STATE OF WISCONSIN PERSONNEL COMMISSION

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MICHAEL LAURI,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 87-0175-PC

* * * * * * * * * * * * * * * * *

FINAL DECISION AND ORDER

The Commission adopts the proposed decision and order in its entirety, and adds the following language to the Order:

> The Fair Employment claim has been assigned case number 88-0174-PC-ER. Because the Fair Employment claim has been severed and assigned another case number, the dismissal of the remaining claim under §230.44(1)(d), Stats., effectuates the dismissal of Case No. 87-0175-PC.

Dated: November 3, 1988 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD HODDINOTT, Commissioner

KMS:rcr
RCR03/1

Parties:

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PROPOSED
INTERIM
DECISION
AND
ORDER

This matter arises from a decision by respondent not to hire the appellant as a Power Plant Operator 4, one day after he commenced his orientation for that position. The jurisdictional basis for this proceeding is explained further, below.

FINDINGS OF FACT

1. Appellant, a forty-two year old male, has worked in a power plant on the University of Wisconsin - Madison campus continuously since 1977.

2. Since 1983, appellant's position in the Walnut Street Plant has been classified at the Power Plant Operator 3 level. His supervisor is Anada Sathasivan.

3. During the summer of 1987, appellant was considered for appointment to the position of Power Plant Operator 4 (PPO 4) at the power plant for respondent's Mendota Mental Health Institute.

4. The PPO 4 position assumes responsibility on an assigned shift for the functioning of the power plant by serving as the lead worker for overall operation of the plant on that shift. The most physically arduous aspects of the PPO 4's duties are to move 55 gallon drums of chemicals, weighing 500 lbs., on and off carts and racks, to work inside the boilers

to remove slag, to carry 50 lb. bags of salt and, occasionally, to unload steel.

5. The duties of the PPO 4 position at Mendota Mental Health Institute (MMHI) were substantially similar to and no more arduous than the duties performed by the appellant as a PPO 3 at the Walnut Street plant.

6. Prior to the PPO 4 selection decision, the MMHI power plant superintendent, Louis Gasman contacted Mr. Sathasivan and asked about he appellant's work. Mr. Sathasivan stated that appellant was a good employe and was currently doing much of the same work as a PPO 4. Mr. Sathasivan made no mention of any back problems experienced by the appellant.

7. On Wednesday, August 12, 1987, appellant met with Mr. Gasman, and was informed that he was selected for the vacancy. Appellant was also advised that he had to have a routine physical exam and a security check before reporting to work on Monday, August 18.

8. On August 12, 1987, respondent issued a letter to the appellant confirming his promotional appointment to the PPO 4 position, effective August 16, 1987. The letter also provided:

> A requirement prior to your starting date is completion of a physical examination to be conducted at the Medic East Clinic.... Enclosed is the Medical History Form. Please complete the front side and have the examining physician complete the back side. Bring this form, along with proof of Rubella immunity if you have such information when you report to work....
>
> There will be a six month probationary period required; after which you will receive a one-step increase. [Emphasis in original].

9. On Friday, August 14, 1987, appellant completed the MMHI history form. Relevant questions and answers are as follows:

> Are you taking any medications? Yes, - Advil.
>
> Have you every had a back injury? Yes.
> If yes, please describe. Low back pain.

Do you have any back problems now? Yes.
If yes, please describe. Low back pain.

Has a physician advised that you are physically unable to do certain work? No.

Have you ever received Worker's Compensation? Yes.
Reason(s). Back out
Employed by UW heating, Madison

10. Appellant's employment physical was conducted by Dr. David Goodman on August 14. Dr. Goodman met with the appellant for approximately 5 minutes during which time he had the appellant bend at the waist and twist his trunk in different directions. Dr. Goodman did not ask any follow-up questions of the appellant regarding those comments on the medical history relating to the condition of appellant's back. Dr. Goodman completed the medical history by indicating he had evaluated fourteen areas including "musculo skeletal." Where directed to "[d]escribe each abnormality in detail," Dr. Goodman wrote: "Seems to be in good health. Back & spine straight [with] normal curvature & full [range of motion]." The completed form was then given to the appellant to take to MMHI on August 17th.

