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DUANE FISCHER,

 Complainant,

v.

Chancellor, UNIVERSITY OF
WISCONSIN SYSTEM (Madison),

 Respondent.

Case No. 84-0097-PC-ER

* * * * *

DECISION
AND
ORDER

Nature of the Case

This case involves a charge of discrimination which alleges that respondent discriminated against complainant on the basis of handicap when it discharged him from his Library Services Assistant 2 position. An Initial Determination was issued on May 17, 1985, by one of the Commission's equal rights investigators finding No Probable Cause to believe that complainant had been discriminated against as alleged. Complainant appealed this finding and a hearing on the issue of probable cause was scheduled for November 8, 1985. This hearing was postponed at the request of the parties pending the outcome of a related grievance arbitration. The arbitration decision was issued on January 30, 1986, and concluded that respondent had just cause for discharging complainant. The hearing on the issue of probable cause was rescheduled for January 27 and 28, 1987. On November 7, 1986, respondent filed a Motion to Dismiss on the basis of res judicata and collateral estoppel. In an Interim Decision and Order dated December 18, 1986, the Commission denied the Motion. The hearing scheduled for January 27 and 28, 1987, was subsequently postponed while the parties pursued the possibility of settlement. Settlement was not achieved and a hearing on the issue of probable cause as well as on the merits was held March 8 and 9, 1990.

Findings of Fact

1. Complainant was initially hired by respondent, as a Limited Term Employee (LTE) in its Memorial Library. Complainant was hired into a perma-

ment position in 1969 in the Memorial Library, after being provided the opportunity to test for the position through an oral examination in lieu of a written test. Complainant's position was classified at the Library Services Assistant 2 level at the time of his termination on July 13, 1984.

2. Complainant's supervisor and leadworker were aware that he was a slow learner. At hearing, the parties stipulated that complainant was handicapped as defined in §111.32(8), Stats.

3. At all times relevant to this matter, complainant was assigned to the Library's Circulation Department. This department was composed of a window team, a fines team, and a shelving team. Complainant, during his employment in the subject position, was assigned at one time or another to work on each of these teams. Complainant was assigned to the shelving team in 1977 and worked primarily on the shelving team until the date of his termination.

4. The duties and responsibilities of complainant's position according to position descriptions signed by complainant in 1972, 1975, and 1976 included: searching for overdue books in the stacks and verifying their call numbers through use of the shelf list; filing of overdue charge cards into the IBM file; searching for books not located by patrons the previous day; and searching for lost books.

5. According to a position description signed by complainant in 1980, the duties and responsibilities of his position included:

A. Shelving of books in call number order in book stacks.

a1. Places books in call number order on book trucks and shelves books in proper place in the stacks.

a2. Reshelves books that are out of shelf-list order and shelves books left in the stacks by patrons.

a3. Shifts books as stack areas become overcrowded.

B. Clerical procedures related to the maintenance of the Circulation charge-out file.

b1 Key-punch all charge-out cards by category, status and date to be returned on an IBM 126 punch using master cylinders for each category. Put punched cards in call number order for filing

b2. Files IBM charge-out cards in the master file by call number.

b3. Discharges IBM master cards by matching master and carbon cards for books that have been returned.

b4. Retrieves books for patrons from storage areas and assists patrons with difficulties in locating books in the stacks.

C. Prepares books from book returns, bindery, marking room and internal use for shelving.

c1. Empties all book returns and book trucks from marking room and bindery. Dispatches books to proper stack level. Carbon and bindery cards are counted, recorded by category and put in call number order for discharging

c2. Checks all books returned from Circulation for tattle-tape and inserts strip in books that do not have tape.

c3. Checks carrels, tables and xerox machines daily for books left by patrons. Books are counted, recorded and dispatched to proper stack level.

D. Searches in stacks for bound periodical overdues for the circulation office and sees to the discharge of periodical carbon cards.

E. Miscellaneous duties such as shifting and tattle-taping.

6. According to a position description signed by complainant in 1981, his duties and responsibilities included all those listed in the 1980 position description except that Goal E had been eliminated and replaced with the following Goals:

E. Prepares books for future use in an automated circulation system

e1. Attaches bar code labels to books and source documents and fills in call number, location, type and size information on those documents.

e2. Enters data from source documents on an IBM 3270 terminal to create circulation files.

e3. Using printout, revises entries by checking printout against the source documents.

F. Retrieves and charges out books requested by Inter-Library Loan.

G. Returns books in Lost and Found to the proper library department or other library.

H. Miscellaneous duties such as shifting, substituting for absent staff and assisting at public service desks during peak periods.

7. Complainant's work performance from March 1, 1970, to March 1, 1971, was evaluated by his supervisor Susan Ubbelohde who rated his performance as "very good "

8. Complainant's work performance from April 1, 1971, to March 31, 1974, was evaluated annually by his supervisor Faith U'Ren who rated his performance as "satisfactory."

9. Complainant's work performance from April 1, 1974, to March 31, 1975, was evaluated by his supervisor Faith U'Ren who rated his performance as "satisfactory" and commented that:

Duane is very reliable in attendance and punctuality. He is very accurate in his work. He tends to let his personal problems affect his work. He also has personal conflicts with other members of the team. He socializes with staff members in other departments which slows down his work

10. Complainant's work performance from April 1, 1975, to March 31, 1976, was evaluated by his supervisor Janet Bailey who rated his performance as "unsatisfactory" and commented in summary that:

. . . Duane is unable to set priorities and apportion his various duties to get them all done each day. By spending an excessive amount of time on his favorite job, searching books not located by patrons, he is neglecting other duties. He must learn to budget his time, and work within that time limit to finish his work.

11. Complainant's work performance from April 1, 1976, to March 31, 1977, was evaluated by his supervisor William Patch who rated his performance as "satisfactory."

12. Complainant's work performance from April 1, 1977, to March 31, 1978, was evaluated by his supervisor William Patch who rated his performance as "unsatisfactory" and commented as follows:

Mr. Fischer continues, as last year, doing satisfactory work at the exit lanes and unsatisfactory work for the stacking team. In spite of the evidence that he tries to improve, he still is not able to finish his work in a reasonable time, compared to other members of the stacking team. Because of this lack of improvement, I must regretfully evaluate his work as unsatisfactory.

13. Complainant's work performance from April 1, 1978, to March 31, 1979, was evaluated by his supervisor Kathleen Jordan who rated his performance as "satisfactory" and commented as follows:

In the past two years Duane received an unsatisfactory rating. We are raising his rating this year with two intentions in mind (1) to give credit for improvements during the past year and (2) to act as an incentive for continuing positive efforts on his part.

Duane has several outstanding qualities: attendance, punctuality, and thoroughness. Although he may not enjoy the pressures of working at the exit lane, he does not only a thorough inspection job but is a great help in terms of stopping people who bring food and drink into the building and in terms of accomplishing extra tasks while he has free time.

He has improved in the following areas in the past year. In terms of quantity of work, Duane has paid more attention to organizing his work load. In terms of adaptability, he has tried to accept constructive criticism and adapt as best he can. He makes an effort to understand new procedures and carry through effectively.

If we can find more noticeable improvements, particularly in the areas of budgeting time and therefore working efficiently, we hope to be able to give Duane more responsibility in his work and decrease the amount of time he has to sit at an exit lane.

Duane's major weak areas are the following:

1. Completing his tasks in an efficient manner so that he is assuming an established fair share of the team workload.
2. Being able to establish priorities in completing tasks efficiently and not being so compulsively thorough on one task that others are left by the wayside.
3. Needing monitoring of his work and his whereabouts.

