.STATE OF WISCONSIN PERSONNEL COMMISSION

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

MARY L. SMITH,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 88-0063-PC

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

INTERIM DECISION AND ORDER

The Commission has reviewed the record in this matter and the objections of respondent, has consulted with the hearing examiner, and adopts the proposed decision and order as the final decision and order with the following changes:

1. Finding of Fact 3 is modified to indicate that it was Clifford Day who met with appellant on October 15, 1987, not Andrea Houlihan.

2. The first sentence of Finding of Fact 3 is modified to read as follows:

> Appellant did not return to work for the purpose of carrying out the duties and responsibilities of her position after October 9, 1987.

This modification is made to take into account the fact, as described in Finding of Fact 10, that appellant did return to her work site on February 1, 1988, but not for the purpose of performing the duties and responsibilities of her position..

3. The third sentence of Finding of Fact 14 is modified to read as follows:

> The reasons cited for the denial were that the evidence provided regarding the appellant's condition to date had been contradictory and had indicated that appellant would not be able to return to her position.

This modification is made to more accurately reflect the record in that the denial took into account both medical evidence and non-medical evidence relating to appellant's condition.

4. The following language is added to the Decision section:

> Respondent argues that §230.37(2), Stats., is not applicable in the instant case because there was no showing that appellant was "physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position by reason of infirmities due to age, disabilities, or otherwise.", .within the meaning of this statutory section. However, it is difficult to read Dr. Vattakattcherry's letter of February 17, 1988, as quoted in Finding of Fact 15, above, and to reach any conclusion other than appellant, in Dr. Vattakattcherry's opinion, was unable, as a result of a disability, to carry out the duties and responsibilities of her position. Dr. Vattakattcherry states regarding appellant that "I do not feel that she will be able to carry out her current job in a long-term fashion" and cites the reasons for her opinion. If respondent disagreed with such opinion, the option was always available to them to require appellant, within the purview of §230.37(2), Stats., to "submit to a medical or physical examination to determine fitness to continue in service." The respondent did not do this, however, and the Commission has no choice but to rely upon the opinion of Dr. Vattakattcherry as it appears in the record of this case and that opinion clearly supports the Commission's conclusion that appellant was unable, due to a disability, to perform the duties and responsibilities of her position.

5. The following language is added to the Decision section:

> The remedy cited is intended to be a "make-whole" remedy for appellant. Appellant is obviously not entitled to more than she would have been entitled to had her request for an indefinite leave of absence without pay been granted. Any attempt to predict what would have occurred had respondent complied with §230.37(2), Stats., and considered the option of placing appellant into a different position would be purely speculative and not enough upon which to base a remedy in this case.

6. The following language is added to the Decision section:

> The Commission declines to overrule its decision in Petrus v. DHSS, Case No. 81-86-PC (12/3/81), which concluded that:
>
> > "...the legislature intended the Commission to have jurisdiction over involuntary resignations under §230.34(1)(am), Stats., just as the Supreme Court has construed §63.10, Stats., as granting the Milwaukee County Civil Service Commission jurisdiction over coerced

> resignations [in Watkins v. Milwaukee Co. Civil Service Commission, 88 Wis. 2d 411, 276 N.W. 2d 775 (1979)]."
>
> While the Petrus decision had a statutory basis, it is also noted that in Johnson v. Director, Downstate Med. Center, SUNY, 384 N.Y.S. 2d 189, 52 A.D. 2d 357 (S. Ct. App. Div. 1976), affirmed other grounds, 396 N.Y.S. 2d 172, 364 N.E. 2d 837 (Ct. App. 1977), the Court held that where a civil service rule, which provided that an unexcused, unexplained absence of 10 work days would be deemed to constitute a resignation, was applied to result in the termination of employment without the employee being allowed a hearing on the validity of the reason for the termination, there was a violation of the due process guarantees of the Fourteenth Amendment.

7. The second sentence of the Order is modified to read as follows:

> The Commission will retain jurisdiction over this matter for the limited purpose of resolving any dispute over remedy, if the parties are unable to reach agreement as to the amounts involved, if any.

8. The following sentence is added to the Order:

> A decision finally disposing of the instant case will not be issued until appellant has an opportunity to file a motion for costs and the Personnel Commission issues a decision on such motion if one is filed.

