STATE OF WISCONSIN PERSONNEL COMMISSION

JOYCE R. SEEP, Appellant, v. Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Respondent, Case No. 83-0032-PC & 83-0017-PC-ER	DECISION AND ORDER

NATURE OF THE CASE

This matter is before the Commission following the promulgation of a proposed decision. The respondent has filed objections, and both parties have filed written arguments, with respect to the proposed decision. The last brief was filed by the appellant's attorney on September 12, 1984. The Commission has consulted with the examiner.

As its final disposition of this matter, the Commission will adopt the proposed decision, a copy of which is attached hereto and incorporated by reference as if fully set forth, except that any requirement that the appellant receive back pay for the period following the denial of her reinstatement will be deleted, for reasons that will be discussed below.

With respect to the factual aspects of this case, the respondent has argued that the proposed decision fails to properly acknowledge that the institution made an attempt to curb sick leave abuse beginning in 1976:

> "...SWC management, in the person of Dennis Janis, the man who made the decision the appellant appeals from, began grappling with the sick

leave abuse problem as far back as 1976! He did so by requiring employes who had exhausted their sick leave to take AWP; they lost money, usually a potent deterent." Objections filed July 20, 1984, page 4.

While the record does reflect that the institution did take this action in 1976, it took no action at that time to curb the basic problem of sick leave abuse - the employees' practice of using sick leave on occasions other than actual illness. Ms. Seep's record does not show that she took more sick leave than she had earned; rather, she took sick leave more or less as she earned it, and not always in connection with bona fide illness under the labor agreement. The respondent never denied or questioned any of her requests for sick leave.

The respondent further argued that the proposed decision failed to acknowledge the nature of the institution as a patient care institution and the serious problems caused by employe absenteeism. This was at least alluded to at a number of points in the proposed decision. However, to avoid any question, the Commission will amend finding #5 to make this explicit. The Commission also will amend finding #14 to make more explicit the facts surrounding the denial of Ms. Seep's reinstatement.

In its objections filed July 20, 1984, the respondent also raised certain arguments concerning the remedial aspect of this matter.

Initially, the respondent argues that the Commission lacks the authority to require that the appellant be reinstated to a position at SWC.

Section 230.44(4)(c), Stats., provides:

> "After conducting a hearing on an appeal under this section, the Commission shall either affirm, modify or reject the action which is the subject of the appeal. If the Commission rejects or modifies the action, the Commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision."

In this case, the proposed order "rejects" the "action which is the subject matter of the appeal" - the respondent's denial of Ms. Seep's

reinstatement. The statute provides that under those circumstances "the Commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision." (emphasis supplied)

This is a very broad grant of remedial authority. If the action of the denial of a reinstatement is rejected, clearly a logical remedy, and an appropriate "action in accordance with the decision" upon remand from the Commission, is to reinstate the appellant.

This is not an interference with the appointing authority's rights to make future appointments under the civil service law, because here we are dealing with the past failure to make a re-appointment. The only specific restriction placed on the Commission's remedial authority in this context is the provision set forth in §230.44(4)(d), Stats.:

> "The Commission may not remove an incumbent or delay the appointment process as a remedy to a successful appeal under this section unless there is a showing of obstruction or falsification as enumerated in §230.43(1)."

The proposed decision does not require the removal of an incumbent or delay an appointment process.

There is one circuit court case holding that the Commission in an appeal under §234.44(1)(d), Stats., of a failure to appoint following examination, lacks the authority to order as a remedy that the appellant be appointed to the position in question when next it becomes vacant. See DHSS v. Wisconsin Personnel Commission, No. 81CV1635 (9/18/81).

This holding rested primarily on two points. First, the court found no specific statutory authority for the Commission to require this result, and, second, the Court felt that requiring the appointing authority to appoint a specific individual to a future vacancy interfered improperly with that appointing authority's statutory authority to make appointments.

However, as set forth above, §230.44(4)(c), Stats., gives the Commission the relatively broad authority, following the rejection of the action which is the subject matter of the appeal, to "issue an enforceable order to remand the matter to the person taking the action [i.e., the respondent] for action in accordance with the decision." (emphasis supplied). The Court's approach would deny any effective meaning to this language and deny any possible effective relief in most of the appeals the Commission hears. The logical implication of the holding is that respondents in appeals would not be required to take any remedial action, following a Commission decision rejecting an action and a remand for action in accordance with the decision, unless there is a specific statutory provision authorizing the specific result. Perhaps not surprisingly, the legislature has not amended all of the civil service statutes to make it clear that certain transactions can be governed by commission orders on appeal. Furthermore, with respect to the argument that there is no authority to interfere with the statutory right of the appointing authority to make appointments, the fact that the legislature has made these actions appealable necessarily implies that this authority is not exclusive.