14. Complainant's work performance from January 1, 1979, to December 31, 1979, was evaluated by his supervisor Ms. Jordan who rated his performance as "satisfactory" to "very good" and commented that.

Duane has made substantial efforts to improve in terms of quantity, dependability and in his relations with co-workers. He has always been very accurate in his work and shown much interest in the quality of service provided by the department. He has re-organized his priorities in handling his work and this has led to noticeable improvements in his shelving assignment.

15. In a memo dated July 11, 1979, the Memorial Library established shelving standard for members of the shelving team. This memo indicated as follows, in pertinent part:

SHELVING STANDARDS

Loading time - One book truck per 30 minutes

Shelving time - One book truck per hour

Error rate for truck loading - 1%

Error rate for shelving - 2%

TESTED AVERAGES - SHELVING TIME

178 books per hour - sample includes new employees

195 books per hour - includes only staff employed beyond six months

TESTED AVERAGES - SHELVING ERROR RATE

.021% includes new employees

016% only staff employed beyond six months

TESTED AVERAGES - TRUCK LOADING ERROR RATE

.0076 includes new employees

.0042 only staff employed beyond six months

SAMPLES OF NEW STAFF

Shelving time 108 books, 50 minutes

 235 books, 90 minutes

 166 books, 60 minutes

These standards were based on book counts supplied by the surveyed employees. These standards were subsequently posted and generally applied to all employees assigned shelving duties. Complainant, however, was required to shelve only 180 books per day and had approximately 3 hours to complete this shelving. Complainant was able to satisfy this standard until some time in 1981 or 1982.

16. Complainant's work performance from February 28, 1980, to March 1, 1981, was evaluated by his supervisor Ms Jordan who rated his performance as "very good" and commented that:

Duane's work has always been extremely accurate and careful. He has taken on new duties this year in which this talent is particularly useful. Duane has made substantial efforts to improve

the quantity of work he is able to perform and has been successful in this regard. He also takes great interest in all phases of the work and has been able to acquire knowledge and proficiency in work that had not normally been assigned to him.

17. Complainant's work performance from April of 1981 to March of 1982 was evaluated by his supervisor Ms. Jordan who rated his performance as "satisfactory" and commented that:

Duane is extremely accurate in his clerical and shelving assignments. He is very responsible in punctuality and attendance. He is knowledgeable of the work of the department. He needs to improve the quantity of work he can perform and the speed at which he performs various tasks. He also needs to discontinue some work habits that impeded his ability to finish his own assignments such as checking up on work that is not his responsibility and over-organizing his own work.

18. On March 1, 1982, Ms Jordan met with complainant and his union representative to discuss problems she had observed with complainant's work performance. The primary problems mentioned by Ms. Jordan at this meeting were complainant's performance of duties assigned to other positions and his failure to complete his own duties in a timely fashion. Ms. Jordan gave complainant the following directives at this meeting:

- 1 Stop interfering with other workers;
2. Improve speed in shelving and other tasks;
3. Stop checking and revising the work of other employees;
4. Stop adding unnecessary stages to the shelving process;
5. Learn the difference between constructive and destructive criticism.

Ms. Jordan issued complainant an oral reprimand at this meeting; gave complainant two days to decide whether he wanted counseling in methods designed to improve his speed in the performance of his duties and in following established procedures; and advised complainant that continued performance problems would result in a written reprimand. Complainant was verbally abusive to Ms. Jordan at this meeting. Complainant subsequently declined to accept the counseling offered by Ms. Jordan.

19 Prior to March 1, 1982, in response to her observation that complainant was not completing his work in a timely fashion, Ms. Jordan walked complainant through his duties more than once. Complainant's assignment, in

regard to books left in study carrels, was to pick up the books left in the carrels by library patrons, look at the back of the book to see if it was checked out, take the books collected from the carrels downstairs, count these books, and place them in the reshelving boxes. Ms. Jordan observed complainant doing unassigned tasks such as rearranging the furniture in the study carrels and advised complainant not to do these unassigned tasks. Ms. Jordan also observed that it sometimes took complainant from early morning through the afternoon to complete his study carrels assignment, an assignment she felt should take complainant 1-1/2 to 2-1/2 hours, and advised complainant that this assignment was taking him too long to complete. Complainant's assignment, in regard to shelving books in his work room, was to unload the books which came to his room in bins on a conveyor belt; place them on the metal shelves in his work room; and to later transfer these books to his library cart (truck) in call number order for shelving in the library. Ms. Jordan observed complainant placing the books in call number order on the metal shelves in his work room and advised him that he should no longer do this because it was unnecessary and was consuming too much of his work time. During these "walk-throughs," Ms. Jordan gave complainant very detailed instructions on the procedures and priorities to be followed.

20. Ms Jordan issued complainant a second oral reprimand in May of 1982 based on her observation that complainant's work performance had not improved. Ms. Jordan directed complainant at this time to:

1. Discontinue shelving books in New Book Shelf Room. This had been one of complainant's assignments but Ms. Jordan had observed him, prior to March of 1982, performing some of the duties of other staff assigned to this room, particularly those duties related to removing books which had been there more than the allotted time. Ms. Jordan had advised him in March of 1982 to discontinue performing these unassigned duties but had observed complainant continuing to do so after that time.
2. Stop interfering with New Book Shelf clerical functions.
3. Follow correct procedures in the work room such as putting books in call number order only when they are transferred from the metal shelves to the cart.
4. Improve speed particularly in handling book returns and shelving.

5. Stop disrupting the activities of other staff.

21. In September of 1982, Ms. Jordan issued an oral reprimand to complainant based on her observation that complainant's work performance had failed to improve. Complainant denied that there were problems with his work performance. Complainant became physically ill after his meeting with Ms. Jordan to discuss the reprimand and had to be hospitalized.

22. On December 14, 1982, Ms. Jordan issued a written reprimand to complainant which stated as follows, in pertinent part:

. . . At this point, I feel that the written reprimand is necessary because you have not shown a consistent and sustained ability to perform a fair share of the work load and to respond to our efforts at correcting your unacceptable performance.

I have been keeping a count of the books that go to your floor for shelving and how much has been done by you. As of Friday, November 26, 1982, there were 800 books in the workroom to be shelved. As of Friday, December 10 at 8:00 a.m., there were 1398 books to be shelved. In monitoring the number of boxes that arrived, the call numbers of the loaded trucks and the number of boxes emptied, I discovered that you accomplished very little. In fact, you emptied 20-25 boxes and shelved between 250-300 books in a 10 work day period.

You have a minimum of 3 hours per day in which you are to shelve books and maintain your workroom. Allowing for two days of vacation that you took during this period, you had 24 work hours available for shelving. By departmental standards, a shelver is to load a truck in 30 minutes and shelve between 178-195 books per hour. In 24 hours you shelved one truck and loaded one truck of approximately 200 volumes each. You emptied 20-25 boxes of books. I believe this illustrates the fact that fifty percent of your work is being done below departmental standards. To further illustrate, at our request, because your workroom was backed up, one student assistant assigned to your workroom on Friday, December 10, emptied 13 boxes, loaded two trucks and shelved one truck in a period of five hours. This is more than you have accomplished in 24 hours. The same deficiencies in production apply to your work in Room 166, on book returns and at the circulation charge file.

At this point, I must tell you that you are expected to meet minimal standards by performing a fair share of the work load in order to avoid further disciplinary action. I expect this to be accomplished by March 1, 1983.

23. In a memo to complainant dated March 4, 1983, Judith Tuttle, Ms. Jordan's supervisor, stated as follows, in pertinent part:

After looking at all the workrooms, which I do on an occasional basis, I think that on a comparative basis you have too many books sitting in you workroom.

