned a relatively unique contractual procedure for dealing with fair employment matters and admit that their intention was to incorporate the applicable state and federal law generally, it is appropriate to apply that law as it relates to handicap to the instant case.

As previously held in Wilkerson, there are three elements essential to establishing that an employe has been discriminated against on the basis of handicap: (1) the employe must be handicapped within the meaning of the Fair Employment Act, hereinafter FEA; (2) the employe must establish that the employer's discrimination was on the basis of handicap; and (3) it must appear that the employer cannot justify its alleged discrimination under an exception set forth in Subchapter II. 10/

In employing this analysis, the first issue is whether Molling is a handicapped individual within the meaning of the FEA. 11/ Section 111.32(8) defines "handicapped individual" as an individual who: (a) has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work; (b) has a record of such an impairment; or (c) is perceived as having such an impairment. The Board argues that Molling's condition was not the disease of alcoholism, but something different. Pointing to Durst's initial and ultimate diagnosis, it claims that he is not suffering from the disease of "alcoholism," but rather suffers from a drinking problem.

Durst's testimony with respect to his ultimate diagnosis of Molling is as follows:

> Q And I also notice on this previous portion you used the term depression and secondary alcohol dependency. Why did you use the term secondary? What does that denote?
>
> A Well, again, I think it reflects -- this is Exhibit 6 -- I think, my own bias in the way I was viewing his particular case.
>
> Q What does it mean? What meaning did it have on that date? Why did you use it on that form?
>
> A For the reasons I've described to you already about what -- what the difference is between primary and secondary, and who -- one group would say one way, and one would say the other.
>
> Q What does that mean in terms of Mr. Molling's own condition on that day? How did the depression and the alcohol dependency in your diagnosis interrelate? You used the term secondary. It's got to have a meaning. He hasn't answered the question.
>
> A They interrelate in ways that are very difficult to separate. You have a witness before you who has a bias in one direction, and a dictionologist would say I'm crazy.
>
> Okay. Why did you use the term secondary?
>
> MR. MUKAMAL: I'd ask that the witness answer the question.
>
> EXAMINER: Just explain why you put down what you put down, okay? That's really what we're getting to.

10/ Ibid. at p. 10; see also Boynton Cab Co. v. I.L.H.R. Department, 96 Wis.2d 396, 406 (1982).

11/ Section 111.32(8), stats.

A Because I -- I believed that Mr. -- Mr. Molling developed his alcohol dependency through having been depressed and through having gone to abuse alcohol in order to make his feelings go away, in order to self-treat, and in the process became addicted to alcohol.

Tr. 279-280

. . .

Q Okay. Do you recall what he did say about those previous courses of treatment?

A In general, that he was dissatisfied with what happened at -- at De Paul.

Q Okay.

A And I -- It may seem hard for you to understand why there is a defect about what I know about that, but, you know, when you're dealing with -- when you're a physician dealing with an alcoholic you're not particularly interested in finding out what their set of excuses are.

Q I understand. By -- by the way -- Yes, I understand.

MR. MUKAMAL: For the record, Mr., or Dr. Durst has used the term alcoholic, and I appreciate that that's his own opinion of Mr. Molling's condition. That does not indicate that we concur.

Tr. 284-285

The Wisconsin Supreme Court has made it clear that a volitional "drinking problem" is not a handicap. 12/ The Court also made it clear that the diagnosis of the disease of alcoholism is a matter of expert medical opinion provided by a physician and not by a layman. 13/ Moreover, the employe's drinking must have progressed to the stage where it is nonvolitional. 14/

Durst's testimony establishes that Molling is addicted to alcohol, i.e., dependent upon alcohol and that his drinking is nonvolitional. As his treating physician, Durst's testimony is the expert medical opinion necessary to establish Molling's alcoholism as a physical handicap. MTEA, therefore, by Durst's testimony, has met its initial burden in proving that Molling suffers from the disease of alcoholism, and that it is a physical handicap.

Durst's testimony has also established that Molling suffers from a mental impairment, depression and mood disorder which is also a handicap under the FEA. 15/ Thus, MTEA has proved Molling suffers from both a physical as well as an emotional handicap. This examiner, accordingly, finds that Molling is handicapped pursuant to Part VII, Section K.