Dated: February 9, 1989 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

LRM/lrm

Parties:

Mary L. Smith
4350 N. 53rd Street
Milwaukee, WI 53216

Patricia Goodrich
Secretary, DHSS
P.O. Box 7850
Madison, WI 53707

STATE OF WISCONSIN PERSONNEL COMMISSION

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

MARY L. SMITH,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 88-0063-PC

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

PROPOSED DECISION AND ORDER

This is an appeal of a decision by respondent removing appellant from a position. A hearing on the objections to jurisdiction and to the issue proposed by the hearing examiner and on the merits was held before Laurie R. McCallum, Commissioner, on October 10, 1988. Appellant was not represented by legal counsel; respondent was represented by Attorney Kathryn R. Anderson.

FINDINGS OF FACT

1. Effective August 17, 1986, appellant was promoted to a position classified as a Social Services Collection Specialist 1 in respondent DHSS's Division of Management Services. This position was not included in any certified bargaining unit. Appellant attained permanent status in class in such position after successfully completing a 6-month probationary period. Mr. Clifford Day was appellant's first-line supervisor. Appellant's performance in such position met or exceeded expectations.

2. J. Timothy Propsom, M.D., a specialist in orthopedic surgery indicated on a form designated as a "Medically Excused Absence" form that appellant had been under his care from September 28, 1987, to September 30,

1987, for a knee injury, had undergone an arthrogram of the right knee on September 28, 1987, and was experiencing swelling and pain as a result of the arthrogram. On October 12, 1987, Dr. Propsom prescribed in writing that appellant not work for two to three weeks. Also on October 12, 1987, appellant wrote the following memo to Mr. Day:

> I am going to have surgery on my leg in the next week. I having (sic) test done now so that the Doctor knows exactly what he's up against. I was in an accident last year and the problem in my leg went undetected because it didn't show up on the regular x-ray. Since then I have damaged some cartilage unrepairable making the leg very weak and it can no longer support me when I stand. Right now I really don't know what to expect. My Doctor is referring me to another specialist to get his opinion before the surgery. I'll keep in touch.

3. Appellant did not return to work after October 9, 1987. She exhausted her accrued sick leave hours some time during the week of October 19, 1987. On October 15, 1987, Andrea Houlihan, Assistant to the Administrator, Division of Management Services, DHSS, met with appellant at appellant's home for the purpose of discussing appellant's performance evaluation and appellant's knee problem. At that meeting, appellant did not indicate she had any problem beside her knee problem which prevented her from returning to work, and indicated that she expected to be back at work in two to three weeks.

4. On November 6, 1987, appellant requested a leave without pay effective October 26, 1987. Appellant provided to respondent as part of her request a report from Omana Vattakattcherry, M.D. of the Curative Rehabilitation Center, to the following effect:

> Mary is currently undergoing evaluations and treatment in Curative Workshop and will be temporarily unable to return to her work at this time.

5. A leave without pay extending to February 1, 1988, was approved by respondent on November 12, 1987. Mr. Day sent the following memo to appellant on or around December 11, 1987:

> For Steve and I to try and make some decisions on planning how to handle the workload for your area, the Division Administrator has suggested your doctor provide us with some sort of prognosis on your recovery. This should include what might be the possibility of your doing light duties such as contacts by phone from home before resuming full time employment.
>
> Also, is there a possibility you might not be able to return to work in the capacity of a field representative?

6. In response to Mr. Day's memo, Dr. Vattakattcherry provided the following in a report dated December 17, 1987:

> Mary continues to have memory problems and has been unable to handle her job. She is currently seeing Psychologist for above complaints and I am unable to predict what the outcome would be at this time.

7. This is the first indication that respondent had that the medical problem preventing appellant from returning to work was anything other than the problem directly related to her right knee. Mr. Day wrote the following letter to appellant on or around January 19, 1988:

> Your approved leave of absence will end on January 31. Our expectation is that you will return to work on Monday, February 1.
>
> Call me on or before Monday, January 25, to make arrangements for the transfer of files and a state car back to you.
>
> We look forward to your return to work. If you have any questions, please call me at (608) 266-2846, or Andrea Houlihan, at (608) 267-9329.

8. In response to such letter, appellant called Mr. Day on January 25, 1988, and stated that she would not be able to return to work on February 1, 1988, and that respondent would receive a letter from her physician that week.