Considering the recent reprimand, I wanted you to know, up front, that we will be counting the books remaining in your workroom on an every-other-day basis (M,W,F). I don't want to make you nervous about this but I do want you to be accountable for your work and to know what is expected. I will ask Tom Hefko to do the counting and to begin the week of March 7 and end the week of March 28.

24. During the entire period of his employment at Memorial Library, complainant's supervisors and lead workers had provided to him detailed written and oral instructions as to the procedures to follow and priorities to set in performing his duties and the reasons for these procedures and priorities; had on several occasions walked through his duties with him to determine whether he was following proper procedures and setting proper priorities and to instruct him as to proper procedures and priorities; and repeatedly asked him if he needed further training or other assistance. Complainant's response varied from silence (no response), to indications that he knew what was expected and what was to be done to stating that he had his reasons for following the procedures that he did, that the procedures his supervisors had directed he follow were wrong, that he intended to continue carrying out his assignments in the manner he had been carrying them out, and that he did not want retraining. On one occasion, after a counseling discussion with Ms. Jordan relating to his work assignment in Room 166, complainant refused to do the work she directed him to do and swore at her.

25. Some time in April of 1983, complainant provided to respondent a document dated April 4, 1983, signed by W. L. Washburn, M. D. It was apparent from the copy provided to respondent that only part of the original document was being provided. It stated as follows:

This patient does have recurrent labyrinthitis for which he has been seen both by Doctors J. K. Scott and Gamber Tegtmeier. He is presently on an anti-depressant, Amitriptyline 75 mgs., two at bedtime and also he uses an antihistamine preparation to improve the dizziness that he experiences with his labyrinthitis.

When he comes under severe pressure at this job, he develops an acute anxiety reaction which is accompanied by severe headache, nausea and vomiting. This has resulted in the necessity to hospitalize him for sedation and intravenous fluids. His last hospitalization was overnight in September of 1982, for this condition. He has no poor social habits, e.g., smoking or drinking.

In conclusion, I would say that Duane Fischer has social pressures with which he sometimes finds difficulty in coping. These are manifested mostly in his job. He is under severe stress because he feels that his job is in jeopardy. His abilities apparently are limited. I hope this will be of some help to you in aiding Duane with the resolution of his problems. Should you need any further information, please feel free to call.

26. In a memo to complainant dated June 2, 1983, Sandra Pfahler, Assistant Director for Budget and Personnel of UW-Madison's library system, stated as follows:

I received a copy of the April 4, 1983 note from your physician. It is difficult for me to determine what accommodation you are seeking. To make an appropriate determination, we need additional specific information. For example, how does your handicap affect the type of supervision you receive? What type of pressure is "severe pressure?" Can you be expected to fully perform your job-related responsibilities? It would facilitate matters if I could obtain this information directly from your physician. Attached is a medical information release form for your signature. This must be returned to me before I can send a letter to your physician requesting more information on your handicap. You agreed that I could contact Dr. Washburn in writing. Attached is a copy of the letter that I will send to him as soon as you return the signed release form.

Please remember that it is your obligation to provide this medical information to us and that any cost incurred must be your responsibility.

Complainant signed the medical information release form in August of 1983.

27. Ms. Pfahler directed a letter to Dr. Washburn on August 27, 1983, which stated as follows, in pertinent part:

. . . We need to know more about the nature of Duane's handicap, what the specific characteristics of it are, and how they impact on this job as defined by the position description which is enclosed. The questions that we need answered are:

1. How does his handicap affect his supervision?

2. What is your definition of severe pressure?
3. You have stated that his abilities are limited. Can he perform job duties described in the position description?
4. How does his handicap affect his response to corrective measures taken by supervisor?

Any information which you can give us in more clearly defining Duane's handicap would be very helpful. It is important that we have this information from you as soon as possible.

28. On or around June 28, 1983, Ms. Jordan completed an evaluation of complainant's work performance for the previous six months which stated as follows, in pertinent part:

Efficient organization of time and work load--Duane has substantial problems in this area. He spends inordinate amounts of time in the work room cleaning up when there is actual work to do. His work room was, in the past, over-organized with books in call number order on the shelves. In the last few months, this has changed to boxes not being emptied, trucks not put in order. This is in spite of direct orders to the contrary. In every assignment he performs he takes much more time than is necessary due to his constant rearrangement of materials and time-wasting gestures. He is not spending his time completing his assigned work....

Establishment of effective priorities in performance--Duane accepts only his own priorities for performing procedures in spite of counseling to point out the inefficacy of his choices. There are clearly defined methods and time limits and limits to the extent of searching, rechecking and organizing that is to be done. Duane has chosen to ignore these directions and continues to put an emphasis on the things he considers important to the detriment of his ability to finish his work in an appropriate time.

Ability to perform an acceptable amount of work--In shelving, Duane is accomplishing 50% less than what is expected. In clerical functions, he is slower than the other workers but it is not quite as far below standards. In the processing of returned books and books used within the building he is below standards to the extent that it causes problems and increases the work for those who follow him in the schedule.

High degree of accuracy in the work performed--Duane is very accurate in everything that he does.

Adequate knowledge of procedures and policies and services and the ability to apply effectively--Duane is very knowledgeable

about the procedures we perform on the shelving team. . . . In application of what he knows, Duane tends to be very rigid and restrictive in interpretation and resists instruction to handle a procedure differently. . .

Skills in communication with the public--Duane is polite and helpful with the public and usually willing to help but this exposure has been limited to basic informational services and chance encounters in the work room. He is easily pressured and often visibly nervous so I have had serious hesitations about training him for the Circulation desk where pressures are substantial, decision making necessary and work must be done quickly.

Constructive work habits--In terms of promptness and use of time off Duane is fine. However, his inability to get his work done is most definitely a result of the ways in which he uses his time. He spends time checking on the whereabouts of other staff, the daily schedule and on the work of other staff. He also looks for errors of other workers which is not his assignment or business.

Contribution to positive staff and public relations--Duane's relationship with other staff can be quite affected by the small volume of work he produces. He has, at times, caused substantial disruption by interfering in the work of other staff in and out of the department. His manner with supervisors can be very confrontational if he is being corrected or counseled. He does not listen to instructions if he disagrees which makes counseling toward improvement impossible.

29. In November of 1983, Ms. Jordan transferred to another position and, as a result, Ms Tuttle functioned as complainant's first-line supervisor until March of 1984 when Helene Ondraski was appointed to Ms. Jordan's previous position.

30. In a letter to complainant dated November 21, 1983, Ms Tuttle stated as follows, in pertinent part:

This letter is to be considered a second reprimand within one calendar year, relating to your work performance as a Library Services Assistant 2 on the stacks maintenance team of the Circulation Department, Memorial Library.

Your lack of attention to your assigned work from 8:00 a.m.-9:00 a.m., on Friday, November 18, 1983 is the immediate cause for this letter. At that time, you were assigned in Room 166 to distribute books to be shelved via the book conveyor to the work rooms in Memorial Library. There were four trucks of new books from the Marking Room to be processed, as well as the book returns and conveyor. You processed 28 books from the book returns and conveyor, then disappeared, and did not process any of the four

trucks of new books. Aside from this instance of not completing assigned tasks, I also am displeased with the number of books currently in your workroom waiting to shelved.

Today, your workroom contains 1,250 books. On Thursday morning, November 17, 1983 at 7:00 a.m., your workroom contained 1,230 books. Since Thursday, it appears that you received 10 boxes of books, each box containing approximately 20 books. Therefore, in two days you shelved 180 books or 90/day

The second cause for writing this letter is to show that since your first reprimand, December 14, 1982, written by your first line supervisor, Kathleen Jordan, you have made no improvement in correcting your unacceptable work performance. This lack of improvement is despite our efforts to counsel you about your performance and to allow time to prove that you may have a handicap which hinders you from meeting minimal shelving standards.