There is no question that the Board was aware of Molling's handicap at the time it made its adverse determination of refusing to permit the rescission of the resignation and refusing to allow Molling to go off on a medical leave. The

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12/ Connecticut General Life Insurance Co. v. Dept. of Industry, Labor and Human Relations, 86 Wis.2d 393, 372 N.W. 2d 206 (1979).

13/ Supra, at 407; see also State v. Freiberg, 35 Wis.2d 480, 484, 151 N.W. 201 (1967);

14/ Muth v. L.I.R.C., 121 Wis.2d 696 (unpublished Docket No. 83-2303 (Oct. 12, 1984, Ct. of App.) and see also A. O. Smith v. L.I.R.C. (Muth) No. 79-1215 (Ct. App. 8/22/86).

15/ Fruehwald v. City of Milwaukee, ERD Case No. 7706159 (12/18/81); also Collaton v. Prudential, ERD 775 (3/31/75); and Tatum v. FDL Foods, ERD Case 5945 (1/30/85).

undisputed evidence provided by MTEA representative Gilbert establishes that Assistant Superintendent Williams on December 4, initially responded to Gilbert's request by stating he was inclined not to permit the rescission but would like to discuss the matter further with the superintendent. Williams requested Gilbert to provide medical verification of Molling's condition. Durst provided said verification by the sick leave form contained in Finding of Fact 22, expressly stating the nature and seriousness of Molling's illness as depression and secondary alcohol dependency. Durst, on this form, also recommended that there be involvement by the Board's Employe (Professional) Assistance Program in this case. Thus, as early as the middle of December, Williams was fully aware of Molling's handicap.

On January 2, Gilbert received and conveyed to Williams an additional letter from Durst detailing Molling's condition. The next day, having reviewed Molling's personnel file including his absentee record and the January 2 letter from Durst, Williams informed Gilbert that he would not permit the rescission of the resignation but would offer Molling employment as a substitute teacher.

Under the Wilkerson analysis, the MTEA must establish that this adverse employment action was discriminatorily made on the basis of Molling's handicap(s). The Examiner concludes that it has met its burden. The Board was aware or should have been aware of Molling's deteriorating mental state prior to his resignation yet did nothing to refer him into the Professional Assistance Program, the contractually agreed-upon mechanism for dealing with employes experiencing these types of difficulties. Nor did it attempt to dissuade Molling from resigning although it must have been aware of his emotional circumstances.

Upon receipt of an expert and unrefuted medical opinion by Molling's treating physician after having requested such documentation, it continued to maintain that Molling voluntarily severed his employment despite the medical evidence to the contrary. It continued its reliance upon the two instances of intoxication and poor attendance as rationales to justify its refusal to rescind the resignation and to place Molling on sick leave. It persisted in this position although said reasons would have been insufficient to sustain a discharge because such an employe would first be referred to the Professional Assistance Procedure, pursuant to Part IV, Section G 6 of the agreement. Part III, Section G 6 mandates a leave for necessary treatment where an employe demonstrates a history of unsatisfactory classroom behavior where it is suspected such behavior may have been caused by mental or emotional disorders. Clearly, Molling fell into this category.

The Board persisted in its determination that it would not permit rescission despite the existence of Part III, Section G 6 and the fact that Molling possessed sixty full days of accumulated sick leave which he could have utilized for treatment pursuant to Part III, Section G 6.

MTEA has shown that, under certain limited circumstances not involving employes suffering from handicaps, the Board in cases where a valid resignation had actually been tendered permitted the employe to rescind his resignation. Yet here the Board has refused to permit such a rescission even where the resignation was clearly ineffective having been based upon Molling's mental state at the time.

Having determined that the Board cannot rely upon the resignation in and of itself in the instant case because it was made while Molling was impaired, the other two reasons advanced by the Board must be considered as to whether they are legitimate or pretextual. The Board claims that poor attendance and showing up intoxicated at school on two occasions more than justify its actions. These reasons, it asserts, establish that Molling's condition prevented him from performing his teaching duties.

Citing Squires v. L.I.R.C. 16/ and Mittlestadt v. L.I.R.C. 17/ as well as Sec. 111.34(2)(a), Stats., the Board argues that it is not discrimination for the Board to refuse rescission based upon the performance-based criterion which it

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16/ Squires v. Labor & Industry Review Commission, 97 Wis. 2d. 648, 294 N.W. 2d 48 (Ct. App. 1980).