11. Later on August 14th, Dr. Goodman telephoned Dennis Dokken, the personnel manager at MMHI to convey concerns that Dr. Goodman had about appellant's back and to ask questions about the duties that would be performed by the PPO 4 incumbent.

12. On Monday, August 17, appellant reported to MMHI for orientation. At approximately 2:30 p.m., MMHI's employe health nurse, Jenny Bancroft, met with the appellant as part of the routine procedure for confirming that all health-related forms and tests had been completed. When the appellant arrived at her office, Ms. Bancroft asked the appellant if he wished to sit down. Appellant declined, saying that his back was sore. Later in the

meeting, the appellant did sit down. Ms. Bancroft discussed the appellant's back further and suggested that the appellant might want to get a more thorough exam. Based on the information obtained during the meeting, Ms. Bancroft wrote in the appellant's chart:

> Michael says he has frequent low back pain which he has had for several years. He says he routinely sees an osteopath. This has also caused a work-related injury in the past. Takes Advil on occasion.

13. Later that day, Ms. Bancroft spoke with Dr. Goodman who concluded that the appellant could do the PPO 4 job but should not have frequent bending, stopping or twisting and he should not be lifting in excess of 15 to 20 pounds.

14. Ms. Bancroft subsequently informed Mr. Gasman, power plant superintendent, of Dr. Goodman's conclusion. Mr. Gasman conferred with the MMHI's director of management services, George Bancroft, and spoke again with Mr. Sathasivan. Mr. Bancroft, after receiving input from several sources, concluded that the appellant could not perform PPO 4 duties given the restrictions imposed by Dr. Goodman. Mr. Gasman then informed the appellant that he could not be employed by respondent as a PPO 4.

15. In June of 1987, the appellant began a series of appointments with Dr. C. A. Gencheff, an osteopath. Dr. Gencheff's treatment notes reflect the following:

> June 15, 1987
>
> <u>Chief Complaints & Findings</u>:
>
> Pt. presents with a long outstanding history of back complaints. Initial onset was while in the Navy when he strained his lower back; since then he has had recurrent problems. He severely reaggrevated [sic] the condition about 4 yrs ago while fishing. At that time he was lifting a 4 x 4 that was supporting some weight that gave way; he was suddenly put in a sharp lifting situation and felt it across the lower back. He has been having D.C. tx's [chiropractic treatments] as often as 3 times a wk to several times a month for cervical adjustments. He has had neck

x-rays taken. Pt. relates that the D.C. tx's are somewhat helpful. However, he finds that every time he hurts his back it seems more persistent; as of late it seems more frequent. Since he has been swimming he has had minimal complaints.

PLANT OF TREATMENT: Pt. was advised of do's and don'ts. Prescribed specific stretching/strengthening exercises. While in the supine position, given soft tissue/isometric to the neck for the above listed lesions. Isolytic movement to the upper dorsals. Lumbar roll with IS-SI tech. Placed on Skelaxin as it may not make him tired as with the Valium. RECHECK - 1 wk.

June 26, 1987

Dx: Same (stable)
RECHECK - prn
Mild AIR, T4, T5, T7, T9 and 04-5 lt. He is tolerating his activities and doing a lot of stretching. Skelaxin is helpful and doesn't make him as tired as the Valium.

July 8, 1987

Dx: Same w/mild spasm
RECHECK - prn
Slight tilt; pt. is aware of it more than I am objectively. Slight spasm with an AIR. T4, T5, T7, T8, T9. Neck is unremarkable.

FULL OMT reissued.

He is to take Advil or Nuprin prn. To continue with Skelaxin prn spasm. He is doing very well with stretching exercises and feeling stronger everyday.

August 4, 1987

Dx: Spasm, LS - 728.85
Osteo lesions - 739
RECHECK - prn
Pt. presents with lower back discomfort and mild spasm. He woke up this a.m. with a trunk shift; at present shift isn't as evident. Neuro and muscular exam is unremarkable except for spasm through the lumbars.

* * *

He is tolerating the prescribed exercises and uses Skelaxin prn. Pt. hasn't had acute episodes since initially seen.

August 6, 1987

Dx: Spasm w/LS pain - 728.85 - 724.2
RECHECK - prn
Pt. related that yesterday he was putting some lights on a hitch and felt a sharp pain in the lower back. Skelaxin and Advil have been helpful; he relates that prior to OMT tx he would be "out of

commission." Presently presents with a mild amount of spasm and no real shift.