On March 4, 1983, I wrote you a note stating that: a) your shelving rate appeared to be below standard and your workroom would be reviewed and the books counted; and b) we were changing your workroom and giving Floor 2, to a 50%-time worker.

In April 1983, we received a letter from your medical doctor which stated the following:

"In conclusion, I would say that Duane Fischer has social pressures with which he sometimes finds difficulty in coping. These are manifested mostly in his job. He is under sever stress, because he feels that his job is in jeopardy. His abilities apparently are limited."

We then waited for you to give the Assistant Director for Budget and Personnel permission to receive further clarification from your doctor as to whether you have a handicap, which would affect your ability to perform your job. On August 27, 1983, a letter was written to Dr. Washburn requesting this information (see attached). We have received no answer from your doctor to-date.

We have waited to change your workroom, we have waited to hear from your doctor, and we have specifically detailed in your six month's evaluation how to improve your performance. At this point, there is no excuse for the inordinate amount of books currently waiting to be shelved in your work room and there is no excuse for your behavior Friday morning, November 18, 1983.

In monitoring your shelving in May, July, August and November 1983, you shelved approximately 75-100 books, at the most, per day in a 3 5 hour period allotted. I will allow until December 9, 1983, for this unacceptable work performance to be corrected. By December 9, 1983, I expect evidence reflected in your workroom that you are loading and shelving a full truck of books per day

(an average of 185 books/truck) on a sustained and consistent basis. This will meet the minimal standard expected, according to the shelving standards which were reaffirmed in the Circulation Department in 1979.

31 In a letter to Ms. Tuttle dated December 8, 1983, Dr. Washburn stated as follows, in pertinent part:

Thank you for the opportunity of talking to you the other day regarding the concerns with your employee Mr Duane Fischer. . . . Review over the past several years of his medical record indicates his complaints of trouble adjusting to his work situation. As far back as March of 1982, my associate, Doctor Richard Schmelzer, advised him to continue with counseling or seek the same and possibly undergo some behavior modification therapy. If in any way this can be successful, possibly he will be able to cope better in his job and perform at a level that will be satisfactory to those of you responsible for making the library an effective work place.

I have been trying to contact him and will continue to do so in an effort to effect proper counseling. Should you have any further questions, please feel free to contact me. With his permission, I will continue to keep you apprised of his progress.

After reviewing this letter, Ms. Pfahler suggested to complainant that he follow Dr. Washburn's suggestions, including receiving counseling and behavior modification therapy

32. In a letter to complainant dated December 14, 1983, Ms. Tuttle stated as follows, in pertinent part:

On November 21, 1983, I wrote a second letter of reprimand to you within a calendar year relating to your poor work performance on the Stacks Maintenance Team of the Circulation Department. In this letter of reprimand I gave you until December 9, 1983, to correct your unacceptable performance. The method of correction was to meet a minimal standard of shelving by loading a truck and shelving at least an average of 185 books per day on a sustained and consistent basis.

If you look at the chart in Attachment A, you will see that you have not loaded a truck and shelved 185 books per day on a sustained and consistent basis. It is difficult for me to understand why you cannot meet this figure since we have made several accommodations to help you. We have taken you off of the ILL duties assignment because you could not fill out charge cards in a timely fashion. You have at least 3.5 hours per day available to you to shelve books and yet there is a 1,000+ volume backlog in

your workroom. As a full-time employee, you should be moved to a floor with a heavier workload, but you cannot keep up with your current shelving responsibilities. Attachment B will show you that you have 21.75 hours per week to shelve 925 books (185 x 5), or 42.5 books per hour. What we are asking of you is below the department standard. Despite repeated efforts on our part to teach you to accomplish your duties in a timely fashion, you have resisted our efforts to assist you.

Your explanation in the past for performing at an unacceptable level has been that you have a medical handicap. On August 25, 1983, you consented to and authorized Dr. Walter Washburn to disclose to Sandra Pfahler, Assistant Director for Budget and Personnel for the General Library System, any and all information he had regarding your handicapping condition. This consent and authorization was effective until November 23, 1983. No information was received from Dr. Washburn. However, on December 7, 1983, Dr. Washburn telephoned Ms. Pfahler and gave her some information. Dr. Washburn indicated that he would be enrolling you in motivational training and psychological testing. According to Dr. Washburn, results of the training and testing should be discernible by February 1, 1983 (sic).

Because you are continuing to perform at an unacceptable level, our next step should be further disciplinary action. However, rather than taking disciplinary action at this time, we are directing you to immediately comply with Dr. Washburn's orders. We will delay further disciplinary action until February 1, 1984. If the training and testing is unsuccessful, additional disciplinary action, in the form of suspension, will be taken at that time. We expect you to shelve on a consistent and sustained basis, complete all work assigned to your scheduled time in Room 166, and when so assigned, empty all book returns in one run and in a timely fashion.

<u>Date</u>	<u>Rec'd</u>	<u>Total at 7:30 am</u>	<u>Shelved since previous count</u>
11/17/83	--	1230	
11/18/83	120	1240	110
11/21/83	100	1250	090
11/22/83	160	1340	070
11/23/83	080	1260	160
11/24/83	Library closed		
11/25/83	080	1250	090
11/28/83	140	1390	000
11/29/83	080	1470	000
11/30/83	100	1390	180
12/01/83	080	1460	010
12/02/83	060	1380	140

12/05	180	1560	000
12/06/83	120	1650	030
12/07/83	160	1690	120
12/08/83	070	1560	200
12/09/83	140	1320	380
12/12/83	180	1440	60
12/13/83	80	1480	40
12/14/83	190	1650	20

Books shelved 1700/Total workdays 18 = 94.44 books per day average.

Complainant had 3.5 or more hours to complete his shelving duties each day

33. In a letter to Ms Pfahler dated January 27, 1984, Gordon Casebolt, a social worker associated with the Odana Medical Center where Dr. Washburn was on the medical staff, stated as follows, in pertinent part:

This letter is for the purpose of reporting to you concerning the training and testing that has been done with Mr. Duane Fischer. As part of the report, I am enclosing a copy of Dr. Barbara Van Horne's psychological evaluation of Mr Fischer which I think is very appropriate and helpful in looking at his particular set of difficulties.

In addition to the psychological evaluation, I have been seeing Duane in therapy since the 16th of December. The therapy has been directed towards helping Duane to identify and change some of his problematic behaviors on the job. Duane is experiencing a set of on-the-job pressures which are severe in nature in his particular case. He is, as you may have seen in the psychological evaluation, a person who tends to interpret himself and the people in the world around him in a very concrete fashion. This is a part of his personality makeup and this, combined with another deficit of difficulty in thinking in more mobile terms, has made him function at a lower level than is desirable according to your stated standards.

This is not due to an inability, we feel, but rather to a need for a different type of supervision than most workers probably can respond well to.

For example, Mr. Fischer is the type of person who would benefit from some rather intensive and supportive training and specifics to compensate for his difficulty in divergent thinking and discriminating details.

For example, he would be a person who would need to know that there are very carefully established and well thought-out priorities in the handling of his job. In other words, it would be help-

ful to him to be shown precisely what those priorities are and how best to go about them.

On the positive side, Duane is extremely well motivated to work in the Library. He enjoys his work very much and I think his characteristics of being conscientious, persevering and dedicated to his job are such that he can be a very valuable and happy member of the staff.