To cite but one example of the kind of result that would obtain as a consequence of the approach used by the Court, under the civil service code, the authority to classify and reclassify positions in the Secretary of DER. See §230.09, Stats. The Commission has the authority to hear appeals of decisions of the Secretary, §230.44(1)(b), Stats., including classification decisions. If the Commission were to reject a classification decision and remand for action in accordance with the decision, the logical thrust of the Court's holding and the respondent's argument in the instant matter, would be that the Secretary would not be required to reclassify the position in accordance with the Commission decision, since

nowhere in the statutes is there a specific provision to the effect that the Secretary must reclassify positions when required by the Commission's decisions, notwithstanding the fact that the Commission has the authority to conduct a hearing on an appeal of such a transaction, reject the action, and "issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision." §230.44(4)(c), Stats.

As the Court noted in DHSS v. Pers. Commn., the result of its approach to the Commission's remedial authority was to render the entire statutorily-provided appeal process essentially meaningless:

> Even if the finding of an abuse of discretion is valid, there is no relief available to give Paul any appointment or other meaningful relief, so the finding of abuse of discretion is meaningless....

In the opinion of the Commission, a statutory construction which would lead to this absurd end should not be reached when §230.44(4)(c) provides an explicit and broad grant of remedial authority which is circumscribed only by certain specific statutes, such as the specific prohibition in §230.44(4)(d) against removing an incumbent or delaying the appointment process, neither of which of course is present in this matter. For these reasons, the Commission declines to adhere to the holding in DHSS v. Pers. Commn.

The respondent also argues in its July 20, 1984, objections, that the Commission lacks the authority in this case to require the award of back pay. The appellant contends that this argument was not made until after the hearing and issuance of the proposed decision[1] and is thus untimely.

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[1] In the posthearing briefs, the only arguments regarding remedy concerned the question of mitigation.

However, the respondent's argument relates to the Commission's statutory authority, can be considered jurisdictional in nature, and therefore, can be raised any time.

Section 230.43(4), Stats., provides in part:

> "If an employe has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been restored to such position or employment by order of the Commission...the employe shall be entitled to compensation therefore from the date of such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled by law but for such unlawful removal, demotion or reclassification."

The respondent points out that the legislature in this subsection has enumerated certain specific transactions with respect to which an employe is entitled to back pay, and argues as follows:

> Under the maxim expressio unius est exclusio alterius, express mention of one matter excludes other similar matters not mentioned. State v. Smith, 103 Wis. 2d 361, 309 N.W.2d 7 (Ct.App. 1981), affirmed 106 Wis. 2d 17, 315 N.W.2d 343 ( ). For purposes of statutory construction, the legislature's failure to specifically confer a particular power in a statute defining the authority of appropriate offices is evidence of a legislative intent not to permit the exercise of the particular power. State ex rel. Harris v. Larson, 64 Wis. 2d 521, 219 N.W.2d 335 (1974).
> While Harris, id., is the "flip side" of the instant case, both Smith, supra, and Harris support the argument that because the legislature expressly empowered the commission to use the remedy of back pay in civil service cases only when dealing with issues of an employee's removal, demotion or reclassification (all clearly different from a reinstatement), it choose not to make that remedy available in a civil service reinstatement appeal. Inasmuch as an employee's right to monetary relief after a successful appeal to the Commission under §230.44, Stats., is governed exclusively by §230.43(4), Stats., and the appellant has not been removed, demoted or reclassified from or in a position, the Commission has no authority to award her back pay. See also DER v. Wisconsin Personnel Commission (Doll), Dane County Circuit Court, Case No. 79-CV-3860, September 2, 1980. pp. 30-31.
> While arguments can be made in support of the Commission's authority

to award back pay in cases of this nature, there are at least three court decisions which may be cited that in essence hold that the recitation of situations in §230.43(4), Stats., with respect to which back pay may be awarded, is exclusive. In addition to DER v. Wisconsin Personnel Commn.

(Doll), see also Nunnelee v. State Personnel Board, Dane Co. Circuit Court No. 158-464 (9/14/78), and DER v. Wis. Pers. Commn. (Cady), Dane Co. Circuit Court No. 79 CV 5099 (7/24/81). Due to this considerable weight of precedent, the Commission must conclude that on these facts, back pay is not available in this forum.

ORDER

The proposed decision and order of the hearing examiner, a copy of which is attached hereto, is adopted by the Commission as its final disposition of this matter, and incorporated by reference as if fully set forth, with the following amendment:

1. Finding #5 is amended by addition of the following:

"This sick leave abuse as aforesaid caused SWC substantial problems in discharging its obligations of patient care, rehabilitation, and training."

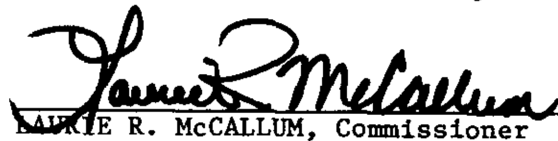
2. Finding #4 is amended by addition of the following:

"Mr. Janis on January 18, 1983, denied the complainant's request for reinstatement on the basis of her record of sick leave abuse at SWC.

3. Inasmuch as the Commission has concluded that Ms. Seep is not entitled on this record to any back pay, that portion of the opinion section of the proposed decision from and including the last paragraph on p. 18 to and including the second paragraph on p. 20 is deleted. For the same reason, Conclusions of Law #8 and #9 are deleted.