August 17, 1987

Dx: Recurrent LS arthralgia
Osteo lesions
RECHECK - 2-3 wks
Pt. still relates back discomfort; achey throughout the day.

* * *

Pt. is scheduled for orthopedic consult with G. Vogt, M.D., to rule out LS instability and/or disc problem in lieu of the chronicity of the problem.

September 15, 1987

Dx: Same; improved
Discussion & Recheck
RECHECK - prn
Overall pt. is doing well. He was resting and cutting back on his activity; the lower back felt better. Today with good symmetry and no shift nor spasm.

November 16, 1987

Dx: Discussion
Low back strain, improved
RECHECK - prn
Pt. had some problems last wk and can't recall a precipitating event for that. He took Motrin which wasn't helpful. He then tried Skelaxin which was helpful. He had D.C. tx which helped. Today exam reveals no spasm.

December 16, 1987

Dx: Muscle strain
Osteo lesions
RECHECK - if persists; 1 wk
Pt. Related that he was using a snow blower. Today with tender areas LS-SI area. Spasm is improved according to pt.; he relates having a trunk shift when he woke up. He took a muscle relaxant this a.m.

December 23, 1987

Dx: Back spasm/pain improved after bedrest
RECHECK - prn
Pt. felt good after last OMT. However, the next a.m. it was very difficult for pt. to get up out of bed. He related having a trunk shift as he demonstrated. He was sore through the lower back. He was bedridden for 5 days. Objectively I didn't appreciate as much as he seems to relate to subjectively. He may have

instability of the lower back. He did some stretches. Today's exam is unremarkable for spasm. ROM is normal. No neuromuscular signs. In lieu of today's finding, he is to continue with work. He may want to wear back support at work as he is doing more maintenance-type activities that involve more back movement.

16. By letter dated April 25, 1988, Dr. Gencheff wrote:

> In lieu [sic] of x-rays that I reviewed that were taken per a chiropractor and orthopedic consultation, I see no reason why Mr. Lauri should have any type of lifting restriction at this point. Also, I do not anticipate any permanent disability. He remains in good shape and is aware of his problem. He tries to do stretching exercises on a regular basis. He has had no neuromuscular findings per myself.
>
> He was last seen in December, 1987. His back problems seem to be more of a mechanical nature. If he continues with prescribed exercises and is careful with how he lefts, I feel that he should do fine.

17. On August 25, 1987, Dr. George H. Vogt, an orthopedist, examined the appellant. His written findings include the following:

> The patient is a 40 year old boiler operator. He was examined August 25, 1987.
>
> CHIEF COMPLAINT: Pain in the back.
>
> HISTORY: The patient reports that he first injured his back in the service twenty years ago. He was quick carrying a shaft with another man and the other man let go. The weight fell to the patient and he strained his back. He saw the doctor, was given medication, seemed to recover and after a couple of weeks was all right. Periodically, since that time the patient has had acute back problems. Ten years ago he bent over in a shower and developed pain, which cleared after a short time. Four years ago he was trying to lift an ice house and jack it up and a 2 x 4 broke. All the weight of the house fell on the patient. He tried to hold the house up until another man could get his arms out from underneath. He was able to make it home and then collapsed on the floor with acute pain. He was in bed for two weeks, took muscle relaxants. Since that time the pain has been more frequent, possibly he has had fifteen acute episodes. The chiropractor has treated him, but the pain recurs. He states that he is all right as long as he is up and around, but when he sits for awhile and gets up, his back is all bent off to one side. He hangs from his hands and does pull ups in order to relieve the pain. He works as a boiler operator. He watches guages [sic]. He walks around and stands most of the night. This is comfortable for him. If he has to sit down he starts having pain. He has no leg pain, but he thinks his right foot is

> colder than the left. When he has acute pain coughing and sneezing aggravates its. [sic]
>
> CONCLUSION: The patient appears to have a mechanical problem at the lumbosacral level. The exact mechanism of his pain is obscure. He functions at a reasonably high level and most of his problem seems to occur after sitting.
>
> RECOMMENDATION: In view of the fact that I would question some of the exercises that he has been taught, I think that he would benefit from a session at the Back School, and he is referred to the physical therapy department. I think that it might be useful to have him wear a back support. He has worn a flimsy one, none was prescribed right now. It might be that he should see Dr. Whiffen in view of his perception of the severity of his disability.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §§230.44(1)(d) and .45(1)(b), Stats.

2. Respondent is an employer within the meaning of §111.32(3), Stats.

3. The appellant has the burden of establishing that respondent's decision not to hire him for the PPO 4 position was illegal or an abuse of discretion.

4. The appellant has failed to sustain that burden.

5. Appellant has the burden of establishing probable cause to believe that respondent discriminated against complainant on the basis of handicap.

6. Appellant has sustained that burden.

OPINION

Jurisdictional Basis

The letter of appeal in this matter provided:

> I am appealing my discharge from DHSS/Mendota Mental Health Institute. I was hired as a Power Plant Operator 4, a promotion from Power Plant Operator 3. My former employer was the University of Wisconsin, Madison. I feel that I was discharged from

> Mendota Mental Health Institute at the abusive [sic] discretion on the part of the appointing authority.

However, a note on the face of the letter of appeal indicates that a member of the Commission's staff contacted appellant's residence and was advised by the appellant's wife that the appellant had never been formally hired as a PPO 4, so the matter arose from a non-selection decision rather than from a probationary termination decision.

At a prehearing conference held on January 19, 1988, the parties agreed to a statement of issue which read:

> Was the decision of respondent not to hire the appellant for the Power Plant Operator 4 position at the Mendota Mental Health Institute illegal or an abuse of discretion?

Jurisdiction over the proceeding was listed as §230.45(1)(a), Stats. Respondent has never raised any jurisdictional objections to proceeding under this statute, and specifically under §230.44(1)(d), Stats.

At the conclusion of the hearing in this matter and in response to questions from the hearing examiner, appellant's counsel stated that during the prehearing conference, he specifically asked the presiding officer whether it was necessary to amend the appeal to include a claim based on perceived handicap as discussed in La Crosse Police Comm. v. LIRC, 139 Wis 2d 740, 407 N.W. 2d 510 (Sup Ct, 1987). Appellant's counsel related that the presiding officer stated that the perceived handicap theory would fall within the scope of the issue for hearing. Counsel for respondent reserved the right to indicate, within 24 hours of the close of the hearing, if it disagreed with the appellant's version of the prehearing conference. The Commission never received such an indication from respondent's counsel.

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

> [T]he following are actions appealable to the Commission under §230.45(1)(a):

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

This provision is typically utilized as a means for obtaining review of a non-selection decision. Even though the appellant was technically employed by the respondent's Mendota Mental Health Institute for one day before a decision was reached that he did not meet the physical exam requirements, the decision in question was in the nature of a non-selection decision rather than of a decision to terminate for poor performance. Therefore, the jurisdictional basis in this matter properly falls within §230.44(1)(d), Stats., and the case may be distinguished from Board of Regents v. Wisconsin Personnel Commission, 103 Wis. 2d 545, 309 N.W. 2d 366 (Ct. of App., 1981). In that case the Court concluded that the Commission lacked jurisdiction over a probationary termination. The employe's appointment as a power-plant equipment operator was terminated during his training period for poor work performance. The court held that §230.44(1)(d), Stats. was inapplicable:

> We decline to equate the hiring process [referred to in §230.44(1)(d), Stats.], by which one's employment is engaged to the firing process by which one is discharged from employment because to do so would not employ the common and approved usage... of the term "hiring process."
>
> * * *
>
> We view discharge of a probationary employe as the process by which an employment contract is terminated, not as a process by which the employe is not hired. The hiring process cannot be reasonably construed to embrace the acquisition of permanent status in class.

In the instant appeal, the respondent makes no argument that the appellant was terminated while on probation nor is there any documentary evidence

that the appellant received notice as would have been required under §ER-Pers 13.08(2), Wis. Adm. Code (1987).

The net effect of the discussions at the close of the hearing in this matter was to modify the agreed upon issue for hearing to include a claim of handicap discrimination under the Fair Employment Act (FEA). The Commission's jurisdiction over such claims is derived from §§111.375(2) and 230.45(1)(b), Stats. Typically, such claims are first investigated by an equal rights investigator employed by the Commission. Depending on the results of the investigation, the initial hearing before the Commission on a FEA complaint is either on the issue of probable cause or on the merits of the complaint. See §PC 2.07(2) and (3), Wis. Adm. Code.

Here, the conduct of the parties must be construed as a joint waiver of the investigation that is typically performed. Given the absence of an express waiver of the probable cause hearing, the Commission will construe the discussion of the parties as no more than an agreement to a hearing on whether there is probable cause to believe that respondent discriminated against the appellant based on handicap, in regard to the decision not to employ the appellant in the vacant PPO 4 position.

Issue of Probable Cause

The method of analysis for the FEA claim is, to a large extent, established by the decision of the Supreme Court in La Crosse Police Comm. v. LIRC, 139 Wis. 2d 740. There, a Mr. Rusch sought employment with the City of La Crosse as a police officer. He was orally offered employment in that capacity subject to a physical examination and he accepted the offer. The physical exam included a test of back strength on a "Cybex" machine. He received a "B" rating with the following notation: "Qualified for any work with the following restrictions: 1. Back conditioning exercise

program before undertaking heavy labor." Mr. Rusch was then informed he would not be hired because of the Cybex test results even though he subsequently received an "A" rating on a second Cybex test. In setting forth the method of analysis, the Court quoted with approval its decision in Brown County v. LIRC, 124 Wis. 2d 560, 564-65, 369 N.W. 2d 735 (1985):

> First, there must be proof that the complainant is handicapped within the meaning of the Fair Employment Act. The burden of proving a handicap is on the complainant. Second, the complainant must establish that the employer's discrimination was based on the handicap. The burden then shifts to the employer to establish, if it can, that its alleged discrimination was permissible under sec. 111.32(5)(f), Stats. (1979-80), which allows an employer to refuse to hire a handicapped applicant if 'such handicap is reasonably related to the individual's ability to adequately undertake the job-relates responsibilities of that individual's employment.' Brown County, 124 Wis. 2d at 564-565, n. 5 (citations omitted).

The court then went on to describe a two-step process to determine whether the complainant has established a handicap:

> First, is there a real or perceived impairment? Second, if so, is the impairment such that it either actually makes or is perceived as making achievement unusually difficult or limits the capacity to work.
>
> The first step in the analytical process requires determining whether an impairment, real or perceived, exists. As stated above, an impairment for purposes of the statute is a real or perceived lessening or deterioration or damage to a normal bodily function or bodily condition, or the absence of such bodily function or bodily condition.
>
> If the individual satisfies the first step, then he or she must establish that the impairment either actually makes or is perceived as making "achievement unusually difficult or limits the capacity to work." Section 111.32(8)(a), Stats. The disjunctive "or" in the statute makes it clear that one of two conditions must be met to satisfy this second step. Either the claimant must show that the real or perceived impairment makes achievement unusually difficult, or the claimant must show that the real or perceived impairment limits the capacity to work. An employer's perception of either satisfies this element as well.

> What is meant by "makes achievement unusually difficult?" The determination rests not with respect to a particular job, but rather to a substantial limitation on life's normal functions or a substantial limitation on a major life activity. See, School Bd. of Nassau County, Fla. v. Arline, 107 S. Ct. 1123, 1129 (1987).
>
> What is meant by "limits the capacity to work?" Obviously, it must mean something other than "makes achievement unusually difficult." Brown County answers the question: "limits the capacity to work" refers to the particular job in question. In Brown County, this court said: "[T]he evidence is clear that Brown county perceived the impairment as one that limited Toonen's capacity to work at the specific job for which he applied .... that perception ... is sufficient to establish that Toonen was 'handicapped' ...." 124 Wis. 2d at 572.
>
> In summary, the person alleging that he or she is handicapped under the Act must establish first, an actual or perceived impairment, then, second, that such condition either actually makes or is perceived as making achievement unusually difficult or limits the capacity to work.
>
> * * *
>
> In the instant case Rusch had no actual impairment of his back. However, the first step is satisfied because the employer perceived that Rusch had an impairment that consisted of a weak back that portended future back problems. Inasmuch as the condition that the PFC perceived would constitute an impairment if it in fact existed, the employer's perception satisfied the first step. The second step is also satisfied; Rusch had no impairment that made achievement unusually difficult or limited his capacity to work, but the employer perceived that Rusch was limited in his capacity to perform police work. Thus, Rusch is entitled to the protections of the statute. La Crosse, 139 Wis. 2d 740, 761-764

The facts of the present case are analogous to those found in the La Crosse case. However, it is important to keep in mind that this matter is before the Commission at the probable cause stage, rather than on the merits.