In short, we feel that he can perform the job duties listed in his position description, that his intellectual difficulties have been problematic to him in the performance of his duties and that he would benefit from a period of intensive and supportive supervision with periodic monitoring sessions. He has a tremendous amount of interest in maintaining his position, likes the library and likes his work very much. While the anxiety and depression which are currently resulting from the job stress are, no doubt, exacerbating the situation, if that can be eliminated and a new direction of supervision taken, that should no longer affect his ability to perform. The potential, in short, for coming up to standards, we feel, is certainly good.

34. The psychological evaluation completed by Dr. Van Horne in December, 1983, indicated as follows, in pertinent part

* * *

The significant difficulties in Mr. Fischer's life arise from his intellectual functioning. The results of the WAIS-R indicated functioning within the borderline to low-average range. Although there are some skills within the average range of functioning, there are also a number of deficits. Mr. Fischer has a problem with divergent thinking. This is to say that he has difficulty with generating alternatives or creative solutions when encountering a problem. Thus, it is likely that Mr. Fischer would persevere at a task using an unsuccessful approach much longer than most. However, although he took much more time than the average he was able to generate an alternative solution and eventually was successful in the task. It was also evident that he becomes preoccupied with the orderliness and neatness of his performance, again to the detriment of speed. With the exception of only one subtest it is clear that time necessary is the major factor that deflates his performance. Thus, if many of the tasks were without time limits he would have performed within the average range of intelligence. The one exception involved his inability to extrapolate rationale for events. The effect of such a deficit in that area is that Mr. Fischer would need very explicit explanations for tasks and detailed instruction as to the most efficient way to complete the job. It is expected that there would be substantial frustration on the part of any supervisor at Mr Fischer's inability to automatically appreciate the ramifica-

tions of his job requirements as well as spontaneously understand the directions. In fact, it is suspected that Mr. Fischer would initially require very specific instructions that not only outline a methodology but explain the rationale. After that point, Mr. Fischer shows evidence of an ability to persevere, to be very conscientious, and make every effort to fulfill his expectations. In fact, Mr. Fischer's strength lies in his willingness to stick to a job until it is completed and an interest in completing that job as well as he can. There is no doubt that Mr. Fischer requires some assistance in delineating which aspect of the task is important and which is not; but once he fully appreciates the expectations, he has every ability to do the kind of work that he described as being part of the responsibilities of a Library Assistant II.

Thus, Mr. Fischer's deficits include his difficulty with maintaining perspective on the whole rather than becoming preoccupied with details and some difficulty with divergent thinking and understanding the rationale of how the world works. Simultaneously, his task approach is methodical and conscientious. The net effect that seems to clearly interfere with his functioning in his employment is that he tends to be very slow. There is substantial evidence, however, that with detailed instruction and careful explanation that Mr. Fischer has the capacity to do a very good job.

In summary, there is no evidence of psychopathology. However, there is evidence that Mr. Fischer has some very specific intellectual difficulties. Although these problems do not tend to interfere with his functioning in general, there is no doubt that his difficulty with divergent thinking, discriminating details from the whole and his slow speed interfere with his performance as a Library Assistant II. However, given his high motivation, basic enjoyment of his work, and his capacity to persevere and desire to do well, there is every indication that with careful and patient supervision Mr. Fischer could be successful as a Library Assistant II.

There is no doubt that some of his intellectual deficits would imply that he would require more time or initial supervisory involvement than someone who does not struggle with the same deficits. However, his personality structure is such that his desire to do well and his capacity to persevere at such a task could compensate for this intellectual weaknesses. It is also clear that the anxiety he experiences as he feels at risk of losing his job and the animosity he feels from some supervisory personnel interfere with his functioning. There is no doubt that anxiety tends to further slow down performance and inhibit thinking skills in general. There is no doubt that Mr. Fischer is currently experiencing some situational depression and anxiety.

* * *

35. Ms. Pfahler and Ms. Tuttle reviewed the information provided by Mr. Casebolt and Dr. Van Horne. Ms. Tuttle did not conclude that the psychological problems described by Mr. Casebolt and Dr. Van Horne affected complainant's ability to do his job since he had demonstrated his ability to do his job, had told her that he knew and understood how to do his job, and she had observed him correcting other employees doing the same or similar duties.

36. On or around February 8, 1984, Ms. Tuttle completed an evaluation of complainant's work performance for the previous six months which stated as follows, in pertinent part:

RESULTS As far as I can see all items pointed out by Duane Fischer's previous supervisor, Kathleen Jordan (Casey), in the previous evaluation session, June 28, 1983 have not changed.

1. Duane has continued to perform his shelving at below minimal standards. The minimal standard we are requesting is to load and shelve a truck of book (sic) in one day. That is approximately at least 185 books.
2. We request that the minimal standard be maintained during the shelving season each semester when patrons are returning books and that this be maintained in a consistent manner.
3. During busy seasons of the library Duane does not finish his work in emptying book returns in the allotted time and processing the books in room 166. This impinges on the work of the person who has to follow him in these duties.
4. Duane continues to accept his own priorities for performing procedures in spite of our counseling him to the contrary. Those tasks he considers important he will work on to the detriment of accomplishing his regularly assigned workload.
5. Duane continues to pay attention to the work of other employees looking into their whereabouts, commenting on their accuracy etc. The time he spends on this continues to interfere with performing his own duties in a timely fashion.
6. There are points in Duane's performance that he should be complimented upon because he continues to show excellent performance in these areas:
 - (a) Duane prides himself on his accuracy in doing a job. This is a very important feature in a high volume operation.

(b) Duane has always appeared to have a thorough knowledge of the procedures of the department.

(c) Duane's work habits in use of sick time & punctuality have always been excellent

(d) Duane has always been very polite and helpful with the public. His visible nervousness is the only reason he has not been trained for further public services responsibilities. Our library patrons can be overly demanding and impatient which would put Duane at an unfair advantage in dealing with them.

(3) Duane continues with his improvements in the arrangement of books in the workroom; that is, he no longer piles books on the side shelf and he puts books in call number order on the trucks rather than on the shelves, thereby not alphabetizing the books twice.

3. Identify specific areas of performance that need improvement.

(a) Shelving and maintenance of workroom. This still remains below standards. Duane will need to load and shelve at least a truck of books/day in the season when that many books are available to be shelved in his workroom.

(b) Ability to perform a fair share of the workload and complete his tasks in a timely fashion. This is still a problem in emptying book returns and in the work assigned in Room 166.

(c) Accountability for time on the job and cooperation in learning to complete tasks as so assigned and in the manner requested. This requires a willingness to accept constructive criticism. Casey stated in June 1983, "We are willing to work with him one more time, but can only do so with his cooperation."

(d) Duane must identify the specific areas he is having difficulty with. We have indicated the departmental priorities and he must show a willingness to follow our directions.

4. Identify areas of development needed:

Duane must work with his supervisor to identify the specific areas he is having difficulty with so that we are able to help him to perform in a satisfactory manner. We can teach, demonstrate, advise, counsel, but Duane is the only person who can change his performance.

Ms. Tuttle and complainant met for 2 hours to discuss this evaluation.

Complainant was silent for most of the meeting. However, complainant did tell Ms. Tuttle that he felt that there was no problem with his work and that, no matter what changes he made, she would not be satisfied so there was no point

in his changing. When asked by Ms. Tuttle whether there was a problem interfering with his ability to do his job, complainant did not indicate there was one. Ms. Tuttle offered to retrain complainant but he refused the offer.

