STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * *
*
WILLIAM HEBERT, *
*
Appellant/Complainant, *
*
v. *
* DECISION
Secretary, DEPARTMENT OF * AND
HEALTH AND SOCIAL SERVICES, * ORDER
*
Respondent. *
*
Case Nos. 84-0233-PC *
84-0193-PC-ER *
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NATURE OF THE CASE

The above-captioned cases were consolidated for hearing. No. 84-0193-PC-ER involves a complaint of discrimination which alleges the respondent forced complainant to resign in lieu of termination of his probationary employment because of his handicap, and failed to accommodate his handicap. The investigator having found "no probable cause", the hearing as to this case was limited to the issue of probable cause. Sec. PC 4.03(3), Wis. Adm. Code. Number 84-0233-PC is an appeal pursuant to §230.44(1)(d), Stats., of the respondent's alleged failure to have informed appellant prior to his hire that the required training for the position included exposure to certain chemical weapons (CS and CN). On April 12, 1985, the Commission entered a decision and order in this case sustaining the respondent's objection to subject matter jurisdiction "to the extent it relates to the appeal of a probationary termination" and, insofar as the objection related to the contention that the appeal was untimely filed, overruled the objection "without prejudice to renewal on the basis of any material facts that may be developed in further proceedings."

FINDINGS OF FACT

1. At all material times, Mr. Hebert (hereinafter referred to as complainant) has been a handicapped individual within the meaning of §111.32(8), Stats., because of his bronchial asthma.

2. In August 1984, the complainant became aware of an Institutional Aide 5 (IA 5) vacancy at the Wisconsin Resource Center (WRC), Winnebago. At this time he was employed by the Department of Industry, Labor and Human Relations (DILHR) with permanent status in class as a Job Service Specialist 2 in the Disabled Veterans Outreach Program (DVOP) and was eligible for transfer to the aforesaid IA 5 position.

3. In August 1984, the complainant called Kathy Karkula, WRC personnel manager to inquire about the IA 5 position, particularly with respect to any physical requirements that might exist. He advised her among other things, that he was a disabled veteran and had a lung condition, asthma. She indicated that she did not believe there would be any problems with respect to physical requirements. She did not mention any chemical exposure requirements associated with the job. In a subsequent conversation prior to the time complainant began working at WRC, he again mentioned his asthmatic condition. Again, Ms. Karkula did not mention any chemical exposure requirement.

4. On September 11, 1984, complainant participated in a pre-employment interview. At the interview, he filled out and submitted a form (Appellant's Exhibit 6) on which, under "Past Military Service," he checked off "Disability Status claimed." At the beginning of the interview, he asked the three interviewers not to smoke, explaining that smoking affected his breathing. During the course of the interview he did not indicate that he had asthma or otherwise elaborate on his handicap.

5. On September 24, 1984, complainant was notified of his appointment to the IA 5 position at WRC, and he transferred there from his DVOP position in DILHR. He commenced employment at WRC on October 12, 1986.

6. On or about October 8, 1984, complainant underwent and passed a pre-employment physical exam administered by a physician acting on behalf of respondent. On the medical history questionnaire (Appellant's Exhibit 22) he filled out before the exam, complainant indicated he had asthma. The physician noted on the part of the form entitled "Physician's summary and elaboration of all pertinent data (Physician shall comment on all positive answers in items 9 through 24. Physician may develop by interview any additional medical history he deems important, and record any significant findings here)" the following, inter alia:

"bronchial asthma -- well controlled with medication"

The complainant asked the doctor whether his asthma would pose a problem for him with respect to his employment with respondent, and the doctor said he didn't think so.

7. The duties and responsibilities of the IA 5 position are summarized on the position description, Appellant's Exhibit 12, as follows:

> Under the supervision of a Center Unit Director this position is responsible for shift management of operations; assigning and coordinating schedules for aids and supervision of assigned Institution Aid 3's.

The specific duties and responsibilities included the following:

25% A. Responsibility for shift management of center operations.