Dr. Goodman concluded that he appellant had a back condition which necessitated a 15 to 20 pound lifting restriction. Mr. Bancroft, after consulting with Mr. Gasman, concluded that with the lifting restriction

imposed by Dr. Goodman, the appellant would be unable to perform the responsibilities assigned to the PPO 4 position and decided not to employ the appellant in that capacity.

The appellant has therefore met the first two burdens recited above from the Brown County case and the burden shifts to the respondent to show that the handicap was reasonably related to the appellant's ability to undertake the PPO 4 duties. When viewed in the context of a probable cause determination, the respondent has not met its burden.

There was little evidence supporting Dr. Goodman's establishment of the 15 to 20 pound lifting restriction and the restriction against frequent bending, stooping or twisting. Dr. Goodman reached his conclusions based on the appellant's notations on his medical history that indicated he was taking Advil, currently had low back pain and had once received Worker's Compensation for a back injury. Dr. Goodman's own examination of the appellant was limited to approximately 5 minutes and included no back-related questions other than as reflected in Dr. Goodman's conclusions that the appellant's back and spine was straight with a normal curvature, that the appellant had a full range of motion, and that the appellant seemed to be in good health. There is no indication on this record that Dr. Goodman was aware of 1) the cause of the appellant's worker's compensation injury (a fall); 2) the appellant's physical duties as a PPO 3 (the same as the PPO 4 position) or 3) the appellant's view that his existing low back pain was due to prolonged sitting during a recent trip rather than work-related. There was no explanation as to how Dr. Goodman set 15 to 20 pounds rather than 50 pounds as the appropriate weight limit. Dr. Goodman's conclusions must also be balanced by the views of the appellant's osteopath, Dr.

Gencheff who indicated that, at least as of the date of hearing, the appellant should have no type of lifting restriction.

There is no question that there is also evidence in the record that favors the respondent's view of this matter. It is also clear that an employer is not obligated to hire someone who is handicapped simply because that person is currently employed in a position with similar physical requirements. However, when viewed together, the above-noted evidence is sufficient for a finding of probable cause.

Abuse of Discretion Issue

The issue under §230.44(1)(d), Stats., refers to whether the respondent's decision was "illegal or an abuse of discretion." The only allegation of illegality made by appellant serves as the basis for the appellant's Fair Employment Claim. Because that claim has been treated above, the remaining aspect of the §230.44(1)(d), Stats., claim is whether the respondent's decision was an abuse of discretion.

Abuse of discretion is defined as a "discretion exercised to an end or purpose not justified by and clearly against reason and evidence." Lundeen v. DOA, 79-208-PC, 6/13/81 (emphasis added). It is not the Commission's role to substitute its judgment for that of the appointing authority. Romaker v. DHSS, 86-0015-PC, 9/12/86. The burden of proof is different than that applicable to a probable cause determination regarding the same personnel transaction.

In the present case, the evidence shows that Dr. Goodman did conduct a brief examination of the appellant and concluded that a 15 to 20 pound lifting restriction was appropriate. As of one year later, appellant's own physician opined that there was no reason the appellant should have any type of lifting restriction. These apparently conflicting opinions do not

generate a conclusion that the decision not to select the appellant, in light of the lifting and bending restrictions, was clearly against reason. Absent expert testimony on which the Commission could conclude that Dr. Goodman's procedures or conclusions were unwarranted or inappropriate, the appellant cannot be found to have sustained his burden of proof as to the abuse of discretion standard.

ORDER

The Commission will contact the parties for the purpose of scheduling a conciliation conference pursuant to §PC 2.07(2), Wis. Adm. Code, with respect to the Fair Employment Act claim. The appellant's claim under §230.44(1)(d), Stats., is dismissed.

Dated: _____,1988 STATE PERSONNEL COMMISSION

_____
DONALD R. MURPHY, Commissioner

KMS:jmf
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LAURIE R. McCALLUM, Commissioner

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GERALD F. HODDINOTT, Commissioner