STATE OF WISCONSIN PERSONNEL COMMISSION

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

MARY SMITH,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 88-0063-PC

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

INTERIM ORDER

A proposed decision and order was issued in this matter on February 6, 1992. A copy is attached. No objections were filed. Having reviewed the matter, the Commission adopts the proposed decision and order except that the order is revised to read as follows:

ORDER

In accordance with the Interim Decision and Order issued on February 9, 1989, the appellant will be provided an opportunity to file a petition for fees and costs pursuant to §227.485, Stats.

Dated: March 19, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:rcr

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

STATE OF WISCONSIN PERSONNEL COMMISSION

MARY SMITH,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 88-0063-PC

PROPOSED DECISION AND ORDER

Nature of the Case

This is an appeal of a decision by respondent removing appellant from a position. In an Interim Decision and Order issued February 13, 1989, the Commission rejected respondent's action terminating appellant from employment and retained jurisdiction over this matter for the limited purpose of resolving any dispute over remedy. The parties engaged in a protracted effort to reach agreement on remedy but were unsuccessful. The Commission as a result convened a hearing on August 20 and September 25, 1991, before Laurie R. McCallum, Chairperson, to decide the issue of remedy. The parties were permitted to file post-hearing briefs and the briefing schedule was completed on December 2, 1991.

Findings of Fact

1. The subject termination was effective on January 30, 1988. Respondent had approved a medical leave without pay for appellant from October 26, 1987, until January 30, 1988.

2. Constanz Hartney, Ph.D., is a licensed psychologist who began treating appellant on July 1, 1986, as the result of a head injury she received and continued treating appellant until the middle of 1989. In Dr. Hartney's opinion, appellant was not capable of any employment from January 30 of 1988 through the middle of 1989.

3. Appellant has been a client of respondent's Division of Vocational Rehabilitation (DVR) since January of 1988. Based on appellant's medical

records, DVR concluded that it would be inappropriate for appellant to return to collections work which is the work appellant had been performing for respondent when she was terminated. Based on appellant's successful completion of college courses during the summer of 1988 and appellant's medical records, DVR concluded that retraining, i.e., completing a college degree in elementary education, was the most appropriate vocational rehabilitation strategy for appellant. Appellant has been a full-time college student continuously since the fall of 1988 and appellant's college expenses have been paid through a combination of college financial aid and DVR funds since that time.

4. Some time in 1988, appellant began collecting Social Security Disability Insurance (SSDI) benefits. Appellant's eligibility for SSDI is based on representations from her physicians that her disability renders her unable to work.

5. Since January 30, 1988, appellant has sought employment only once. As a result, in the latter half of 1988, appellant was employed on a part-time basis by the American Automobile Association for two months as a dispatcher but resigned as the result of job stress.

6. Although leaves of absence can be granted for as long as three years, respondent usually limits such leaves to one year.

Conclusions of Law

1. Appellant is entitled as a matter of law to reinstatement from the date of her termination until October 26, 1990.

2. Appellant has not shown that she is entitled to any benefits and/or back pay.

Opinion

Appellant argues that she is entitled to reinstatement with full back pay from January 30, 1988, until the present. However, to be entitled to this remedy, the record would have to show that appellant was able to work during the relevant period of time and that she made an effort to mitigate damages by diligently seeking employment that she would have been able to have performed during that period of time. Pursuant to §230.43(4), Stats., a restored employee is entitled to compensation "from the date of such unlawful removal .. at the rate to which he or she would have been entitled by law but for

such unlawful removal. " (emphasis supplied).[1] It follows that if appellant would not have been earning any wages if she had retained her employment status with DHSS, she did not suffer any loss of wages as a result of her termination of employment, and she is not entitled to any back pay under §230.34(4), Stats.

Back Pay

The record in the hearing on remedy clearly shows, through the testimony of Dr. Hartney, that appellant was not able to work from January 30, 1988, through at least the middle of 1989. As a result, even if appellant had been reinstated, it must be presumed that she would have been placed on a leave of absence without pay until at least the middle of 1989 and would not have earned any wages from respondent during this period of time. As a result, appellant has failed to prove that she was entitled to any back pay for this period of time.