* * *

A.5 Function as crisis intervenor. Respond to calls from unit and assist in resolution to crisis situations.

8. While an employe in an IA 5 position was neither required nor permitted to discharge chemical weapons such as CS and CN, such an employe

is required to immediately supervise IA 3's who are involved in controlling or subduing a resident at WRC who has been exposed to CS or CN administered by a member of the WRC security staff. In the course of this activity, IA 3's and IA 5's are likely to receive some exposure to CS or CN. Such chemicals have been used for this purpose at WRC twice in the period of approximately three years prior to February 1986.

9. Any WRC staff potentially could become a hostage in a disturbance and be subjected to CS or CN countermeasures used to suppress the disturbance. During the aforesaid period of approximately three years, there was one hostage situation at WRC, and no chemical weaponry was used.

10. Neither Vince Broekema, a Psychologist Supervisor 1 and the unit supervisor for the assessment and security units, nor the WRC staff psychologist, were required to have undergone chemical exposure training, although Mr. Broekema participated in this on his own volition.

11. On October 22, 1984, complainant commenced a mandatory training course for Correctional Aides at the Corrections Training Center, Oshkosh.

12. The director of the training center, Pat Ogren, gave an orientation talk to the trainees on October 22, 1984, in which she mentioned to them that there would be chemical weapons exposure as part of their training.

13. On October 26, 1984, the complainant attended a training session on chemical agents. The instructor, Jay Sandstrom, explained that the students actually would be exposed at a later date to chemical agents as part of their training. Complainant informed Mr. Sandstrom that he had asthma, and asked if the chemical exposure would be harmful. Mr. Sandstrom assured him that it would not.

14. Several days later, the complainant was in a first aid class taught by a registered nurse. She said she had asthma, and that persons with asthma or other bronchial problems could have an adverse reaction to CS or CN chemical weapons. He told her that he was asthmatic and asked if those chemical weapons could harm him. She said they could. The complainant also was given instructional materials in this session which included the following:

> ...These agents [CN and CS] are considered weapons, although normally nonlethal. Exposure causes uncomfortable physical effects. In excessive usage, they can cause serious illness or even death..." (Appellant's Exhibit 17)

15. Thereafter, complainant called Bea Lynch, the WRC training coordinator, and explained to her that he was concerned that the chemical exposure scheduled for November 9, 1984, would be harmful to his health because of his asthma. She told him not to go through with that part of the training. However, she did not tell him that he would be excused from completing the chemical exposure part of the training. She said she would have to check with someone else as to that.

16. On the morning of November 9, 1984, complainant participated in training in fire science and in the use of "mace" (liquid CN). As part of the mace training, the complainant was sprayed in the chest with mace. He suffered an adverse reaction consisting of swelling of the face, closing of the eyes, and difficulty breathing. However, this reaction was not extremely severe and he did not require special help from the course instructors. The complainant had lunch and did not attend the afternoon training session where the trainees were scheduled to be exposed to tear gas. The complainant did not seek any medical treatment with respect to his mace exposure, although shortly after the exposure he utilized an inhaler he had in his car that was part of his asthma medication.

17. The following week, Bea Lynch told complainant that the respondent was planning to terminate him because he had failed to complete the required chemical exposure training. He was told to attend a pre-termination meeting.

18. The pretermination meeting was held on November 15th and reconvened on November 16th. The respondent gave complainant three options:

(1) Complete the chemical exposure training (respondent would have required prior medical clearance)

2) Resignation.

3) Dismissal.

19. After thinking the matter over, the complainant decided to resign, and submitted a written resignation.

20. With respect to Case No. 84-0233-PC, the record does not support a finding that exposure to CS or CN would pose a health hazard to persons with bronchial asthma.

21. With respect to Case No. 84-0193-PC-ER, the record does support a finding that complainant's failure to have completed the chemical exposure requirement was because of his bronchial asthma.

CONCLUSIONS OF LAW

84-0233-PC

1. This subject matter of this appeal is cognizable pursuant to §230.44(1(d), Stats.

2. The appellant has the burden of proof.

3. This appeal was untimely filed pursuant to §230.44(3), Stats., and therefore the Commission lacks jurisdiction over this appeal.