9. Mr. Day wrote the following letter to appellant on or around January 29, 1988:

> In response to my letter of January 19, you telephoned on Monday, January 25, and stated that you would not be able to return to work on February 1. You also said we would receive a letter from your physician this week.
>
> We have not received a request for additional leave from you. Nor have we received a letter, or any medical evidence, to support your continued absence.
>
> With this letter, I am directing you to return to work effective Monday, February 1, as scheduled at the time your leave was approved. You are to report to me, at my office by 10:00 am, Monday morning, February 1, 1988.
>
> If you fail to return to work as directed, your absence will be unauthorized.

10. On February 1, 1988, appellant reported to Mr. Day's office. Ms. Houlihan and Steve Sanborn, Director, Bureau of Collections, Division of Management Services, DHSS, were also present. Appellant indicated that the only medical problem preventing her from returning to work was that related directly to her injury to her right knee, that the memory and cognitive problems referenced by Dr. Vattakattcherry related to her fear that her knee would give out, and that she could return to work if the limitations on her mobility created by her knee problem could be accommodated. Appellant could not identify any aspect of her job which was particularly stressful or difficult for her. Mr. Sanborn indicated that respondent would investigate the possibility of appellant conducting certain meetings with parents at the offices of the juvenile courts rather than at the homes of the parents to reduce the amount of travel for appellant. Ms. Houlihan indicated she would direct a letter to appellant's physician asking him to specify in detail the nature and extent of the restrictions on appellant's activities and the medical reasons for such restrictions.

11. Respondent investigated the possibility of using juvenile court offices for parent meetings and determined it was not feasible. This determination was not communicated to appellant. Respondent did not at any time consider placing appellant in another position.

12. On February 4, 1988, respondent received a report concerning appellant signed by Dr. Vattakattcherry on January 22, 1988, to the following effect:

> Above client currently attends psychology 1 time per week for stress management and cognitive rehabilitation and is not capable of returning to her current job. She needs a job that is less emotionally stressful and requires low cognitive demands.

13. Ms. Houlihan directed a letter to Dr. Vattakattcherry on February 5, 1988, explaining appellant's current employment status; outlining the duties and responsibilities of appellant's position; summarizing the chronology of events relating to appellant's absence from work since October 9, 1987, and the medical information received by respondent relating to such absence; and requesting a clarification of the statements made by her in the January 22, 1988, report, specifically, "what, if any, specific functional limitations Mary may have relative to her job" -- and "any objective medical reasons why Mary should not return to her job." A copy of this letter was sent to appellant.

14. Some time after February 1, 1988, appellant requested an indefinite leave without pay. This was denied by respondent on March 8, 1988. The reasons cited for the denial were that the medical evidence provided to date had been contradictory and had indicated that appellant would not be able to return to her position.

15. In a letter to Ms. Houlihan dated February 17, 1988, Dr. Vattakattcherry stated as follows:

> Mary Smith, as I have discussed in my notes in the past, is a brain injured black female who returned to work as the patient was significantly motivated to do so, although psychologic testing, including WAIS-R, have shown problems in cognitive, as well as memory skills. The patient opted to return to work and has had problems because of her memory and cognitive problems as the patient stated that she has misfiled things and misplaced files at jobs and this has been especially stressful to her. This is inconsistent with reports from your letter regarding her work performance. In my previous notes, I have also stated that she should avoid any significant lifting over 25 pounds because of a chronic back pain problem.
>
> She also was recently evaluated by orthopedic surgeons for the knee giving out on her, however, my objective evaluations have not shown any functional derangements, including instability problems or strength deficits or neurologic residuals, although Mary was originally diagnosed to have left-sided weakness secondary to head trauma.
>
> In your reports, you state that Mary covers Southeast Wisconsin with the counties as mentioned in the letter. However, Mary reports that she has had to travel much more than the stated counties, including Washington County, which has been especially stressful to her. However, it is still our opinion that Mary should not have any significant stress in her job.
>
> In referring to her job description, it is my opinion that she will not be able to handle hostile and unstable clients as this is especially frustrating to her because of her cognitive level of functioning. Her WAIS-R testing has identified impairment in planning, interpretation of social situations, visual sequencing, short-term auditory memory attention, concentration, verbal comprehension and long-term memory. These are skills that she would need to adequately do her job.
>
> Although it is not a severe involvement, when activities are time limited and requiring deadlines, this can cause frustration and lead to further depression. I feel that Mary has attempted to do her job and in the process realized that she has difficulties which she was denying initially. I do not feel that she will be able to carry out her current job in a long-term fashion and it is in the best interest of both the client and state that she be placed in a job that requires reduced cognitive demands.
>
> I hope this will answer your questions.