17/ Mittlestadt v. Labor & Industry Review Commission, Case No. 82-CV-1412 (Outagamie Cir. Ct., 11/28/83).

utilized. It expressly relies upon the Squires case, wherein the Court of Appeals found that the employe was in fact terminated for inability to perform his job duties, in particular for reporting to work intoxicated on four separate occasions, the last resulting in his discharge. Citing the two instances of intoxication and Molling's absentee record, the Board argues that the facts are identical to those set forth in Squires.

The Board's reliance upon Squires in the instant case is misplaced. It has undercut its own arguments regarding Molling's inability to perform the job by offering him employment as a substitute teacher in the classroom at the same time it refused to rescind the resignation and to allow the sick leave. The Board, therefore tacitly acknowledged Molling's ability to handle a classroom of students by offering this form of employment, irrespective of Molling's previous job-related intoxication and attendance record.

When its offer of employment is considered in light of its previous actions with respect to the resignation of other non-handicapped employes and Molling's request for medical leave, the reasons of absenteeism and intoxication on the job must be found to be pretextual. A finding of discrimination by the Board based upon Molling's handicap(s) is therefore warranted.

The third element of the Wilkerson analysis involves a determination as to whether or not the employer can justify its alleged discrimination under an exception set forth in Sec. 111.34(2)(a), Stats. Sec. 111.34(2)(a) permits an employer to discriminate if the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of the employe's employment. In other words, if the employe cannot perform the job because of his handicap, an adverse action based upon the reason is not discrimination under the FEA.

Much of this argument has been addressed above. However, any determination by the Board as to Molling's inability to perform his job must comport with the parties' agreed-to contractual procedures. Part III, Section G 6 (b) and (c) expressly provides for the steps to be employed when there are suspected mental or emotional disorders and the teacher's classroom behavior is unsatisfactory. Subsection G 6 b. provides for treatment if the employe is medically disabled. Subsection G 6 c. provides for disposition of the case under the evaluation or misconduct procedures in the agreement where it is determined that the employe's performance is unrelated to any mental or emotional disorders or the teacher refuses to participate in any program of appropriate medical treatment.

Under the terms and conditions of this agreement, any determination as to Molling's inability to perform is premature where, as here, the Board has avoided the contractually-mandated mechanisms for making such a determination. Thus, while the Board's contentions might ultimately lead to the conclusion that Molling cannot perform his job, it has failed to prove that this is the case before this Examiner. Accordingly, it has not justified its discrimination as an exception to Sec. 111.34(2)(a), Stats. Therefore, its refusal to rescind Molling's resignation and permit him to take a medical leave was discrimination based upon physical and mental handicaps and a violation of Part VII, Section K of the collective bargaining agreement. Hence the Board violated Sec. 111.70(3)(a)5, Stats. and derivatively Sec. 111.70(3)(a)1.

Remedy

With respect to remedy, MTEA has requested that Molling be reinstated and the period of time from November 27, 1985 through January 13, 1986 be shown in his record as sick days. Given the passage of time, the MTEA does not request reassignment to Vincent High School.

The record in this matter indicates that Molling accepted the District's offer to substitute teach and has taught on every day that he has been called to work by the District. Molling has had several long-term assignments at Bay View High School, at Custer High School, and at Rufus King High School. Molling's evaluation as a substitute teacher has been satisfactory. Molling has not, however, completed inpatient treatment at a medical facility which deals with alcohol and/or mental-emotional disorders. He checked himself out against medical advice on both occasions from Good Samaritan's treatment program in December. As of the date of hearing Molling was still consuming alcohol. He was also taking an antidepressant prescribed by Durst and had attended a few Alcoholics Anonymous meetings.

Having found that Molling never tendered a valid resignation, it is unnecessary to order the rescission of his resignation. The Board is, however, ordered to restore the status quo with respect to Molling's employment insofar as possible. It it ordered to recognize him as possessing employe status and to treat him as any other employe for all purposes including the granting of sick leave, commencement of misconduct proceedings and granting of other benefits pursuant to the contract. In sum, the Board is ordered to treat him as he would have been treated but for his resignation.

Because restoration of the status quo is what is being ordered, and if monetary remedies such as backpay and/or other entitlements are contingent upon the outcome of the misconduct proceedings, Molling's participation in the Professional Assistance Procedure, and additional medical evidence as to Molling's condition with respect to his ability to return to the regular classroom environment. Noting these contingencies, no further remedy is ordered.

Dated at Madison, Wisconsin this 3rd day of April, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By: Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner