STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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.

ORDER AFFIRMING, MODIFYING AND SETTING ASIDE EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND REVERSING EXAMINER'S ORDER

On April 3, 1987, Examiner Mary Jo Schiavoni issued Findings of Fact, Conclusion of Law, and Order with Accompanying Memorandum in the above-entitled matter in which she found that the Milwaukee Board of School Directors had committed a prohibited practice within the meaning of Secs. 111.70(3)(a)5 and 1, Stats., by discriminating against David Molling, a teacher employed by the Board, contrary to provisions of the 1982-85 collective bargaining agreement of the parties, and ordered that Molling's employment with the Board be restored to its preresignation status along with other provisions of relief.

The Respondent Board timely filed a written petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. Both sides have filed written arguments in support of and in opposition to the petition for review, the last of which was received on June 29, 1987.

NOW THEREFORE, the Commission having considered the matter and being fully advised in the premises, makes and issues the following:

ORDER 1/

A. Examiner's Findings of Fact 1-9, 11, 13-16, 18-22, 24 and 25, inclusive, are hereby affirmed; Examiner's Findings of Fact 28-30, inclusive, are hereby set aside; Examiner's Findings of Fact 10, 12, 17, 23, 26, and 27 are hereby modified to read as follows:

10. That prior to November 27, 1985, Dr. Durst provided Molling with diagnostic and treatment services on the following dates in 1985: September 7, September 21, November 5, November 20; that by virture of his occupation, educational background, specific training, professional experience and board certification, Dr. Durst is eminently qualified to offer expert opinion evidence on the subject of alcoholism in general and specifically on whether or not Molling is an alcoholic; that Dr. Durst was unequivocal in expressing his opinion that Molling is an alcoholic; that the Board offered no expert opinion to the contrary; and that Molling is an alcoholic.

(Footnote 1 continued from Page 1.)

1/ order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

12. That on November 18, 1985, Molling reported for work at approximately 7:30 a.m. in an intoxicated condition, and appeared to be distraught, very upset, emotional, and vociferous, with the odor of an alcoholic beverage on his breath; that as a result of the foregoing, Assistant Principal Trythall arranged for Molling to be driven home immediately; that on November 25, 1985, at or about 1:00 p.m., Principal Harrison and Assistant Principal Trythall found Molling's class which he was regularly assigned to teach to be unsupervised and unattended; that when Molling subsequently appeared in his classroom a few minutes later, he had the odor of an alcoholic beverage on his breath which he attributed to having consumed vodka during his lunch break; and that as a result of the foregoing, Molling was requested to leave the building which he did and drove his own car from the school premises.

17. That the morning meeting on November 27 among Molling, Ristau, Trythall and Harrison took place at approximately 8:00 a.m.; that Molling had last consumed an alcoholic beverage at 3 or 3:30 a.m. on the same date, or approximately four and a half to five hours prior to the beginnning of said meeting; that at said meeting, Molling was appropriately dressed and groomed, appeared and acted rational, stated he had given the matter of his resignation a great deal of prior thought, asked Principal Harrison if she would write a letter of recommendation on his behalf should it be necessary, and handed Assistant Principal Trythall an additional letter and an accompanying tape to be read and played to his students to allay any possible feelings of desertion the students might otherwise experience; that the resignation submitted by Molling was typewritten, in conventional format, free from grammatical or spelling errors, and signed by him; that Molling believes some alcohol remained in his system at the time of said meeting, but does not believe he was intoxicated; and that the time of said meeting, Molling was not under the influence of an alcoholic beverage.

23. That in December, 1985, Molling successively signed himself in to and out of two separate in-patient treatment programs for alcoholism at two separate hospitals; finally, at the end of December, 1985, Molling was readmitted to one of these hospital in-patient alcoholism treatment programs under the care of Dr. Durst, and signed out of said facility a little more than one week later against Dr. Durst's recommendation, although his discharge from said hospital was not recorded as being against medical advice; and that hospital tests given Molling in December, 1985, showed evidence of elevated liver enzymes at that time which is consistent with a condition of alcoholism existing over a significant period of time.

26. That Molling accepted employment as a substitute teacher and is working in such capacity until (at least) the date of hearing; that said employment as a substitute teacher has included several long term assignments at three different high schools, and that Molling has not missed a day of substitute teaching employment; that one of Molling's substitute teaching assignments was at the school to which he was assigned to teach at the time of his resignation (Vincent High School); that Principal Harrison expressed concern about Molling's substitute teaching assignment at Vincent High School to Raymond Williams and wanted clarification about that matter; and that as of the date of hearing, Molling had been able to limit his consumption of alcoholic beverages to no more than two drinks prior to dinner each evening.

27. That on September 7, 1985, following the administration of a mental status exam to Molling, Dr. Durst found no loose associations or defective reality testing in

connection with Molling; that Dr. Durst further found that Molling's memory, intellectual functioning and judgment to be grossly well intact; that Dr. Durst found Molling's condition on November 20, 1985 to be slightly worse from when Molling had started treatment with Dr. Durst, especially Molling's judgment, memory, and general intellectual functioning; that at the time Molling submitted his resignation, though his judgment was impaired, he possessed sufficient mental capacity to understand the nature, meaning, and probable consequences of his act of resignation and to be responsible for such decision; that at the time the Milwaukee Board of School Directors refused to rescind Molling's resignation, by virtue of such resignation Molling was not an employe of the Milwaukee School District; that Part VII, Section K (Nondiscrimination Clause) is limited by its terms to application to employes of the Milwaukee Board of School Directors; and that Molling was not covered by the terms and conditions of the collective bargaining agreement then existing between the parties.

B. That Examiner's Conclusion of Law is set aside and in lieu thereof the following Conclusions of Law are substituted:

1. That Molling submitted a valid resignation from his employment on November 27, 1985, and ceased to be an employe of the Milwaukee Board of School Directors on such date;

2. That Part VII, Section K (Nondiscrimination Clause) is limited by its terms to application to employes of the Milwaukee Board of School Directors;

3. That any act or refusal to act in connection with Molling by the Milwaukee Board of School Directors after November 27, 1985, did not constitute a violation of Part VII, Section K (Nondiscrimination Clause), and therefore said Board did not commit a prohibited practice contrary to the provisions of Sec. 111.70(3)(a)5, Stats.

C. That the Examiner's Order is hereby set aside and in lieu thereof the following Order is substituted to read:

It is ordered that the complaint of the Milwaukee Teachers' Education Association alleging a violation of the non-discrimination clause of the collective bargaining agreement existing between said Association and the Milwaukee Board of School Directors by virtue of said Board's refusal to rescind the resignation from employment of David Molling be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 26th day of February, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

MILWAUKEE PUBLIC SCHOOLS

MEMORANDUM ACCOMPANYING ORDER AFFIRMING, MODIFYING AND SETTING ASIDE EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND REVERSING EXAMINER'S ORDER

The Complainant alleged that the Respondent School Board committed a prohibited practice proscribed by the terms and conditions of the "non-discrimination clause" contained in the collective bargaining agreement between the parties. Specifically, Complainant accuses the School Board of discriminating against David Molling, a veteran teacher with 13 years seniority, by refusing to honor his request that his resignation from teaching employment be rescinded.

Part VII - Section K specifically bars both of the parties to the agreement from discriminating ". . . against any employee on the basis of . . . physical handicap . . ." The Complainant asserts that Molling's alcoholism is a "physical handicap" within the meaning of the Non-discrimination Clause, and that the School Board had a duty to accomodate the handicapped by allowing Molling to rescind his resignation (a decision both parties appeared to agree did not represent good judgment), take whatever sick leave was necessary (not exceeding that which he had accumulated), and obtain treatment for his alcoholic condition.

Respondent School Board defended against the claimed discrimination on several grounds: 1. As a former employe, Molling was not entitled to any of the benefits or protections provided by the terms and conditions of the labor agreement in existence at the time between the parties; 2. Even if Molling were entitled to such protections, his handicap of "alcoholism" is not a physical handicap within the meaning of the contractual Non-discrimination Clause; 3. Even if Molling is entitled to the benefit of the protections contained within the collective bargaining agreement and alcoholism is a "physical handicap" within the meaning of the Non-discrimination Clause of the collective bargaining agreement, the Board's refusal to rescind Molling's resignation was based on two valid job related reasons: (a) On two occasions in November, 1985, Molling appeared at his school in an inebriated condition (according to the School Board); (b) Molling had a spotty attendance record because of frequent sick leaves.