16. On February 25, 1988, appellant and Ms. Houlihan had a telephone conversation which had been initiated by Ms. Houlihan in which appellant indicated that, on the basis of the advice she received from Dr. Vattakattcherry, she did not plan on ever returning to her position.

17. On March 10, 1988, James R. Meier, Administrator, Division of Management Services, DHSS, sent a certified letter to appellant to the following effect:

> Your request for indefinite medical leave is denied. You have not submitted medical evidence that a second medical leave is warranted.
>
> In your telephone conversation on February 25, 1988, with Andrea Houlihan, you stated that you did not intend to return to your Social Services Collections Specialist position now, or at any time in the future.
>
> Your absence from work is unauthorized. In light of your February 25 statements, we would expect a letter of resignation from you, as required in ER-PERS 21.01, Wisconsin Administrative Code.

18. Appellant received but did not respond to Mr. Meier's letter.

19. On April 11, 1988, Mr. Meier sent a certified letter to appellant which stated:

> As you know, your approved leave of absence ended January 30, 1988. We directed you to return to work on February 1, and notified you that continued absence would not be authorized.
>
> While you did report to your supervisor's office on February 1, you stated you would not return to work at that time, since your physician advised against your return. You also stated you were ready to work and that a continuing problem with your knee was the only barrier to doing your job. You requested an accommodation for this problem. Your supervisor agreed to investigate making an accommodation, pending receipt of medical verification of the need for one. We agreed to contact your physician regarding your medical status and the need for an accommodation.
>
> On February 17, we received a letter from Dr. Vattakattcherry indicating that she feels you will not be able to carry out your job in a long term fashion. We found Dr. Vattakattcherry's letter, as well as her prior communications, to be equivocal and inconsistent with your own statements and your work history with us.
>
> On February 25, Andrea Houlihan telephoned you and asked if you would be returning to your position. You stated that you would be following your physician's advice; you do not intend to return to your Social Services Collections Specialist position now or at any time in the future.

> We granted your request for three month leave upon exhaustion of your sick leave. We have initiated all contact with you over the last five months. We attempted, unsuccessfully, to hold a scheduled meeting with you to clarify inconsistent communication regarding your need for medical leave. You refused our offer of home based assignments, and would not discuss your medical status. You requested an accommodation for knee problems but did not submit medical evidence of a knee problem. You have also requested an additional medical leave but provided no reason, length of time or medical support for your request.
>
> You have failed to return to work as directed following your authorized leave, have initiated no contact with your supervisor since your leave expired, and have stated that you will not return to your job. Our letter of March 10, 1988, (sent by certified mail 3/10 and 1st class mail 3/28), denied your request for additional leave without pay and notified you that your absence from work was unauthorized. Per ER-PERS 21.03, Wisconsin Administrative Code, we have no choice but to consider your position abandoned, and advise you that we consider you to have resigned from your position in the Division of Management Services, effective January 30, 1988.

20. Mr. Meier's April 11, 1988, letter was delived to appellant's home on April 12, 1988, and appellant's daughter Lisa Smith signed for it.

21. Appellant was in New Jersey from April 10, 1988, to May 15, 1988, caring for her ill sister. Her daughter Lisa, age 15 and her 11-year-old son remained at home by themselves during this time period. The only contact appellant had with her children during this time period was a telephone call to let them know she had arrived safely in New Jersey. Before she had left, appellant had instructed her children to place the mail that arrived for her in a drawer. Appellant testified at the hearing that, since the mail that came for her from the state was always bad news, she did not instruct her children to forward it to her. Upon returning to her home, appellant opened and read Mr. Meier's April 11, 1988, letter on May 15, 1988.

22. On June 3, 1988, appellant filed with the Commission an appeal of respondent's decision to consider appellant as having resigned from her position.

23. At a prehearing convened by the Commission on July 20, 1988, the commissioner conducting the prehearing proposed the following issue:

> Whether there is just cause for the appellant's termination from her employment by respondent for alleged job abandonment.

24. On August 5, 1988, respondent: 1) filed a motion to dismiss the appeal for lack of subject matter jurisdiction arguing that the appeal was not timely filed and that there is no right of appeal from a resignation resulting from job abandonment and 2) objected to the issue proposed at the prehearing conference.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this appeal pursuant to §230.44(1)(c), Stats.