Dated: Oct 10, 1984 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson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STATE OF WISCONSIN PERSONNEL COMMISSION

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JOYCE R. SEEP,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES

Respondent.

Case No. 83-0032-PC
83-0017-PC-ER

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PROPOSED
DECISION
AND
ORDER

NATURE OF THE CASE

These matters were consolidated for hearing by stipulation. No. 83-0032-PC is an appeal pursuant to §230.44(1)(d), Stats., of the denial of reinstatement. No. 83-0017-PC-ER is an age discrimination complaint arising out of the same transaction, the parties having agreed to waive an investigation and an initial determination, and to have the matter heard on the merits. The following are the stipulated issues:

1. Whether the respondent's decision not to reinstate the appellant was an illegal act or an abuse of discretion.

2. Whether there is probable cause to believe that the respondent's decision not to reinstate the appellant was an act of employment discrimination on the basis of age, in violation of Subch. II of Ch. 111, Stats.

3. If so, whether the respondent's decision not to reinstate the appellant was an act of employment discrimination on the basis of age, in violation of Subch. II of Ch. 111, Stats.

The respondent's motion to dismiss No. 83-0032-PC for lack of subject matter jurisdiction on the grounds that the transaction in question was not encompassed within §230.44(1)(d), Stats., and alternatively, that any jurisdiction was superseded by the operation of §111.93(3), Stats., was denied by the Commission in an interim decision and order dated July 7, 1983.

FINDINGS OF FACT

1. The complainant, whose date of birth was February 17, 1927, was employed in the classified civil service as an institution aid by the respondent from January 8, 1962, until her resignation effective January 8, 1982, at Southern Wisconsin Center for the Developmentally Disabled (SWC).

2. During her period of employment as aforesaid, the complainant accrued sick leave at the rate of 4 hours per biweekly pay period.

3. At the time of her resignation, the complainant had a sick leave account balance (i.e., unused sick leave) of 4 hours and 27 minutes.

4. During 1980 and 1981, the complainant's attendance records reflect a pattern of sick leave abuse, in that there was a predominant pattern of taking sick leave more or less as it accrued, and of taking single days of sick leave contiguous with days off, vacations, and holidays, which indicated that the complainant was using sick leave for personal holiday purposes rather than for bona fide illness or other use approved under the collective bargaining agreement, and the Commission finds that the complainant's use of sick leave during this period was predominantly abusive.

5. During most of the complainant's tenure at SWC, abuse of sick leave by rank and file employes was widespread, with many or most of the employes using sick leave for personal holiday purposes on a regular basis

and as they saw fit, with at least tacit condonation by management. No effort to curb sick leave was made by management until August, 1981, as will be described more fully below.

6. During her tenure at SWC, the complainant was never denied the use of sick leave, disciplined or counseled regarding her use of sick leave, nor told that any use of sick leave was improper.

7. The complainant's performance of her duties and responsibilities while she was at work was considered good by management.

8. In August, 1981, SWC management issued a document entitled "Employe Sick Leave Programs - A Clarification" (Respondent's Exhibit 1) and caused it to be circulated and posted at various places around the institution. In summary, this document explained the legitimate reasons for using sick leave, reviewed the problems caused by sick leave abuse, and cautioned employes against improper use of sick leave.

9. SWC management also caused the posting and circulation of certain "Personnel Bulletins," containing various items of information about personnel and personnel policies, with titles including "Procedure for Reporting Sick Leave" (August 13, 1981), "Sick Leave for Personal Medical and Dental Appointments" (September 17, 1981), "Absenteeism Caused by Sick Leave Abuse" (October 1, 1981), "Are You Abusing Your Sick Leave" (October 8, 1981), "When You're Too Sick to Work" (October 15, 1981), Absenteeism Caused by Sick Leave Abuse" (November 19, 1981), "Are You Abusing Your Sick Leave" (November 25, 1981), "When You're Too Sick to Work" (December 3, 1981) (Respondent's Exhibit 2).

10. SWC management subsequent to August, 1981, implemented a policy with respect to suspected sick leave abusers whereby such employes' immediate supervisors could require them to bring in a doctor's certification of illness for specific absences, and, in the absence

thereof, be required to take leave without pay.

11. The complainant was never subjected to this policy and never was denied requested use of sick leave.

12. SWC has never instituted a policy of taking any formal discipline against employes who did not produce such a certification when requested as set forth in finding #10, although such employes were denied use of sick leave and required to take leave without pay.

13. The complainant applied for reinstatement pursuant to §ER-Pers 16.035(1), Wis. Adm. Code, at SWC as an institution aide on January 3, 1983. Prior to January 18, 1983, SWC granted reinstatement to the following employes who could be said to have had records of sick leave abuse according to the standards used by SWC management:

a. Iverson-Sommers age at reinstatement (July 20, 1982): 22
b. James age at reinstatement(September 1982): 40
c. Boykin age at reinstatement (December 8, 1981): 41

14. With respect to the aforesaid reinstated employes, Mr. Janis determined that they continued to evidence some sick leave abuse despite counseling, and he decided to implement a policy of denying reinstatement to ex-employes who were determined to have had a pattern of sick leave abuse. He made this decision shortly before the complainant applied for reinstatement on January 3, 1983.