To these defenses, the Complainant asserts that Respondent's conduct amounts to a constructive discharge which entitles Molling to the protections of the collective bargaining agreement, that in any event his resignation was invalid because of the diminished mental capacity, that Molling's liver damage caused by his alcoholism is sufficient to place his affliction in the status of a "physical handicap," that the School Board's claimed reasons it failed to rescind Molling's resignation are pretextual, and that the pretext is exposed by the fact that Molling was offered (and accepted) employment by the School Board as a substitute teacher.

While the School Board submitted evidence as to why it refused to rescind Molling's resignation, it failed to offer any evidence as to why he was offered alternate employment as a substitute teacher.

THE EXAMINER'S DECISION

The Examiner found that Molling suffers from a physical handicap within the meaning of Part VII, Section K of the parties' collective bargaining agreement. She further found that by failing to permit Molling to rescind his resignation and 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 (Non-discrimination Clause) of the parties' collective bargaining agreement, thereby committing a prohibitive practice in violation of Sec. 111.70(3)(a) 5 and 1, Wis. Stats. The Examiner was able to reach this conclusion by determining "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."

POSITION OF THE PARTIES ON REVIEW

The Board makes the following arguments in support of their petition:

- The Examiner had no jurisdiction to consider the merits of the MTEA's complaint due to Molling's severance of the employment relationship; the complaint should have been dismissed.

- Molling knowingly, intentionally and voluntarily resigned his employment - the Examiner committed error when she concluded otherwise.

- The Examiner erred when she concluded that Part VII, Section K of the MTEA/MBSD agreement applied to non-physical (i.e., mental) as well as "physical" handicaps; that provision explicitly applies only to "physical" handicaps.

- The Examiner erred when she imposed upon the MBSD and its agents the obligation to scrutinize the reasons for Molling's resignation or his state of mind at that time - the MBSD was entitled to accept his resignation on its face.

- The Examiner erred when she denoted Dr. Durst as an "expert" witness and relied upon his supposed "diagnosis"; Dr. Durst did not qualify as an expert witness and his testimony did not possess the objectivity of that of an expert witness.

- The Examiner erred when she concluded that Molling was an "alcoholic"; the record demonstrates that Molling suffered only from a "drinking problem" and that his drinking was entirely volitional.

- The Examiner erred when she concluded that the MBSD "constructively discharged" Molling.

- The Examiner erred when she concluded that Molling suffered from any legally-cognizable "physical handicap" at the time of his resignation.

- The Examiner erred when when she found that any "past practice" existed with respect to rescissions of voluntary resignations by MPS teachers; no such "past practice" ever existed.

- The Examiner erred in relying upon post-resignation events in support of her decision.

- The Examiner erred when she concluded that Williams' reasons for declining to permit Molling to rescind his resignation were "pretextual"; such reasons were well-founded and would have been paramount to any official of any public school system.

- The Examiner erred when she concluded that Molling was fit to perform the duties of a regular teacher, and further erred when she relied upon Molling's appointment in January, 1986 as a substitute teacher in support of her decision.

- The Examiner erred in admitting and relying upon evidence of Molling's past classroom performance evaluations in support of her decision.

- The Examiner erred when she concluded that the MBS had a "duty to accommodate" Molling by rescinding his resignation.

- The Examiner erred when she concluded that the MTEA had met its burden of proof.

- The Examiner erred when she charged the MBSD with avoidance of contractual procedures with teachers requiring "professional assistance" (Part III, Section G, MTEA/MBSD agreement); such procedures do not apply to former employes who have resigned and who may be seeking rehire.

- The Examiner erred when she failed to award extraordinary relief in favor of the MBSD and against the MTEA.

Given the foregoing, the Board asks the Commission to reverse the Examiner.

The Association opposes the District's Petition for Review and urges the Commission to affirm the Examiner's decision. It asserts that the Examiner's Findings of Fact and Conclusion of Law are not clearly erroneous and are well supported by the evidence and submitted in the law in this case.

According to the Association, the Examiner's initial finding that Molling was impaired and his resignation therefore ineffective is well supported by the record.

Next, the Association argues that the evidence supports the Examiner's finding that Molling is handicapped within the meaning of the collective bargaining agreement. It also agrees with the Examiner's ultimate conclusion that the Association met its burden of proof with respect to each of the elements of proof necessary to maintain a claim of handicap discrimination.

The Association submits that the Examiner properly found that the Board's stated reasons for refusing to rescind Molling's resignation (i.e. his twice appearing at work intoxicated and his attendance record) were a pretext for discrimination. First, the Association asserts that neither of these stated reasons relate to the circumstances surrounding the termination. Second, the Association agrees with the Examiner's determination that Molling's behavior must be dealt with under Part III, Section G, 6, a of the contract. Third, the Association argues there is a long standing practice of not disciplining employes who exhibit behavior such as that of Molling, but rather ensuring they get professional assistance and sick leave. Thus, the Board's refusal to rescind Molling's resignation was not the same treatment afforded similarly situated non-handicapped individuals.

The Association also contends that the Examiner's reliance on post-termination events was proper inasmuch as these events were utilized to make the determination of pretext. Hence, the Board's objection to same is misplaced.

Finally, the Association notes that while it raised the "reasonable duty to accommodate" argument before the Examiner, she did not rely on this argument in her decision. Hence, it believes the Board claim of error with respect to the duty to accommodate is also misplaced.

Given the foregoing, the Association asks the Commission to affirm the Examiner.

DISCUSSION

It cannot be seriously disputed that David Molling is an alcoholic. This is initially established by unrefuted and highly credible expert testimony. 2/ Not withstanding Board attempts to characterize such testimony as establishing only a

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2/ Counsel for the Board attempted to limit Dr. Durst's testimony to a treatment chronology only as Molling's "treating psychiatrist," and objected to any opinion evidence from the doctor on the subject of alcoholism. However, pursuant to the provisions of Sec. 907.02 Stats., we find Dr. Durst is well qualified to testify as an expert on alcoholism (which follows almost automatically from his being a qualified "treating psychiatrist"). While opinion may vary, of course, as to the weight to be accorded the doctor's testimony, his opinions on Molling's alcoholism were properly received into evidence.

"drinking problem," Dr. Durst was explicit in diagnosing Molling's affliction as "Alcohol Dependency", which we regard as synonymous with "Alcoholism." 3/ Dr. Durst's testimony is corroborated by Molling's pattern of absences, his drunken telephone calls, a drunken early morning episode at his school, reporting late to an early afternoon class after he had been drinking, blackouts, and hospital tests verifying liver damage.

Although Molling's status as an alcoholic is not open to serious question, neither party suggests that such status alone is a sufficient basis to invalidate his November 27 resignation. Both parties appear to agree that it is the mental status of Molling at the time of the resignation which controls whether he can now be relieved of the results flowing from it.

We agree: ". . . an employee must have the mental capacity to quit if he is to be bound by that act." 4/ It is in the application of that standard that the parties disagree.

The MTEA believes that since unrefuted expert testimony establishes that Molling had a "diminished capacity" at the time he submitted his resignation, it follows that he lacked ". . . the mental capacity to quit," and the resignation should be set aside.

The Board does not appear to quarrel with the Crown Cork standard that "an employe must have the mental capacity to quit if he is to be bound by that act." The Board, however, denies that mere "impaired" or "diminished" capacity at the time of resignation is sufficient to establish an absence of the requisite mental capacity to quit. The Board urges that the standard by which to assess whether or not the mental capacity to quit is present should be whether the employe was aware of what he was doing, even if his resignation occurred while the employe was in a state of severe emotional anxiety. 5/

As a starting point, we believe the Board's standard more clearly defines the term "mental capacity to quit" than that suggested by the MTEA. While an "impaired" or "diminished" capacity may constitute a lack of "mental capacity to quit," it does not necessarily lead to that end. To do so, it must be shown that the impaired or diminished capacity produced an unawareness on the part of the employe of what he was doing. More specifically, such diminished capacity must be severe enough to render the employe incapable of voluntarily formulating an intent to resign or of understanding the nature, meaning, and probable consequences of his act.

It is immaterial whether such diminished mental condition is produced by drunkenness, mental illness or a combination of both.

This is not to suggest that any mental impairment claimed need rise to the level of a criminal insanity defense 6/ or even an involuntary mental commitment standard under civil procedures. 7/ At the same time, the fact that in retrospect the resignation appears to represent an error of judgment or even poor judgment, by itself, is insufficient to relieve the employe from the consequences which flow from it.

We are not persuaded that at the time Molling submitted his resignation, his mental condition was so severely impaired as to render him either incapable of

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3/ Our perception is shaped not only by a common sense perspective gained from Dr. Durst's specific description of Molling's symptomology, but the provisions of Sec. 51.01(1m), Stats., which provides in part: "'Alcoholism' is a disease which is characterized by the dependency of a person on the drug alcohol . . ." (Emphasis supplied).