2. The respondent has the burden to show that it had just cause to terminate appellant from her employment for alleged job abandonment.

3. Respondent has not sustained its burden.

DECISION

Timeliness

In Goers v. DOR, Case No. 82-101-PC (7/8/82), the respondent had moved to dismiss the appeal on the ground that it was untimely filed. In that case, a certified letter of termination was mailed to appellant's home and signed for by her daughter on March 23, 1982. Appellant was out of town at the time. Appellant's daughter delivered the letter to appellant on March 25, 1982. The Commission decided that the appellant had received effective notice of her termination on March 25, 1982, and stated as follows:

> In the absence of a statute or rule permitting service of such a notice by certified mail, notice requires actual notice to the person involved. See 66 CJS Notice, ss 3, 18C. (1):
>
> > "Generally a notice is regarded in law as actual when the person sought to be affected by it knows of the existence of the particular fact in

> question or is conscious of having the means of knowing it. Notice is actual when it is directly and personally given to the person to be notified.
>
> * * *
>
> "In the absence of custom, statute, estoppel, or express contract stipulation, when a notice, affecting a right, is sought to be served by mail, the service is not effected until the notice comes into the hands of the one to be served, and he acquires knowledge of its contents, except perhaps in those cases where the party to be notified resorts to some trick or artifice to avoid personal communication with him."
>
> See also Wing v. Bureau of Personnel, No. 77-63 (5/26/78).

A question is presented in the instant case as to whether appellant engaged in some trick or artifice to avoid personal communication with respondent in view of her instructions to her children to put the mail addressed to appellant in a drawer during her 5-week absence and offering as her reason for such instruction her feeling that the only news she ever received from the state was bad news. Militating against such a conclusion, however, are the facts that appellant did not absent herself from her home to avoid communicating with respondent, had no way of knowing during her absence that the subject letter had been sent by respondent or received at her home, and took possession of the subject letter almost immediately upon her return home.

The Commission concludes, on the basis of the above, that appellant received effective notice of the subject actions of respondent on May 15, 1988, and appellant's June 3, 1988, filing of the instant appeal with the Commission was timely in view of the 30-day filing requirement specified in §230.44(3), Stats.

Subject Matter Jurisdiction

Respondent argues in this regard that there is no right of appeal from a resignation resulting from job abandonment and urges the Commission to reverse its decision in Petrus v. DHSS, Case No. 81-86-PC (12/3/81). The Commission in Petrus concluded that, consistent with the Wisconsin Supreme Court's decision in Watkins v. Milwaukee County Civil Service Commission, 88 Wis 2d 411, 276 N.W. 2d 775 (1979), a coerced resignation is a form of discharge and, as a result, reviewable by the Commission pursuant to §230.44(1)(c), Stats. The Commission stated in Petrus:

> The present case raises very similar concerns to those considered in Watkins. Resignation by abandonment, under the terms of s.230.34(1)(am), Wis. Stats., can be invoked whenever an employe fails to report for five days. The statute serves a useful purpose when it is carefully applied to an employe who decides to quit work and fails to tell anyone of his or her decision. At the same time, the statute is readily subject to abuse, if invoked as a retaliatory means of discipline. The likelihood of such abuse is magnified if no method for administrative review is provided.
>
> The Watkins case was decided by the Supreme Court on March 27, 1979. On April 30, 1980, section 740, Chapter 221 of the laws of 1979 went into effect, thereby creating s.230.34(1)(am), Wis. Stats. When the legislature enacted the provision for job abandonment found in s.230.34(1)(am), Wis. Stats., the presumption is that "it did so with knowledge of existing laws, including both the statutes and the court decisions interpreting it." State ex rel. Klinger and Schilling v. Baird, 56 Wis. 2d 460, 468, 202 N.W. 2d 31 (1972). See also Kindy v. Hayes, 44 Wis. 2d 301, 314, 171 N.W. 2d 324 (1969); Town of Madison v. City of Madison, 269 Wis. 609, 614, 70 N.W. 2d 249 (1955).
>
> Therefore, the Commission concludes that the legislature intended the Commission to have jurisdiction over involuntary resignations under s.230.34(1)(am), Wis. Stats., just as the Supreme Court had construed s.63.10, Wis. Stats., as granting the Milwaukee County Civil Service Commission jurisdiction over coerced resignations.