37. The Expected Results developed for the next 6-month rating period as part of the February 8, 1984, evaluation were reported as follows:

1. Duane will show over the next six months that he has made great improvement already and will continue to do so in relation to emptying book returns and processing books in 166.
2. Since January 3 and since seeing my doctors, I think I have learned to change my priorities. This refers specifically to part 3 (a) ...shelving and maintaining the workroom.
3. Duane says that he knows the priorities in Room 166 and knows what has to be done.
4. Duane is willing to make a step forward.

38. On March 20, 1984, Tom Hefko, complainant's lead worker, sent a memo to Ms. Tuttle reporting on complainant's shelving statistics from January 3, 1984, to March 20, 1984. These statistics showed that complainant had shelved an average of 38 books per day and that the range was from 10-160. The day that complainant shelved 160 books was the day he was counseled by Mr. Hefko about the large accumulation of books in complainant's workroom.

39. On April 12, 1984, Mr. Hefko sent a memo to Ms. Tuttle reporting on complainant's shelving statistics from March 20, 1984, to April 12, 1984. Discounting March 30th and April 6th, when complainant had difficulty on other tasks which affected his shelving time, complainant shelved an average of 66 books per day with a range of 0-140.

40. In April of 1984, Ms. Pfahler contacted Mr. Casebolt for the purpose of discussing complainant's continuing performance problems. Mr. Casebolt said that he had been trying to get complainant in to his office, but that complainant would not come. Ms. Pfahler told Mr. Casebolt that she would be willing to meet with him regarding complainant, but Mr. Casebolt did not follow up on this offer.

41. In a letter to complainant dated April 30, 1984, Ms. Tuttle and Ms. Ondraski stated as follows, in pertinent part:

In November 1983, I wrote you a letter of reprimand with a follow-up letter written in December 1983. The reprimand concerned your continued lack of attention to completing your duties in a timely manner as an LSA2 in the Circulation Department, Memorial Library. This included shelving a minimal amount of books on a sustained basis. In January 1984, following these letters, we received documentation from your consulting psychologist, Barbara Van Horne, and your social worker, Gordon Casebolt. They explained your need for clearly stated priorities in job assignment as well as possible retraining, and accommodations to compensate for your tendency towards divergent thinking.

Although we feel that we have already made accommodations on your behalf, and we have previously explained and re-taught job assignments to you, we will reiterate here appropriate and inappropriate priorities in your duties, accommodations we have made and the level of performance we expect. We will also state the consequences of not meeting these expectations. You recently have claimed to understand our expectations for performance (see attached planning conference report), but you continue to act in a manner previously stated to be inappropriate. An example is the necessity for an oral reprimand on Tuesday, April 10, 1984 in relation to your not following instructions in job performance; namely, in emptying book bins in your workroom and in making a partially loaded shelving truck unavailable for patron access. Other examples will follow.

I. PRIORITIES (DO's)

- A. Empty all book bins in your workroom on a daily basis so that all books are available for patron access. (On April 10 at midday, you had 8 bins in your workroom, 4 of which were there the previous Friday and 4 more were added by early April 9.) On April 11th you had 4 of these same boxes, still untouched.
- B. Remove the books from the bins and place them on the appropriate shelves available in Room 266.
- C. Load and shelve at least one truck of books per day (approximately 180-185 books in the shelving season). This is below minimal departmental standards, but is adequate to keep abreast of the workload available in the second floor workroom. (The shelving season refers to the period of time when patrons begin returning books to the library during a particular semester. For spring semester this would be mid-March through May. For fall semester this time period is mid-October through December.) The departmental standard, completely reconfirmed in July 1979, continues as follows: to load one truck in one-half hour; to shelve an average truck of 180-185 books in one hour. You have approxi-

mately 3.5 hours per day available for organizing your workroom and completing your shelving duties. Even when you are assigned to substitute for an absent employe, you are still given 1 to 1-1/2 hours for shelving, which is enough time to empty bins and load a truck.

- D. Empty all book returns, when scheduled to do a book return (and empty the conveyor when scheduled only for Room 166), and process the books retrieved from book returns in the allotted amount of time assigned for these duties in Room 166. On more than one occasion, either Kathleen Jordan or Tom Hefko has carefully instructed you on how to efficiently accomplish these duties. Emptying a book return efficiently does not incorporate either carefully straightening the books on the truck or watching other people in the vicinity. Processing books in Room 166 entails these generalized priorities in ranked order:
- 1) pull snag card from book picked up on book returns
 - 2) re-sensitize books
 - 3) place book in appropriate bin and take full bins to book conveyor
 - 4) stamp pulled snags with return date
 - 5) count retrieved cards and record for statistics.

The next group of priorities are again in ranked order and are to be worked on as time permits:

- 6) process other books being received for shelving (i.e., from bindery, marking room, etc.)
 - 7) count cards/books for statistics
 - 8) arrange snag cards in call number order
 - 9) tattletape books -- this task is lowest in priority during this assignment.
- E. Accomplish all other assigned duties in a timely manner so as not to leave unfinished work for the next staff person so assigned. This refers to processing of books in Room 166 and to the key punching procedure. It can also be applicable to picking up books around the building when so assigned.

When Punching:

- 1) collect the cards from the circulation windows
- 2) separate into groups for counting
- 3) count groups and record numbers
- 4) take cards to punching room and punch them, checking for accuracy and begin to sort them into card sorters as they come from the machine
- 5) put cards in call number order, including other cards needing to be filed
- 6) Put groups of cards in appropriate file trucks.

When doing Carrels:

- 1) remove books from carrels and tables assigned, checking for charge cards
 - 2) keep one running count of total volumes picked up
 - 3) drop books off in appropriate shelving rooms along the way, with remaining ones to be sorted in Room 166
 - 4) help to clear Room 166; i.e., sort books to appropriate bins, record statistics.
- F. Search AP's (journals) currently due for return. This should be done on Monday only for no more than two hours. Your Monday schedule has only two other hours assigned which still leaves 3.25 to 3.5 hours for your shelving assignment. On Monday, should you be subbed in for an absent staff person, it will only be for a 1 to 1-1/2 hours assignment, still leaving you nearly two hours for shelving.
- G. Reshelve in Room 212. This should take no more than one-half hour/day. This duty was assigned upon your own instigation and should continue to maintain a lower priority on your list.

Naturally there are other assignments for which you may be scheduled, such as filing and paging. Most of the above assigned priorities, although quite prescribed, allow for individual differences in the ability to properly complete one's duties and allow for much independence of action. A supervisor may not be in the immediate vicinity to immediately correct inappropriate or inattentive behavior on the job.

II. INAPPROPRIATE, SELF ASSIGNED PRIORITIES (DONT'S)

- A. Do not leave full book bins sitting on the conveyor in your workroom from day to day. Make sure you empty them on a daily basis.
- B. Do not leave piles of books removed from these bins on the counter or table in your workroom. Books should go directly from bin to shelf in loose arrangement.
- C. Do not continually leave trucks partially loaded by loading more than one truck at a time in your workroom.
- D. Do not place book trucks in places where they are inaccessible to patrons and staff, especially in an area such as the old Circulation Department locker area on floor 2. In fact, do not leave books waiting to be reshelved anywhere outside the workroom unless actually working on them.
- E. Do not leave your assigned workload for the next assigned person to complete. You have been told previously to consult with a supervisor or lead worker in times when the workload is extremely heavy (i.e., book rush).