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4. This complaint of discrimination is properly before the Commission pursuant to §230.45(1)(b), Stats., and §PC 4.03(3), Wis. Adm. Code.

5. The complainant has the burden of establishing probable cause except that the respondent has the burden of establishing no probable cause as to the questions of whether handicap is reasonably related to the complainant's ability to adequately undertake the job-related responsibilities of the complainant's employment, §111.34(2)(a), Stats., and whether the respondent has satisfied its duty of accommodation, §111.34(1)(b), Stats.

6. There is probable cause to believe that respondent discriminated against complainant on the basis of handicap by failing to accommodate his handicap.

OPINION

STATEMENT OF ISSUES

Initially, the post-hearing briefs filed with the examiner reveal a dispute as to the proper statement of the issues. The prehearing conference report dated January 6, 1986, reflects that the following issues were agreed to by the parties at the prehearing conference:

1. Whether there was probable cause to believe respondent DHSS discriminated against complainant on the basis of handicap when he was separated from employment as an Institutional Aide 5 in November, 1984?

2. Did the respondent abuse its discretion related to the hiring process when it failed to inform him of the chemical exposure requirement at the time of hire after having been given notice of his asthmatic condition.
   a) Whether the respondent had been given notice of the appellant's asthmatic condition on or before the date of hire.

The aforesaid conference report also contained the following:

> Respondent will review issue number 2 below as to framing and Commission jurisdiction and inform the Commission on or before 12/20/85 as to any objections thereto.

In a letter dated December 20, 1985, and filed December 26, 1985, the respondent stated:

> This is to inform you that it is Respondent's position that the issue number 2 should be stated as follows:
>
> 2. Did the Appellant notify the Interview Panel of his asthmatic condition during or prior to his interview for the Aide 5 position at Wisconsin Resource Center?
> a. If so, did the Respondent abuse its discretion in failing to inform Appellant of the chemical abuse requirement prior to hire.

In a subsequent letter dated February 17, 1986, and filed February 18, 1986, respondent stated, inter alia, the following:

> I note that Ms. O'Mara's December 20, 1985, letter to Mr. McGilligan in which she set forth the issue proposed by the Respondent in Case No. 84-0233-PC contains a typographical error: a. should read:
>
> If so, did the Respondent abuse its discretion in failing to inform the Appellant of the chemical exposure requirement prior to hire.

Inasmuch as the Commission did not amend the statement of issues as requested by the respondent, the issues as set forth in the January 6, 1986, conference report must be deemed the issues for hearing.[1]

Case No. 84-0233-PC -- Timeliness

This is an appeal pursuant to §230.44(1)(d), Stats., which, pursuant to §230.44(3), Stats., must be filed "...within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later...." At an early stage in these proceedings, the respondent objected to subject matter jurisdiction on the grounds of untimely filing. The respondent argued that appellant knew on September 11, 1984, when he had his pre-employment interview, that the respondent failed to inform him of a chemical exposure requirement, and yet he failed to file his appeal until November 24, 1984, more than 30 days thereafter.

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[1] In any event, the alternative wording of the issues do not appear to be particularly substantive.

In an interim decision and order entered April 12, 1985, the Commission overruled this objection, pointing out that the alleged illegal act or abuse of discretion involved a failure to have informed the complainant of something that was not to occur until later in the training process. Under these circumstances, it would be absurd to charge the complainant on September 11, 1984, with knowledge for statute of limitations purposes that he was not being told of a training requirement that he neither knew about at that time nor could reasonably be expected to have known about. However, because there were a number of unresolved factual issues relating to timeliness, the Commission overruled respondent's objection "without prejudice to renewal on the basis of any material facts that may be developed in further proceedings." In her posthearing brief filed with the examiner, the respondent has renewed the timeliness objection.