4/ Crown Cork and Seal Company, Inc., 74 L.A. 980 (Arbitrator Kaufman, 1980).

5/ Cedar Coal Company, 79 L.A. 1028 (Arbitrator Dworkin, 1982).

6/ See Sec. 971.15(1).

7/ See Sec. 51.20(1).

voluntarily formulating an intent to resign or incapable of understanding the nature, meaning, and probable consequences of his act of resignation. Indeed, we believe the evidence is more persuasive of the converse, that is, that Molling was sober, rational and "aware" of what he was doing when he submitted his resignation, albeit he demonstrated what is now conceded by all to be poor judgment.

We are lead to this conclusion, in part, by Molling's own testimony. He describes the meeting at which he submitted his resignation as taking place on November 27, 1985 at 8:00 a.m. The resignation was typewritten, in conventional format, and free from grammatical or spelling errors. Although Molling says he had been drinking until "the wee hours of the morning," he recalls that his last alcoholic beverage had been consumed at 3:00 or 3:30 of the same morning. While he suggests that he still had alcohol in his system, he doesn't believe he was intoxicated. He was appropriately attired and groomed at the meeting. While there, he acted in an appropriate and rational fashion. He professed to have been thinking about the resignation for a long time. His letter of resignation offered an apparently rational reason for resigning, i.e., pressures placed on school teachers which Molling found to be intolerable. There is no evidence to suggest that Molling had to be driven to or from the school that morning. Just prior to the meeting, he had indicated to the principal that he (Molling) could now avoid the misconduct proceedings scheduled for later in the day, arguably another rational reason for the resignation. Two of the other three persons at the meeting believe Molling to have been sober. The third person, a friend of Molling's, did not testify, but had his judgment as to Molling's sobriety at the meeting been different than that offered by the other two witnesses, it is reasonable to infer he would have been called as a witness by Molling.

We recognize that Dr. Durst testified that he believed Molling's judgment to be significantly impaired at the time he resigned, and that Molling ". . . deserves a second chance because he was sick at the time of his (Molling's) resignation." At the same time, although Dr. Durst allowed that depression alone will not cause the kind of cognitive impairment he was observing in Molling, ". . . but sloshing your mind with alcohol will," he did not offer the opinion that Molling was intoxicated when he resigned. We also note that Dr. Durst found Molling only "slightly worse" on November 20, than on the initial date of examination, September 7; on September 7, Molling's memory, intellectual functioning and judgment were found to be "well intact" by the doctor.

We have no quarrel with Dr. Durst's medical conclusions. Neither do we fault them for containing what appear to be both compassionate and a posteriori qualities. They fall short, however, of expressing an opinion on the central question, i.e., whether Molling was aware of what he was doing at the time he resigned. Nowhere did Dr. Durst speak to Molling's capability of voluntarily formulating an intent to resign or Molling's capability to understand the nature, meaning and probable consequences of his act.

Based on the evidence in the record, and notwithstanding our sympathy for Molling, we find that his mental capacity was not so impaired as to render him incapable of voluntarily formulating an intent to resign or of understanding the nature, meaning and probable consequences of his act. On this basis we find his resignation to be valid, and that he ceased to be an employe of the Milwaukee Board upon delivery of his written resignation to the School District's administrative offices later that day.

This being the case, it follows that the Board could not have violated Part VII, Section K (Non-Discrimination Clause) of the collective bargaining agreement then in effect between the parties by refusing to rescind Molling's resignation. It owed Molling no duty arising from the contract because Molling was no longer an employe to whom the clause applied. Whether the Board's refusal to rescind the resignation constitutes "discrimination" in violation of applicable state or federal law is, of course, not a matter for this forum and one on which we make no judgment.

We do not deny that Molling, as an alcoholic, is deserving of compassion. But "compassion" is something the Board has no duty to provide, and may grant or withhold as it deems expedient. 8/

Dated at Madison, Wisconsin this 26th day of February, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

8/ Board Counsel urged us that the following analysis from Cedar Coal Company, op. cit., directly applies to the circumstances of this case, and could be applied word for word:

> "Grievant, as a sick human being, was deserving of compassion. But compassion was something the Company had the right to grant or withhold. It is not a proper foundation for an arbitral award."

We accept counsel's analogy.