- F. Do not set your own priorities in relation to work tasks. An example is being more concerned about other people's work and statistics than your own. You have been seen comparing notes on numerous occasions, and in particular, while doing the key punching on Thursday, April 12. Your past attempts to remove books from the New Book Shelf against strict orders not to, are another example. You have been corrected on setting your own priorities repeatedly.
- G. Do not repack the book bins over and over in Room 166. Fill them and send them on their way to the appropriate shelving floor.
- H. Do not resensitize a book 3-5 times. Two swipes on the machine is more than sufficient.
- I. When assigned to Room 166, do not do personally assigned tasks; (i.e., clearing the shelves by the staff lockers), if there is still work to be done.
- J. Do not spend all unassigned hours on Monday searching AP's.
- K. Do not straighten chairs, wastepaper baskets or pick up beverage cans while being assigned to pick up BOOKS in the early morning.

The reason for listing above some of the inappropriate habits which you have demonstrated over time is to 1) point out why you are often unable to complete your work in a timely fashion; 2) point out that although advised otherwise, you continue to set your own priorities, which interferes with your assigned work; 3) point out that your divergent thinking as explained by the psychologist obstructs proper work habits.

III. ACCOMMODATIONS WE HAVE MADE

- A. We have continued to assign you to the second floor workroom which is too light an assignment for a full-time employee. At the same time, we have given you few extra assignments (e.g. Room 212, Searching AP's).
- B. We have set a shelving standard for you that is below departmental standard.
- C. We have removed you from the ILL duty which should have been scheduled at least once per week, because it was clear that it was very difficult for you to write out the charge cards in a timely fashion.

- D. Because you become visibly nervous when put under any stress, and patrons can be quite demanding at the Circulation Desk, we have not assigned you to work there.
- E. When it became quite apparent that you could not handle a data entry and proofreading assignment in a timely fashion or in the manner instructed (i.e., not to proofread the proof-reader), we removed you from the schedule despite the fact that most staff were involved in data entry.

IV. PERFORMANCE EXPECTATIONS

- A. Complete shelving tasks as previously stated in part I., A-C ...load and shelve a truck of books/day and empty all book bins in your workroom by the end of your work day.
- B. Complete all tasks in a timely fashion.
- C. Accept departmental priorities for the completion of assigned tasks rather than your own priorities.
- D. Meet the above performance criteria, and work priorities within 30 calendar days from the date of this letter on a sustained and consistent basis. This will require changing your routines, so as to make them as free as possible from the list of inappropriate self-assigned duties, as stated in Section II.

If you need further directives or further explanation of work assignments, let us know. We are unable, without your cooperation and explanation, to retrain you in areas in which you are unsure of your responsibilities. If your consulting psychologist and social worker wish us to meet with them or give further explanation of appropriate work priorities, please contact us. However, we will reevaluate your performance in 30 days to determine whether to continue your employment as an LSA2 in the Circulation Department of the General Library System.

A copy of this letter was sent to Mr. Casebolt but neither he nor complainant's physician contacted Ms. Tuttle in response to this letter. Ms. Tuttle carefully reviewed each of the points in this letter with complainant.

42. On June 11, 1984, Mr. Hefko reported complainant's shelving statistics from April 13, 1984, through June 4, 1984. Discounting absences, complainant had 120 hours available for shelving during this time period. He shelved a total of 2,290 books for an average of 19 books per hour, or 72 books per day. On 10 of these days, complainant shelved no books even though he had 1.5-4.5 hours available for shelving on those days. On May 9, complainant shelved 200 books in 4 hours, and on May 23, he shelved 190 books in 4.5 hours.

The statistics for the period of April 30, 1984, through June 1, 1984, showed that complainant was shelving an average of 22 books per hour, or 93 books per day.

43. In a letter to complainant dated June 29, 1984, Ms. Pfahler stated as follows:

On April 30, 1984, you received a letter from your supervisors outlining priorities and including a detailed account of performance expectations in relation to your position as a Library Services Assistant 2, in the Circulation Department of Memorial Library. We also stated that we would reevaluate your performance to determine whether to continue your employment.

Despite a workroom full of books over the period April 30, 1984, to June 1, 1984, you have not shelved a full truck of books on a consistent and sustained basis. Nor have you emptied all bookbins in your workroom by the end of your workday.

We have allowed you full opportunity since December 1982, the time of your first written reprimand, to meet minimal standards for accomplishing your workload. Performance expectations were clearly outlined for you once again in the letter from Helene Androski and Judith Tuttle, dated April 30, 1984. You still are not meeting the minimal performance expectations. Therefore, we are terminating you in your LSA 2 position with the General Library System in the Circulation Department of Memorial Library, effective July 13, 1984.

Your position is covered by a collective bargaining agreement, and this action may be grieved in accordance with the provisions of that contract.

44. Complainant did grieve his termination through the contract grievance process. The grievance was appealed to arbitration and the arbitrator ruled that there was just cause for the termination.

45. At the time of complainant's termination, Ms. Tuttle and Ms. Pfahler did consider assigning complainant to perform other duties in the circulation department of Memorial Library. Their conclusion after this consideration was that some of the less complex duties involved public contact which had caused complainant a great deal of stress when he had been assigned to perform these duties in the past; and that the other less complex duties were duties which complainant's position was performing at the time or were duties which complainant had unsatisfactorily performed in the past, e.g., removing books from study carrels. There were no LSA 1 positions in the general library sys-

tem. Ms. Tuttle and Ms. Pfahler did not consider transferring complainant to a position outside the general library system of the UW-Madison; did not consider a medical leave for complainant and complainant did not request one; did not consider assigning complainant to a different supervisor since he had experienced similar problems with all his supervisors and lead workers; and did not refer complainant to the Division of Vocation Rehabilitation since Ms. Tuttle was under the impression that complainant was receiving services of respondent's Employee Assistance Program (EAP) since he had asked for scheduling adjustments for the purpose of meeting with an EAP counselor.

Conclusions of Law

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden to prove that there is probable cause to believe that respondent discriminated against him on the basis of handicap in terminating his employment.
3. Complainant has failed to sustain this burden.

Opinion

The issue in this case is:

Whether there is probable cause to believe, and whether respondent did discriminate against complainant on the basis of handicap in violation of the Fair Employment Act with respect to his discharge on July 13, 1984.

Probable cause is defined as "a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe, that discrimination, retaliation or unfair honesty testing probably has been or is being committed." §PC 1.02(16), Wis. Adm. Code. The following discussion is intended to apply this definition of probable cause to the facts of the instant case.

As the Commission stated in Harris v. DHSS, Case Nos. 84-109-PC-ER, 85-0115-PC-ER (2/11/88), a typical handicap discrimination case will involve the following analysis:

- (1) Whether the complainant is a handicapped individual;
- (2) Whether the employer discriminated against complainant because of the handicap;

(3) Whether the employer can avail itself of the exception to the prescription against handicap discrimination in employment set forth at §111.34(2)(a), Stats., -- i.e., whether the handicap is sufficiently related to the complainant's ability to adequately undertake the job-related responsibilities of his or her employment (this determination must be made in accordance with §111.34(2)(b), Stats., which requires a case-by-case evaluation of whether the complainant "can adequately undertake undertake the job-related responsibilities of a particular job");

(4) If the employer has succeeded in establishing its discrimination is covered by this exception, the final issue is whether the employer failed to reasonably accommodate the complainant's handicap.

The first question then is whether complainant is handicapped within the meaning of the Fair Employment Act. Section 111.32(8), Stats., defines a "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.

Based on the stipulation of the parties that complainant is handicapped within the meaning of the Fair Employment Act as well as the fact that complainant was initially hired by respondent as part of a program for "slow learners," and the fact that the evaluations completed by Mr. Casebolt and Dr. Van Horne indicate the existence of a mental impairment which limited his capacity to work, the Commission concludes that complainant had a handicap within the meaning of the Fair Employment Act.