There was a great deal of dispute at the hearing concerning the question of when the complainant first had notice of the chemical exposure requirement. The respondent contends that this was covered in the orientation speech given on October 22, 1984, by Ms. Ogren, the training center director. The complainant contests this. The record before the Commission supports a finding that notice of the chemical exposure requirement was given by Ms. Ogren on October 22, 1984. She testified that as part of her normal practice in her orientation remarks, she reviewed each day's training schedule, and that she always informed the trainees about the chemical exposure aspect and cautioned them not to wear contact lenses. Her testimony is also confirmed by the training schedule for "Correctional Aide Pre-Service," Appellant's Exhibit 13, which had been given to all trainees and which lists "Chemical Exposure" as the activity for the afternoon of November 9, 1984. While the complainant argues that Ms. Ogren

did not testify that she specifically informed the trainees that the chemical agents involved included CS and CN in gas form, and that successful completion of the exposure was required to pass probation, it would have been reasonable for the complainant to have inferred that the "Chemical Exposure" would have included CS or CN or something of a similar nature, that completion of the material on the training schedule was not optional with the trainees, and that some kind of waiver would have to have been obtained to have omitted part of the training curriculum. The Commission must find that as of October 22, 1984, the complainant had sufficient information to have put him on notice as to the respondent's chemical exposure training requirement.[2]

Notwithstanding the foregoing conclusion on timeliness, since this appeal was heard on the merits, and since this decision is originally being issued as a proposed decision, the Commission will address the merits.

The parties disagree as to whether the complainant ever provided respondent notice of his asthmatic condition prior to his hire.

The complainant asserts that he informed the pre-employment interview panel of his asthmatic condition. In the Commission's view, the record does not support a finding to this effect. All three of the panelists testified that if complainant had made specific mention of his asthma, they have reason to believe it would have been reflected in their notes, but such was not the case. Ms. Ogren's interview notes contained the cryptic

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[2] Since the Commission lacks jurisdiction under §230.44(1)(d), Stats., or otherwise, over terminations of probationary employment, Board of Regents v. Wis. Pers. Commission, 103 Wis. 2d 545, 309 N.W. 2d 366 (1981), the date of his probationary termination (or alleged forced resignation) has no significance from the standpoint of timeliness.

notation "smo breath." (Appellant's Exhibit 7). This is consistent with the complainant's assertion that he asked the panelists to refrain from smoking, but it would seem more likely than not that if the complainant had made specific mention of his asthma that this too would have been recorded. The notation on page two of her notes (Appellant's Exhibit 7a) "Counselor in current job...[3] disabled" does not make specific reference to his asthma and probably has to do with the fact that in his then current job he counseled disabled veterans.

The record supports a finding that he did notify Kathy Karkula, WRC personnel manager, of his asthma. While she testified he did not refer to his asthmatic condition in his initial inquiry, the complainant's contrary testimony is corroborated by a witness who overheard complainant's side of the conversation.

Furthermore, there were at least two occasions after the complainant was offered a job but before he began work where it is undisputed he informed respondent's agents of his asthma. One occasion was a subsequent conversation with Kathy Karkula, and a second occasion was at his pre-employment physical examination on October 8, 1984.

The question then is, having knowledge that complainant had asthma, was respondent's failure to have advised him at the time of hire of the chemical exposure requirement an abuse of discretion?

An abuse of discretion is a "discretion exercised to an end or purpose not justified by and clearly against reason and evidence." Black's Law Dictionary (4th Ed. 1968), p. 25; Murray v. Buell, 74 Wis. 14, 19 (1889); Lundeen v. DOA, Wis. Pers. Commn. No. 79-208-PC (7/3/81). In evaluating a matter for abuse of discretion, the question for the Commission then is not

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[3] It is not clear what the symbol is at this point in the notation.

whether it believes that the respondent agency took the best possible approach or handled a situation the way the Commission believes would have been preferable. Only if the action was "not justified by and clearly against reason and evidence" can the Commission conclude there was an abuse of discretion.