The only argument offered by respondent which was not addressed by the Commission in Petrus is the following, as excerpted from respondent's August 4, 1988, brief:

> ...if the Commission treats a resignation under §230.34(1)(am) as a constructive discharge, then the Respondent believes the appointing authority must afford the predisciplinary due process protections required under Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 84 L. Ed. 494, 105 S. Ct. 1487 (1985). If all the predisciplinary steps must be taken and the employe has a right to appeal, there is no purpose for the section providing for the appointing authority to treat job abandonment as a resignation.

However, the due process safeguards prescribed by Loudermill and the procedures outlined in s. 230.34(1)(am), Stats., are not inconsistent. As discussed below, a situation such as the one under consideration here is not equivalent to the termination under consideration in Loudermill and does not require as rigorous a pre-termination procedure as that required in Loudermill. This less rigorous due process requirement is entirely consistent with the less rigorous procedure for separation from state service prescribed by s. 230.34(1)(am), Stats. The Commission concludes that the respondent's argument in this regard is not persuasive and affirms the approach taken in Petrus, infra.

Respondent contends that the application of the just cause standard to the instant appeal, as proposed by the Commission at the prehearing conference, is erroneous, and argues for application of an abuse of discretion standard. This issue was also addressed by the Commission in Petrus, as follows:

> The Commission concludes that the just cause standard for lay-off situations is the proper standard to be applied in the review of an abandonment/resignation. This result is consistent with the Wisconsin Supreme Court's decision in Weaver, supra, where the Court relied upon the existence of detailed lay-off procedures within the statutes and administrative code. In the present case, the language of s.230.34(1)(am), Wis. Stats., establishes precise procedural requirements that must be followed before an employe may be considered as having resigned his or her position. The existence of the five day statutory requirement must be contrasted with the unspecific statutory standard of "just cause" that is to be applied to disciplinary actions.

Under such a just cause standard, the burden of proof is on the respondent.

Once again, the Commission finds the Petrus decision in this regard persuasive and affirms the application of the Weaver just cause standard to situations such as the one under consideration here.

Merits

In Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46 (1976), the Wisconsin Supreme Court stated:

> While the appointing authority indeed bears the burden of proof to show "just cause" for the layoff, it sustains its burden of proof when it shows it has acted in accordance with the administrative and statutory guidelines and the exercise of that authority has not been arbitrary and capricious.
>
> * * *
>
> We have said that, for administrative action to avoid the label of "capricious or arbitrary," it must have a rational basis. In Olson v. Rothwell (1965), 28 Wis. 2d 233, 239, 137 N.W. 2d 86, this court said:
>
> > "Arbitrary or capricious action on the part of an administrative agency occurs when it can be said that said action is unreasonable or does not have a rational basis. ...and [is] not the result of the 'winnowing and sifting' process."

In the instant case, respondent, in sustaining its burden to show that it followed all the proper procedures, must show that it satisfied the due process requirements laid out in Loudermill, as well as those specified in §230.34(1)(am), Stats.

The Court in Loudermill stated that an employer's interest in continued employment is a property interest protected by the due process clause of the 14th amendment and that:

> The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. See Arnett v. Kennedy, 416 US, at 170-171, 40 L Ed 2d 15, 94 S Ct 1633 (opinion of Powell, J.); id., at 195-196, 40 L Ed 2d 15, 94 S Ct 1633 (opinion of White, Jr.); see also Goss v. Lopez, 419 US, at 581, 42 L Ed 2d 725, 95 S Ct 729. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.
>
> * * *
>
> ...the pretermination "hearing," though necessary, need not be elaborate. We have pointed out that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." Boddie v. Connecticut, 401 US, at 378, 28 L Ed 2d 113, 91 S Ct 780. See Cafeteria Workers v. McElroy, 367 US 886, 894-895, 6 L Ed 2d 1230, 81 S Ct 1743 (1961).

In the instant case, the property interest of appellant in continued employment, i.e., the impact of respondent's actions on appellant, is less compelling than in Loudermill where the employe was fired for allegedly lying on his job application. In this regard, the Court in Loudermill noted:

> While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job. See Lefkowitz v. Turley, 414 US 70, 83-84, 38 L Ed 2d 274, 94 S Ct 316 (1973).