15. The aforesaid policy was neither reduced to writing nor communicated to anyone who performed Mr. Janis's functions with regard to reinstatement applications after he ceased to be personnel manager on April 3, 1983.

16. Mr. Janis, the personnel manager, left this position to become director, management services, on April 3, 1983. He was succeeded as

personnel manager on a permanent basis by Owen Bradley, who started employment in this position about the end of June 1983.

17. During the period between the time Mr. Janis left the personnel manager position and Mr. Bradley began, three eligible ex-employes were denied reinstatement. They were between the ages of 26 and 24 at the time of the transactions. The reasons for the denials of their requests for reinstatement are as follows:

a. Sick leave abuse and poor work experience.
b. Poor work performance.
c. Sick leave abuse and other attendance problems.

18. After January, 1983, 11 employes were reinstated at SWC, of whom 3 or 4 had a sick leave balance of less than 10 hours.

19. As of February 1984, there were 458 institutional aides employed at SWC, of whom 101 were over the age of 50.

20. The general preference among the institutional aide supervisors was for more mature and older aides, and they expressed this from time to time to Mr. Janis.

21. The decision to deny the complainant reinstatement was not motivated in whole or in part by her age.

22. During the period in question, SWC hired institutional aides on a relatively ongoing basis, both as reinstatements and as new hires. A number of new hires were made from those certified from a register for institution aide 1 which was established in September 1982 and which was good for at least 6 months (see §ER-Pers 11.03(1), Wis. Adm. Code). Institution aide 1 is the entry level for this series, institution aide 2 is the objective level. New hires were made at the institution aide 1 level; reinstatements usually were made at the institution aide 2 level. The

complainant, as an applicant for reinstatement, as an institution aide 2 did not have her name on the aforesaid institution aide 1 register. Any aide position to which Ms. Seep could have been reinstated also could have been filled by appointment from the foregoing register.

23. Shortly after her resignation from SWC, Ms. Seep obtained employment with Upjohn Homecare Services in patient homecare, doing generally the same kind of work she performed at SWC. From the time of the denial of her reinstatement on January 18, 1983, through February, 1984, she worked an average 40 hour per week and was earning $4.85 per hour at the end of that period. During that period, she made no effort to obtain other employment because she was attempting to obtain reinstatement at SWC through the instant proceeding and because she knew that nursing home jobs that might be available to her in the area paid no more, and probable less than she was earning at Upjohn.

24. Had Ms. Seep been reinstated at SWC in January 1983, her salary would have been $7.97 per hour in accordance with prevailing policy.

CONCLUSIONS OF LAW

1. These cases are properly before the Commission pursuant to §§230.44(1)(d) and 230.45(1)(b), Stats.

2. The complainant/appellant has the burden of proof as to all matters in issue except mitigation of damages.

3. The complainant has satisfied her burden of proof with respect to case no. 83-0017-PC-ER as to probable cause, but not as to the merits.

4. The complainant has satisfied her burden of proof with respect to case no. 83-0032-PC.

5. There is probable cause to believe that the respondent discriminated against the complainant on the basis of her age with respect to the denial of her application for reinstatement.

6. The respondent did not discriminate against the complainant on the basis of her age with respect to the denial of her application for reinstatement.

7. The respondent's decision to deny the appellant's request for reinstatement constituted an abuse of discretion.

8. The respondent failed to satisfy its burden as to mitigation of damages.

9. The appellant did not fail to satisfy her responsibility with respect to mitigation of damages.

OPINION

No. 83-0032-PC

The Commission, in an interim decision and order dated July 7, 1983, denied the respondent's motion to dismiss for lack of subject matter jurisdiction. At this point, following a hearing on the merits, there is no basis for a change in that ruling.

Section 230.44(1)(d), Stats.,[1] provides:

> Illegal action or abuse of discretion. A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.

The main jurisdictional question is whether the denial of Ms. Seep's application for reinstatement constituted a personnel action "after certification," inasmuch as Ms. Seep herself was not certified for the position.

To begin with, §230.44(1)(d) uses the term "after certification". It does not say "after a certification" or "after certification of the

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[1] All statutory references are to the statutes as they existed in January 1983.

appellant." This statutory language refers not to a specific event, but rather to a point in the selection process "after certification".

This particular line of demarcation has substantial significance, as can be seen from the roles of the administrator and the appointing authorities in the selection process.

The administrator is responsible for recruitment, §230.14, Stats., examination, §230.16, Stats., and the certification of eligibles to the appointing authorities, §230.25, Stats.[2]

The appointing authorities have the authority to appoint persons to vacancies, see §230.06(1)(b), 230.25(2), Stats.

The point of certification marks the extent of the administrator's legal authority in the selection process. The appointing authority is generally responsible for actions in the selection process which occur after the point of certification. Actions which occur at or prior to certification, and which typically concern the examination process, are appealable pursuant to §230.44(1) (a) or (b) as actions of the administrator. Actions which occur after the point of certification (and which meet the other criteria set forth in §230.44(1)(d)) are appealable pursuant to §230.44(1)(d), Stats.

A reinstatement is a form of appointment. §ER-Pers 16.01(1), Wis Adm. Code. It is a permissive act at the discretion of the appointing authority. §ER-Pers 16.01(2), Wis. Adm. Code. An original appointment also is a discretionary act, as the appointing authority has the discretion to choose from among those certified. See Jacobson v. DILHR, Wis. Pers. Comm. No. 79-28-PC (4/10/81):

> In such a post-certification hiring decision, it is a deeply-rooted principle of the Wisconsin Civil Service that the appointing authority

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[2]These functions may be delegated to the appointing authorities, see §230.05(2)(a), Stats.

> does have considerable discretion as to whom to appoint. See, e.g., State ex rel Buell v. Frear, 146 Wis. 291, 131 N.W. 832 (1911). p. 25.

An appointing authority, in considering whom to appoint to a vacancy, can choose from among those certified following examination, and from among those eligible for reinstatement. While applicants for reinstatement are not themselves certified, their names may be submitted to the appointing authority in conjunction with a certification, See §ER-Pers 12.02(3), Wis. Adm. Code:

> The administrator may submit the names of persons interested in transfer, reinstatement or voluntary demotion along with a certification or, at the request of the appointing authority, in lieu of a certification.

From a purely statutory standpoint, it would appear that a decision by the appointing authority on reinstatement is a "personnel action," that it is "related to the hiring process in the classified service, "and that it is "after certification" in the sense, discussed above, that certification refers to a point in the staffing process. Even if "after certification" were interpreted as a reference to a particular certification, the record in this case shows that the denial of reinstatement occurred after a certification related to the position in question. Finally, the statute does not by its terms require that the appellant be actually certified as a prerequisite for appeal pursuant to §230.44(1)(d), Stats., and the commission can discern no reason for finding such a requirement by implication.

From a policy standpoint, there is a good deal of similarity between decisions on reinstatements and on original appointments. The major point of similarity is that both decisions are committed to the sound exercise of the appointing authority's discretion. The commission cannot discern any substantial policy reason why the legislature would not want a decision on

reinstatement to be appealable under §230.44(1)(d), Stats.

With respect to the merits, the first question is whether the denial of reinstatement constituted an abuse of discretion. The term "abuse of discretion" has been defined as follows:

> The term "abuse of discretion" exercised in any case by the trial court, as used in the books, implying in common parlance a bad motive or wrong purpose, is not the most appropriate. It is really a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence. Murray v. Buell, 74 Wis. 14,19 (1889).

The record in this case clearly reveals that sick leave abuse was a longstanding and deep-rooted practice at SWC throughout the complainant's tenure there. It was commonplace for employes to consider accrued sick leave as an adjunct to their vacation, personal holiday, and days off, rather than to be used only for legitimate illness or treatment purposes, and this was routinely and consistently condoned by management.

With respect to the complainant personally, the commission is satisfied that the record supports a finding that she too abused sick leave during the period of 1980 and 1981. It is true that the department's case rests on circumstantial evidence. However, when an employe's attendance record shows that, on a consistent basis, sick leave is taken more or less as it is earned, and immediately before or after days off, holidays, or vacations, common sense alone dictates that, at the least, the employer has satisfied his burden of going forward with the evidence on that point and the burden of proceeding has shifted to the complainant. The complainant's generalized testimony was insufficient to counter the respondent's evidence.

There was no effort to curb sick leave abuse by SWC management until August 1981 when the first of a series of general statements on sick leave

was issued. With respect to the complainant, at no time during her employment at SWC, through the date of her resignation effective January 8, 1982, was she ever disciplined or counseled in any way regarding her use of sick leave. Management never questioned or denied any of her requests for the use of sick leave. Thus, while her pattern of sick leave use did not change in the last few months of her employment, this is completely consistent with the respondent's own testimony regarding the deep-seated nature of the sick leave abuse attitude among SWC employes, and the difficulty of changing that attitude without an extended, intensive pattern of behavior modification. This is amply illustrated by the testimony of Mr. Janis:

> It was a very arduous process, getting this [sick leave abuse] program in place. It took months and months, and years, and I didn't expect to attain a reasonable success for 5 years. But mind you, people were so engrained with the belief, and the union told employes this too, that sick leave was your time - you could use it anytime you wanted to, and you didn't have to give any reason. Specifically, the point of the matter is, they couldn't, and they had to give reasons, and nobody did anything about it. Because of that we suffered severe staffing shortages... to implement a policy like this requires notification, training, and behavior modification. You don't just tell people "you can't use your sick leave that way." You have to work with them day in and day out. Relate specifically to instances of absenteeism, deal with it specifically, and train these people to change their behavior, and as a result of this program we have done substantially that...(Tape 2, at approximately 48 minutes).
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> ...the only way you can combat sick leave abuse is through the immediate interaction between the supervisor and the subordinate employee. (Tape 3 at approximately 3 minutes).

Thus, based on the respondent's own testimony, there was no reason to have expected any change in the complainant's behavior after August, 1981. While there is a degree of culpability on the complainant's part with respect to sick leave abuse, that degree must be considered indeed small when employes' abuse of sick leave was routinely and consistently approved

and condoned by management, even after August 1981.

Now, it must be remembered that this is not a discharge case where the respondent must show that there was just cause for the termination. Rather, the appellant/complainant must establish that the denial of reinstatement constituted an abuse of discretion.

If the record before the Commission on this appeal were the single transaction appealed, the respondent's position would be superior to that framed by the actual record.

With respect to the denial of the complainant's reinstatement request, viewed in isolation, there is a question concerning the adequacy of notice to the complainant of the respondent's new policy on reinstatement while she was still employed at SWC. There is also a question concerning the reasonableness of holding the complainant's sick leave abuse against her, considering the respondent's extensive testimony about how sick leave abuse had been routinely condoned by management and had been considered a rightful benefit by employes generally, and how it would take a long time and extended individual interaction with the employes to effect any behavior modification.

On the other hand, the respondent can argue that the complainant's use of sick leave was at least technically improper, and the institution had a basis for believing that former sick leave abusers generally tended to continue that pattern after reinstatement, to the detriment of the institution.

However, the denial of the complainant's request for reinstatement cannot be viewed as an isolated transaction. The complainant introduced evidence of a number of other transactions which occurred both before and after the denial of the complainant's request for reinstatements.

The record reflects that after the respondent commenced institution of its sick leave policy in August 1981, and before it denied the complainant's request for reinstatement in January 1983, it reinstated several ex-employes who also had poor sick leave records.

Mr. Janis testified that after he determined that these employes continued to abuse sick leave even after counseling, he decided to deny reinstatement altogether to former employes who had records of sick leave abuse. He further testified that Ms. Seep's application was the next one to cross his desk, and it accordingly was denied.

However, the record further reflects that the complainant was the only former employe to be denied reinstatement solely on the basis of a sick leave abuse record. There were three employes denied reinstatement subsequent to Ms. Seep. For each of these three was some other reason for denial besides sick leave abuse. Furthermore, of the 11 former employes reinstated at SWC subsequent to January 1983, 3 or 4 had sick leave balances of less than 10 hours, all of which indicates that the new policy on reinstatement was applied in a "one-shot" manner to Ms. Seep.

The foregoing evidence elicited by the complainant was not met by any rebuttal from the respondent.[3]

In considering whether, under all the circumstances, the denial of the complainant's request for reinstatement constituted an abuse of discretion, it is instructive to examine how this concept was applied by the Wisconsin

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[3] In the absence of any evidence that the policy was communicated to his successor, the fact that, following Mr. Janis' tenure, ex-employes with very low sick leave balances were being reinstated, leads to the conclusion it was not.

Supreme Court in Bernfeld v. Bernfeld, 41 Wis. 2d 358, 164 N.W. 2d 259 (1969). This case involved the contention that the trial court abused its discretion in denying a motion to vacate a judgement and order a new trial. In the proceedings in the trial court, the defendant in a divorce action failed to file a responsive pleading and the matter was brought on for trial,as a default. At the trial, the defendant's attorney advised the court that the defendant, who resided in England, wanted to contest the matter. The court treated this as a motion for a continuance and denied it, voting that no motion or supporting affidavit had been filed was required by §270.145, Stats. The court did acknowledge, however, that it previously had been the

> ...unwritten rule [in the Family Court] that defendants in default actions, on the day set for the default trial, could walk up to the bench and bar and serve up an answer and counterclaim and say, "I want an adjournment" and they got it.
>
> ***
>
> Now, that apparently was the rule of thumb here that these things could be accomplished, but there is no law that allows for that proceeding. 41 Wis. 2d at 360-361.

In concluding that the trial court abused its discretion in denying a motion to vacate the ensuing default judgment and order a new trial, the Supreme Court held as follows:

> It is difficult to believe that counsel for the defendant did not know, at least eight days before the scheduled trial of the default divorce, that defendant wanted to contest the divorce. Counsel could have submitted the proper written motion for continuance in advance of trial. Obviously he did not do so because, relying on his past experience, he thought he could get the case transferred from the default calendar to the contest calendar at the last minute. The trial court ruled that this procedure was improper. While the trial court was undoubtedly correct in his application of the law, it certainly appears that this abrupt change from the prior "rule of thumb" worked a hardship in the instant case. When it became obvious, on the motion to vacate the judgment, that the defendant was going to be denied her day in court because of counsel's reliance on extra statutory procedure, the trial court abused his discretion in refusing to vacate the judgement. 41 Wis. 2d at 367-368.

While the Bernfeld case is by no means an exact parallel to the instant case, it contains some interesting points which have application here.

In determining that an abuse of discretion occurred, the Supreme Court obviously relied heavily on the fact that the defendant's attorney had depended on a long-standing, although informal practice that involved the omission of statutorily-mandated notice, motion papers, and affidavits, and that the trial court's ruling, which was unquestionably legally correct, worked a hardship on the defendant.