Turning to the facts of this case, it could only be said that the respondent abused its discretion in failing to advise the complainant about the chemical exposure requirement if there were some basis in the record to find that exposure to CS or CN would pose an undue risk of health complications to a person with asthma. On this record, there are basically two pieces of evidence that would support such a finding. One is the hearsay statement by the nurse who taught first aid at the training center that such exposure could cause an adverse reaction in an asthmatic individual. The other is the reaction suffered by the complainant after he actually had been exposed to mace.

Ms. Lynch and Ms. Karkula did testify that although they gave complainant the option of completing the chemical exposure training at his pre-termination meeting, they would not have permitted him to have proceeded at that point without a physician's clearance. However, this decision, made after the complainant had expressed the view that because of his asthma he could not undergo the remainder of the chemical exposure requirement, cannot be viewed as competent evidence of the effect of chemical exposure on a person with asthma.

The nurse's statement was only that exposure could be problematical, without going into any details as to the circumstances under which it might have such an effect, or the extent of the adverse reaction.

With respect to the complainant's reaction to the mace exposure, there was conflicting testimony as to the extent and severity of the reaction.

The respondent's witness denied anyone had an unusual reaction, while complainant testified that he had an extreme reaction which required the ministrations of the trainers. The record supports a finding consistent with the testimony of respondent's witness. He testified that in the event of an extreme reaction by a trainee requiring first aid, the normal operating procedures required the preparation of a report, and no report had been completed for the day in question. Furthermore, complainant testified that the trainers squirted a yellow liquid in his eyes. However, respondent established that the yellow liquid was used only to treat the skin and was applied with gauze pads, and only water was applied to the eyes.

There also was evidence that exposure to CS or CN would not be particularly dangerous to an asthmatic. Mr. Sandstrom, who was responsible for teaching the course on chemical agents, obviously disagreed with the nurse about the potential for harm from such exposure by an asthmatic. Furthermore, complainant passed a pre-employment physical exam given by a physician who was aware of complainant's asthma. This is inconsistent with the theory that the chemical exposure requirement presented an undue health hazard to he complainant.

The complainant argued as follows in his reply brief:

> As to the respondent's claim that because Mr. Hebert passed the respondent's medical examination he could have participated in the chemical exposure safely, one might put more stock in respondent's argument if respondent had produced the examining physician to testify that Mr. Hebert could have in fact gone through the chemical exposure with no hazard to his health. As the record stands, there is no evidence to suggest that the physician who examined Mr. Hebert was even aware of the chemical exposure requirement. Mr. Hebert's uncontradicted testimony was that the physician made no mention to him of the chemical exposure requirement.

However, it is reasonable to infer that a physician retained by the WRC to conduct pre-employment physicals would be aware of the physical

requirements of employment at that institution, including training. The complainant has the burden of proof. In the absence of any evidence that the physician was not aware of all the physical requirements of employment as an IA 5 at WRC, including exposure to chemical agents as part of the required training, the foregoing inference remains unrebutted. The fact that the physician did not mention the chemical exposure requirement to the complainant does not rebut the inference, because his failure to mention it is also consistent with a belief on the doctor's part that the chemical exposure would not be problematical.

The complainant also referred to several training documents (Appellant's Exhibits 14, 16, and 17). Appellant's Exhibit 17 contains the warning:

> "...These agents [CN & CS] are considered weapons, although normally nonlethal. Exposure causes uncomfortable physical effects. In excessive usage, they can cause serious illness or even death...."

However, this risk of "serious illness or even death" is not connected to persons with pre-existing respiratory problems. In fact, there is no reference in any of these documents, including Appellant's Exhibit 14 ("Lesson Plan, chemical agents") and Appellant's Exhibit 16 ("Wisconsin Resource Center Policy Manual, Use of Force and Chemical Agents") to the need to establish prior to exposure whether the inmate or other person to be exposed to CN or CS has a respiratory or asthmatic condition, or any other reference to such conditions. The Wisconsin Administrative Code section on "Use of chemical agents" in a correctional setting, §HSS 306.08, upon which the WRC policy is based, makes no reference to any pre-existing respiratory or asthmatic conditions in its detailed coverage governing chemical weapon use, which includes a subsection (HSS 306.08(11)) entitled "Medical Attention and Clean-up."