The record also shows that appellant collected SSDI from some time in 1988 through at least the date of the hearing on remedy. Appellant testified that, in order to qualify for SSDI benefits, she was required to provide information from her treating physicians that she was unable to work. It could be concluded from this testimony that appellant was also unable to work from 1988 through the present. However, since the record is not clear as to the degree of disability required in order to qualify for SSDI benefits, and is not clear then as to whether appellant was unable to work at all during this period of time, we will proceed to the next step of the analysis.

If it were concluded that appellant was able to work in some capacity after the middle of 1989, she would have to have actively sought employment during this period of time. This requirement to mitigate damages is consistent with the language of §230.43(4), Stats., which states in pertinent part:

> If an employee has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been restored to such position or employment by order of the commission or any court upon review, the employe shall be entitled to compensation therefor

---

[1] This subsection also provides that "[i]nterim earnings or amounts earnable with reasonable diligence by the employee shall operate to reduce back pay otherwise allowable." This aspect of the case will be discussed below.

> from the date of such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled by law but for such unlawful removal, demotion or reclassification. Interim earnings or amounts earnable with reasonable diligence by the employe shall operate to reduce back pay otherwise allowable. . . .

In State ex rel. Schilling and Klingler v. Baird, 65 Wis 2d 394 (1974), which was a case arising out of the suspension of two Waukesha County deputy sheriffs, the Wisconsin Supreme Court held:

> This court has consistently recognized the rule that a discharged employee has a duty to seek other employment, and that the employer has the right to a credit to the extent that the employee obtains work and earns wages, or might have done so.

In the instant case, appellant concedes that, since the latter part of 1988, she has not sought employment and, as a result of her status as a full-time student, was not available for full-time employment. As a consequence, appellant has failed to show any back pay liability on the part of respondent.

Reinstatement

In view of the Commission's ruling on the merits of this appeal, appellant was entitled to reinstatement as of the date of her termination. However, it is clear from the record that the only result of such reinstatement would have been to extend appellant's medical leave without pay beyond the date of termination since she was unable to work as of the date of her termination. The question then becomes one of determining how long such a medical leave without pay would have lasted and what appellant was entitled to receive during this leave without pay or thereafter. Respondent's usual practice is to grant medical leaves without pay for a period of time not to exceed one year. Under the facts before us, leave granted to appellant under this practice would have lasted until October 26, 1988, at the latest, if appellant had not been terminated by respondent. The record clearly shows that appellant was unable to work on October 26, 1988, or at any time between October 26, 1987, and October 26, 1988. Even if respondent would have been required to grant to appellant a medical leave without pay for three years, the maximum allowable pursuant to §ER 18.14, Wis. Adm. Code, this leave would have expired on October 26, 1990. The preponderance of the evidence shows that appellant was unable to work on October 26, 1990, or at any relevant time prior to October 26, 1990. This is

shown by appellant's collection of SSDI benefits from 1988 through the present, by her failure to seek employment after 1988, by her continuing eligibility for DVR benefits from 1988 through the present, and by appellant's failure to produce any evidence that she was able to work at any time after October 26, 1988. The Commission concludes from this that appellant, if reinstated, would have continued on medical leave without pay from the date of termination until October 26, 1990, the maximum amount of time respondent would have been required to grant appellant a medical leave without pay Obviously, respondent's obligation to reinstate appellant would not have extended beyond this period of time and this point was already enunciated by the Commission in its decision on the merits. Since appellant would have been on a medical leave without pay during the entire period of time for which she was entitled to reinstatement, she would not have been on pay status and would not have earned any benefits during this period of time.

Order

This appeal is dismissed.

Dated: _____, 1992 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt/2

_____
DONALD R. MURPHY, Commissioner

_____
GERALD F. HODDINOTT, Commissioner

Parties:

Mary Smith
4350 N 53rd
Milwaukee WI 53216

Gerald Whitburn
Secretary DHSS
1 W Wilson St
P O Box 7850
Madison WI 53707