In the instant case, the complainants' use of sick leave was in large part the product of a long-standing practice at SWC that had been condoned by management. Management made no attempt to change this practice until shortly before the complainant resigned her employment, and the record is clear that at no time was the complainant ever disciplined, warned, or counseled regarding her use of sick leave, nor was any of her requests for sick leave ever denied, even after August of 1981. Moreover, Mr. Janis himself testified in very strong terms that there was no way that management could expect to change the behavior of the employes without an extensive program of many years duration involving extensive personal contact between the individual employe and his or her supervisor. There still was no program for taking disciplinary action against sick leave abusers as of February, 1984. In addition, the record shows that Ms. Seep was the only person to be denied reinstatement solely because of sick leave abuse. There were a number of former employes with poor sick leave records who were reinstated both immediately before and immediately after Ms. Seep was denied reinstatement.[4]

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[4]C.f., Scharping v. Johnson, 32 Wis. 2d 383, 390 (1966): "'Typical of the cases in which the epithet capricious may properly be applied are those where an agency has given different treatment to two respondents in identical circumstances..."

In its post-hearing brief, the respondent pointed out that an employer's policies are rarely static, but rather are usually dynamic in nature. However, what the record in this case demonstrates is not simply a change in policy. Rather, the policy was changed, applied to the complainant, and the inexplicably abandoned after Mr. Janis left as personnel manager, with the result that, shortly after Ms. Seep's denial, other employes with poor sick leave records were reinstated. This scenario is an important factor in determining whether an abuse of discretion was established.

Certainly the respondent had some basis for denying Ms. Seep's reinstatement, just as the trial court in the Bernfeld case had some basis for its ruling. Ms. Seep's attendance record indicated a pattern of sick leave abuse which at least technically was in violation of the contract, and there was at least some reason to anticipate that this behavior would continue after reinstatement. However, in order to determine whether an abuse of discretion has occurred, all the facts and circumstances must be considered. As the Bernfeld case illustrates, having some basis for a decision does not render it rational under all of the circumstances. Under all of the facts and circumstances of this case, the commission must conclude that the denial of Ms. Seep's reinstatement, while well-intentioned, constituted an abuse of discretion.

No. 83-0017-PC-ER

In order to establish a prima facie case of discrimination under the Fair Employment Act, the complainant must establish that (1) she is a member of a protected class; (2) she was the subject of an adverse personnel action by the respondent, and (3) facts from which a reasonable

inference can be drawn that the adverse personnel action was caused by her membership in the protected class.[5]

The complainant established a prima facie case by showing that at the age of 56 she was denied reinstatement on the ground of sick leave abuse, while younger employes who also had poor records of sick leave abuse were granted reinstatement about the same time.

The respondent must then produce evidence, that at least raises a genuine issue of fact, of a legitimate, non-discriminatory reason for the transaction. The respondent did this by adducing evidence that the complainant had abused sick leave and there was a basis for believing that this would continue in the event of her reinstatement, and that the reinstatement of the younger employes was pursuant to a policy that was changed prior to the complainant's reinstatement application.

The complainant then has the opportunity of attempting to demonstrate that the rationale articulated by the respondent is pretextual.

In the instant case, the complainant produced substantial evidence probative of pretext. The institution long had condoned the kind of sick leave abuse upon which it based the denial of complainant's reinstatement, and it was routinely practiced by a great many employes. Employes with poor records as to sick leave usage were reinstated immediately before and after the complainant's reinstatement was denied. The record reflected that the employes reinstated prior to the complainant's denial were younger than the complainant. The policy pursuant to which the respondent denied the complainant's reinstatement was never reduced to writing, nor, as far as can be ascertained on this record, was it communicated to his successor

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[5] See Vesperman v. UW-Madison, Wis. Pers. Commn. 81-PC-ER-66 (3/22/83); McGhie v. DHSS, Wis. Pers. Commn. 80-PC-ER-67 (3/19/82).

when Mr. Janis left as personnel manager. The complainant was the only employe who, the record shows, was denied reinstatement solely on the basis of her sick leave usage.

However, the respondent also produced substantial evidence that would support a finding that the complainant's age was not a factor in the denial of her reinstatement. Mr. Janis was greatly concerned about sick leave abuse and initiated a continuing program against it in 1981. The several employes reinstated prior to Ms. Seep's denial continued to exhibit difficulties regarding sick leave after reinstatement, and notwithstanding counseling. Like these employes, Ms. Seep had had a poor sick leave record during her prior employment at SWC. Furthermore, and this is of particular significance, it is undisputed that the supervisors at SWC generally tended to favor older employes as aides, and had expressed this preference to Mr. Janis. This is perhaps the most direct evidence bearing on whether there was an intent to discriminate on the basis of age with respect to staffing institution aides.

The record supports the conclusion that Mr. Janis was sincerely motivated by a desire to deal with the problem of sick leave abuse when he denied Ms. Seep's reinstatement request, that his stated reasons for this decision were not pretextual, and that the respondent did not discriminate against Ms. Seep on the basis of age in denying her reinstatement.

Remedy

The only real issue that has been raised concerning the remedy is whether Ms. Seep made an adequate effort to mitigate her damages. The parties are in agreement that the burden of proof on the mitigation issue is on the respondent.