Also, Appellant's Exhibit 14 contains the following notation: "CN/CS/HC ALL VERY SAFE."

Therefore, while the Commission believes it is regrettable that the complainant was not given notice about the chemical exposure prior to his being hired, the record does not support a finding that the chemical exposure requirement constituted an undue health hazard to a person, such as complainant, with bronchial asthma. Therefore, while it would have been preferable had complainant been given such advance notice, the Commission cannot conclude on this record that the absence of such notice constituted an abuse of discretion.

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The basic elements of a handicap discrimination case under the FEA were set forth in Samens v. LIRC, 117 Wis. 2d 646, 658, 345 N.W. 2d 432 (1984), as follows:

> "...(1) That the individual is handicapped under the FEA, (2) that the individual has shown that the employer's discrimination was because of the handicap, and (3) that the employer's action was not legitimate under sec. 111.32(5)(f), Stats...."

The Commission must determine whether there is probable cause, as that term is defined at §PC 4.03(2), Wis. Adm. Code, to believe that handicap discrimination occurred.

The respondent argues that complainant has not established that he is handicapped because "[a]sthma is a disease that can only be established by competent medical testimony." The respondent cites the following from Connecticut General Life Ins. Co. v. DILHR, 86 Wis. 2d 393, 407, 273 N.W. 2d 206 (1979):

> "...Alcoholism is a disease. Its diagnosis is a matter of expert medical opinion proved by a physician, and not by a layman. State v. Freiberg, 35 Wis. 2d 480, 484, 151 N.W. 2d 1 (1967)."

While in the context of a discrimination case resting on a claim of alcoholism, vague lay references to a "drinking problem" are no substitute for a physician's diagnosis as to the presence or absence of alcoholism, it would be too broad a reading of that case to conclude it holds that in any handicap discrimination case the presence or absence of an asserted handicapping disease can only be established by the testimony of a physician at the hearing. In the instant case, there was ample evidence to establish the presence of a handicap for the purposes of a probable cause determination.

The complainant testified not only that he suffered from asthma, but also that he received a veteran's disability payment based in part on being asthmatic, and that he had been prescribed specific medications for treatment of asthma. Complainant also entered Appellant's Exhibit 22, a "Report of Medical History" which was filled out on October 8, 1984, when complainant took his pre-employment physical examination. This document contains not only the complainant's own references to his asthma, but also the physician's notation: "bronchial asthma -- well controlled with medication" in the part of the form labeled "Physician's summary and elaboration of all pertinent data (Physician shall comment on all positive answers in items 9 through 24. Physician may develop by interview and additional medical history he deems important, and record any significant findings here.)" This may be considered a physician's confirmation of complainant's asthma.

In order to establish the second element -- "that the employer's discrimination was because of the handicap" -- there must be an adequate relationship between the reason for the respondent's action and the complainant's handicap.

The complainant was given three options after he failed to complete the chemical exposure requirement on the afternoon of November 9, 1984. He could have completed the chemical exposure requirement, resigned, or been terminated. Since he decided not to attempt the first option, it could be said that the complainant resigned in lieu of termination for having failed to complete the chemical exposure requirement. It there were no adequate relationship between his asthma and his failure to have completed the chemical exposure requirement, then it could not be said respondent caused his separation from employment "because of the handicap." That is, if complainant failed to complete the chemical exposure requirement because of his fear of an adverse reaction related to his asthma, and there was no medical basis for his concern, then a resulting termination would not be considered to be "because of his handicap." Therefore, the Commission must evaluate the evidence concerning extent of the relationship between the complainant's asthma and the chemical exposure.

As discussed above, the complainant did suffer an adverse reaction on exposure to mace, although even in the context of the lesser evidentiary standard required in a probable cause proceeding, it still cannot be found that the reaction was as severe as complainant testified. The presence of this adverse reaction is consistent with the complainant's theory of causality. Another piece of evidence that supports this theory is the statement of the nurse that chemical exposure could result in an adverse reaction in a person with asthma. There is also countervailing evidence contained in Appellant's Exhibits 14, 16, and 17 and the Wisconsin Administrative Code, in the fact that complainant passed the pre-employment physical, and in the statements of Mr. Sandstrom, all of which were discussed above.