The second question is whether the respondent discriminated against the complainant because of his handicap. There are two ways that discrimination on the basis of handicap under this element can occur. The first would occur if respondent's discharge of complainant had been motivated by complainant's handicap. The second would occur if respondent terminated complainant for performance reasons which were causally related to his handicap. Conley v. DHSS, 84-0067-PC-ER (6/29/87). In proving discrimination pursuant to the first model, complainant would first have to prove that respondent was aware or should have been aware of complainant's handicap. The record shows that complainant was hired by respondent initially as part of an em-

ployment program for "slow learners." Although Ms. Tuttle testified that she was not aware of complainant's handicap until she had a chance to review the reports prepared by Mr. Casebolt and Dr. Van Horne, it is obvious from the record that each of complainant's supervisors and lead workers was aware that complainant was held to a different productivity standard than employees in comparable positions and had been assigned the least complex and least stressful LSA 2 duties. Under the circumstances of this case, this should have placed complainant's supervisors on notice that complainant had an impairment which limited his capacity to work.

The record does not show, however, that respondent's discharge of complainant was motivated by his handicap. Respondent has articulated that complainant was discharged for failure to meet performance expectations and this reason is non-discriminatory on its face. Complainant has failed to show that his performance deficiencies and inconsistencies were not as they have been represented to be by respondent; that the work respondent has alleged did not meet performance standards actually did meet those standards; or that complainant was provided inferior training or evaluated by stricter standards than any other LSA 2 at Memorial Library. Complainant has failed to show that any factor other than his inadequate work performance was the basis for his termination.

In order to establish the existence of discrimination pursuant to the second model, it would be necessary for complainant to show a causal link between his handicap and his poor work performance. Dr. Van Horne's psychological evaluation indicates that complainant's mental impairment may interfere with his ability to learn a job but, once learned, he would have the ability to carry it out and to carry it out well. There is no question that complainant had learned the duties and responsibilities of his LSA 2 position. In fact, he had learned them so well that he was often observed correcting other employees performing these same duties and responsibilities. The record also shows that complainant was able to carry out the duties and responsibilities of his position and to satisfy the performance standards established for him. The fact that complainant was able to shelve 380 books on one day but zero on another appears to indicate that something other than his handicap was interfering with his performance of his job responsibilities. The psychological evaluation also indicates that the "anxiety he experiences as he feels at risk of losing his

job" tended to further slow down his performance and inhibit his thinking skills. It is interesting to note in his regard that, when complainant had a deadline of December 9, 1983, for showing that he was loading and shelving a full truck of books per day on a sustained and consistent basis, he shelved 200 books on December 8 and 380 books on December 9. In contrast, complainant had shelved a total of only 150 books during the first three days of the week and a total of only 330 books during the five days of the previous week. It appears from this example that the imposition of a deadline for meeting performance standards on this occasion, which presumably would be a stressful or anxiety-producing circumstance relating to the risk of losing his job, actually had a positive effect on complainant's performance. Again, the necessary conclusion is that something other than his handicap was interfering with complainant's performance of his job responsibilities. Complainant has failed to show a clear causal relationship between his handicap and his performance deficiencies.

The Commission concludes that complainant has failed to show that he was discriminated against on the basis of his handicap.

If the complainant had shown such discrimination, the next question under the Harris analysis would be whether respondent can avail itself of the exception to the proscription against handicap discrimination in employment set forth at §11134(2)(a), Stats., i.e., whether the handicap is sufficiently related to the complainant's ability to adequately undertake the job-related responsibilities of his or her employment. Such a conclusion would not be consistent with the evidence in the record that, at more than one point during his employment, complainant was actually meeting the performance standards set for him.

In view of the conclusions reached above, the Commission further concludes that respondent did not have a duty to accommodate complainant's handicap. If such a duty existed, however, the Commission concludes that respondent was not required to go beyond the accommodations suggested by Mr. Casebolt and Dr. Van Horne, i.e., to go beyond the recommendations of the mental health experts selected by complainant's physician, to determine what other reasonable accommodations would be available or practical. See McClure v. UW-Madison, 88-0163-PC-ER (1992). Mr. Casebolt recommended the following: intensive and supportive training explaining and demonstrating spe-

cific tasks; precise explanation of priorities and how best to carry them out; and intensive and supportive supervision with periodic monitoring sessions. Dr. Van Horne recommended the following: very explicit explanations for tasks and detailed instruction as to the most efficient way to complete the job; very specific instructions that not only outline the methodology but explain the rationale; and assistance in delineating which aspect of the task is important and which is not. The record is replete with examples of frequent and detailed retraining; listing and explanation of priorities; and frequent supervisory contact and periodic monitoring sessions. Clearly, respondent provided the accommodations recommended by Mr. Casebolt and Dr. Van Horne. Complainant argues that respondent should have considered a medical leave, a transfer, or assignment to a new supervisor. However, none of these accommodations was recommended by complainant's social worker, physician, or psychologist or requested by complainant. In view of the ruling in McClure cited above, the Commission concludes that, even if a duty of accommodation had existed, these were not accommodations respondent would have been required to make.

Complainant argues in this regard that reliance on the recommendations made by Mr. Casebolt and Dr. Van Horne was misplaced since neither of them was aware that their report would be used to delineate accommodations for complainant. However, not only were these reports obviously precipitated at least in part by respondent's inquiries to Dr. Washburn regarding possible accommodations (See Finding of Fact 27), but, in addition, both reports actually focused on the relationship between complainant's handicap and his job. The Commission concludes that respondent's reliance on these reports in regard to accommodating complainant was not misplaced.

In addition, the Commission notes that complainant had experienced previous performance problems in 1977 and 1978. (See Finding of Fact 12, above). At the time that Ms. Jordan became complainant's supervisor, she attempted to bolster his performance by rating his performance as "satisfactory" in 1979 in order to give complainant credit for his improvement and as an incentive to continue his positive efforts (See Finding of Fact 13). This was apparently successful until some time in 1981 or 1982 when complainant's performance again began to deteriorate. Ms. Jordan attempted what the Commission will characterize as "patient supervision" by counseling com-

plainant on what to do and walking him through various tasks. These efforts did not bring about improvement. At hearing, complainant testified that, even though he didn't always get along with her, Ms. Jordan was "all right as a supervisor." These actions are certainly consistent with what the health care professionals' concluded that complainant needed in order to succeed on the job. They were in agreement that complainant could do the job if the tasks and the rationale for following certain procedures were explained to him in detail. Based on the record, this appeared to work in some cases, but was not successful if complainant did not agree with the procedures, methods, and/or rationales.

Complainant argues that respondent failed to accommodate complainant by not assisting complainant in obtaining outside counseling or other state services. First of all, such an accommodation was not suggested by complainant's physician, social worker, or psychologist. Second, respondent was also aware that complainant at one point had refused to continue the counseling sessions arranged by his physician. As a result, this argument by complainant is not persuasive.

The Commission concludes that there is no probable cause to believe that discrimination has occurred as alleged.

Complainant, in his brief, requests that "the Personnel Commission should find probable cause" and "set the matter for full trial." However, based on the issue set for hearing, the "full trial" before the Commission has already occurred and the record for review has already been established.

Order

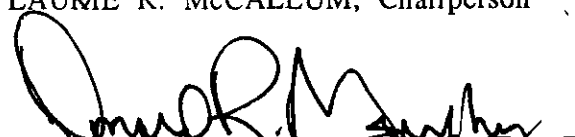
There is No Probable Cause to believe that discrimination has occurred as alleged and this complaint is dismissed.

Dated: July 22, 1992

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served

and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's 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. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.