The legal standard for evaluating mitigation was set forth in Anderson v. UW-Whitewater, Labor & Industry Review Commission, No. 8133525 (2/16/83):

> Respondent has the burden of proving that (1) the complainant failed to exercise reasonable diligence to mitigate his damages and (2) that there was a reasonable likelihood that complainant might have found comparable work by exercising reasonable diligence.
>
> ***
>
> Respondent's burden of proving a lack of diligence is not satisfied by merely showing that there were further actions that complainant could have taken in pursuit of employment. Rather, respondent must show that the course of conduct actually followed was so deficient as to constitute an unreasonable failure to seek employment.

In this case, the only evidence as to mitigation was Ms. Seep's own testimony. This was to the effect that following her resignation from state service she obtained employment with Upjohn Homecare Services doing patient care approximately similar to her work as an institutional aide at SWC, that since the denial of reinstatement in January 1983, she has worked an average of approximately 40 hours per week, and that as of February 1984 she was earning $4.85 per hour. Following her denial of reinstatement she made no attempt to find a higher paying job. She felt the only available jobs were in nursing homes, and she was earning as much or more as those jobs paid. Her knowledge of these wages was based on information from friends of hers who were employed in nursing homes.

In light of this, there is no basis for the respondent's assertion as set forth in its post-hearing brief that:

> ...one must conclude that the damage allegedly suffered by the appellant could have been avoided or substantially reduced if she had sought to obtain employment at a hospital or nursing home whose wages would have exceeded $4.85 an hour.

There simply is nothing in this record to indicate that there were any better paying jobs in the area for which Ms. Seep was qualified. The only finding indicated on this record is that she was earning more than she could have expected at a nursing home. Any implication that she was qualified for better paying jobs at hospitals is, on this record, completely speculative.

Based on the record before the commission, Ms. Seep is entitled to receive the difference between her hourly wage at Upjohn and the hourly wage of $7.97, which she would have received had she been reinstated on January 18, 1983, from January 18, 1983, to the date she is reinstated as an institutional aide 2 at SWC, or until the effective date of an unconditional offer of such reinstatement, and to such fringe benefits as she would have received during such period, all computed on the basis of a 40 hour workweek.[6]

Finally, the commission will comment on two evidentiary rulings made during the course of the hearing which concerned the application of §PC 2.01, Wis. Adm. Code, which provides, as material:

> Following the prehearing conference... the parties are under a continuing obligation to file and exchange lists of further witnesses and further evidentiary matter which they intend to utilize at the hearing. With the exception of rebuttal matter, names of witnesses and copies of exhibits must be submitted more than 2 working days before the commencement of the hearing or will be subject to exclusion, unless good cause for the failure to comply is shown.

The hearing in this matter commenced on February 20, 1984, a Monday. By letter of February 13, 1984, which was received by the commission, and presumably also by the respondent's attorney, on February 14, the appellant's attorney provided notice that she reserved the right to "... use as exhibits... those exhibits listed by the respondent...

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[6] Pursuant to an agreement between the parties in connection with a postponement of the hearing, back pay and benefits will be tolled from October 31, 1983 - February 20, 1984.

At the hearing, the respondent objected to an exhibit offered by the appellant that was among those previously submitted by the respondent and covered by the foregoing statement in the appellant's February 14th letter, but copies of which had not been separately served and filed by the appellant. This objection was overruled.

In the opinion of the commission, this document (appellant's exhibit 10) was properly received in evidence. The respondent knew more than 2 working days before the hearing that the appellant intended to use the documents already submitted by the respondent. To require the appellant to have served and filed another copy of appellant's exhibit 10 under these circumstances would be redundant and mere surplusage. The respondent cited a ruling made by an examiner in Berryman v. DHSS, 81-PC-ER-53. However, in that case the party relying on the other party's documents had not indicated in advance of hearing that he would do so.

The second evidentiary issue arose when the respondent objected to appellant's exhibit 9, a list of hires at SWC from January-March 1983, and this was sustained. This document had not been submitted previously by either party. The appellant relied for notice on a letter dated February 16, 1984, which contained the following:

> ...Complainant/appellant intends to use as exhibits personnel and/or payroll records or other records to establish the following:
>
> ***
>
> (2) Names, ages and dates of hire of all persons hired as institution aides at Southern Wisconsin Center during the months of January, February, and March 1983.
>
> A records custodian of the Personnel Office at Southern Wisconsin Center has been subpoenaed for the purpose of obtaining the above documentation.

Even if this letter could be construed as providing adequate notice of

this document, it could not possibly have been submitted more than two working days before the hearing, as this would have had to have been not later than February 15th, the Wednesday preceding the commencement of the hearing on Monday, February 20th.

ORDER

Case No. 83-0011-PC-ER is dismissed, the commission having determined that no discrimination occurred. With respect to case No. 83-0032-PC, the decision of the respondent denying Ms. Seep's reinstatement is rejected and this matter is remanded for action in accordance with this decision.

Dated:______________________________,1984 STATE PERSONNEL COMMISSION

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DONALD R. MURPHY, Chairperson

AJT:jab

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LAURIE R. McCALLUM, Commissioner

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DENNIS P. McGILLIGAN, Commissioner

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