While the evidence was insufficient to support a finding in Case No. 84-0233-PC that there was such an undue health risk to an asthmatic from exposure to CS or CN that the respondent's failure to have advised complainant of the chemical exposure requirement at the time of hire could be considered an abuse of discretion, the complainant's evidentiary burden is less in a hearing on the issue of probable cause. In the Commission's view there is enough evidence of the necessary causal relationship to support a probable cause determination. Notwithstanding the conflicting evidence on whether in theory chemical exposure was problematical for a person with asthma, the complainant did have an adverse reaction to the exposure, including difficulty in breathing, and did have recourse to his medication immediately after the exposure. This suggests that his asthmatic condition was exacerbated at least to some extent by exposure to mace, and that a further adverse reaction to CS and CN in gas form could be expected.

Pursuant to §111.34(2)(a), Stats., there is no violation of the FEA "...if the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment...." The respondent has the burden of proof on this point. Samens v. LIRC, 117 Wis. 2d 646, 664, 345 N.W. 2d 432 (1984).

Under certain circumstances, CS or CN is used to control inmates. While the chemicals are applied by a member of the security staff, the IA 3's, under direct supervision of an IA 5, are required to subdue the inmate after the chemical is applied. Since this activity may well result in the IA 3's and IA 5's being exposed to the chemicals, it is reasonable to require them to undergo this exposure as part of their training so they will be familiar with the effects and the extent of their capability to tolerate those effects.

The complainant laid considerable stress on the facts that Mr. Broekema, a psychologist who would have been his direct supervisor, and another staff psychologist, were not required to have undergone chemical exposure training. However, these employes were not as directly involved in the process of subduing inmates as were the IA 5's. That the psychologists were not required to have undergone chemical exposure training does not lead to a finding that the chemical exposure training requirement for IA 5's was not "reasonably related to the [complainant's] ability to adequately undertake the job-related responsibilities of [his] employment...."

Notwithstanding the operation of §111.34(2)(a), Stats., the employer still has a duty of accommodation pursuant to §111.34(10(b), Stats. The employer has the burden of proof with respect to the question of accommodation. Giese v. DNR, Wis. Pers. Commn. No. 83-0100-PC-ER (1/30/84).

The main possible means of accommodation discussed at the hearing was the use of protective equipment. Ms. Ogren testified that to her knowledge protective gear was available for use by corrections officers using CS or CN in the adjustment unit at the Waupun Correctional Institution. Mr. Morris, a chemical weapons instructor at the training center, testified that members of the Emergency Response Unit had gas masks available for use, but that they were stored in the armory, outside the interior part of the institution, so they could not be used by inmates during a disturbance. He also testified that there was no protective gear for the use of mace. However, complainant did undergo the required mace training, so this did not enter into his termination.

In its brief, respondent argues, inter alia, as follows:

> The only suggestion made by the Appellant is that gas masks be made available. But such an accommodation is unreasonable not

> merely because it would be ineffective but more importantly it would be contrary to the most basic principles of security. In an emergency situation gas masks that would be accessible to Institution Aids would also be accessible to residents, which would defeat the whole purpose and effectiveness of the use of chemical agents to quell disturbances. Tear gas would not be of much use if the residents were wearing gas masks.

This argument is inconsistent with the testimony that protective gear is available to correctional staff and is stored outside the institutional interior. Inasmuch as the burden of proof on the question of accommodation is on the respondent, and this case is only at the probable cause stage, the Commission concludes that there is probable cause to believe the respondent failed to meet its statutory obligation of accommodation.

ORDER

Case No. 84-0233-PC is dismissed as untimely filed. Case No. 84-0193-PC-ER is to be scheduled for prehearing conference/conciliation.

Dated: October 1, 1986 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

AJT:jmf
JMF02/2

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