In the instant case, appellant was not on pay status at the time, was not capable of performing the duties of her position or any equivalent position, and would not be stigmatized by respondent's actions by having a

firing on her record since the transaction would be characterized in her record as a resignation.

The Commission concludes on this record that respondent's February 25, 1988, and March 10, 1988, communications to appellant and the opportunity provided by respondent to appellant to respond to such communications prior to taking the subject action on or around April 11, 1988, satisfied the due process requirements for notice and an opportunity to respond.

Under the facts of the instant appeal, appellant's approved leave without pay ended January 31, 1988; when appellant reported to work on February 1, 1988, she indicated that her only medical problem preventing her from returning to work was that related directly to her right knee and that she otherwise was able to perform the duties and responsibilities of her position; appellant's physician's January 22, 1988, report received by respondent on February 4, 1988, indicated that appellant was not capable of returning to her current job because of problems related to stress and cognitive difficulties; a February 17, 1988, letter from appellant's physician indicated that appellant had memory and cognitive problems and chronic back pain but no functional deficiencies in her right knee and that appellant could not carry out the duties and responsibilities of her position; appellant indicated to respondent on February 25, 1988, that she did not plan on ever returning to her position; appellant was notified in a March 10, 1988, letter from respondent that her request for an indefinite leave was denied and her absence from work was unauthorized; appellant received but did not respond to respondent's March 10 letter; and respondent directed a letter to appellant on April 11, 1988, advising her that her position was considered abandoned and respondent considered her to have resigned from her position.

The action of respondent under review here is the decision by respondent to remove appellant from her position. A review of such decision necessarily includes a review of respondent's decision to deny appellant's request for an indefinite leave of absence. In regard to appellant's request for an indefinite leave of absence, respondent had most recently been advised by both appellant and her physician that she was not capable of performing the duties of her position at the present time or at any time in the future. Appellant has neither specifically alleged nor shown that respondent failed to follow the proper procedure in processing this request. In addition, in view of the statements by appellant and her physician that appellant could not return to her job then or ever, it was not unreasonable for respondent to deny appellant's leave request. Common sense dictates that a leave would only be appropriate if an employe planned to return to her position at some future time. This is consistent with § ER-Pers 18.05, Wis. Adm. Code, which limits the duration of a leave to 3 one-year terms and which requires the employer, in reviewing a request for a leave such as the one under consideration here, to assess the value to the organization to be gained by providing a means for the employee to return to her position. Finally, in view of the effort expended by respondent in attempting to clarify the nature and extent of appellant's medical problems and the effect they had on appellant's ability to perform the duties and responsibilities of her position, it must be concluded that the decision to deny appellant's leave request was made pursuant to a "sifting and winnowing" process.

In regard to appellant's abandonment of her position, i.e., her continued unauthorized absence from her job, it should be noted that respondent had notified appellant that her request for an indefinite leave

of absence extending from February 1, 1988, had been denied and appellant's absence from work was, therefore, unauthorized and had failed to receive a response from appellant to this notice. Appellant neither alleges nor has shown that respondent failed to follow the proper procedure in this regard. Respondent's conclusion that appellant had abandoned her position was not unreasonable in view of the fact that she was aware that her continued absence from the job was unauthorized and she failed to respond to respondent's communication with her regarding this fact. Again, respondent's efforts to obtain information regarding appellant's medical and work status militates against a conclusion that no "sifting and winnowing" occurred, particularly in a situation such as this when only one course of action is really feasible in view of the employee's inability to return to her position at any time in the future.

In regard to respondent's decision to consider appellant as having resigned her position, it should be noted again that it was not possible for respondent to conclude that appellant would ever return to her position. The imposition of discipline, the alternative to effecting a resignation under 230.34(1)(am), Stats., would be appropriate only in those instances where it is likely that the employe would be returning to work. Again, respondent's substantial efforts to determine the conditions, if any, under which appellant could return to work would be consistent with a conclusion that a "sifting and winnowing" process occurred in this regard and the Commission so concludes.

Finally, the Commission must not limit itself to considering only those statutory and administrative code provisions relating to job abandonment in considering the just cause issue presented by this case. As the Wisconsin Supreme Court stated in Weaver v. Wisconsin Personnel Board, 71 Wis. 2d at 51, 52 (1976),

> ... the only questions presented in a layoff review are whether the procedure outlined in s. 16.28(2), Stats., and Wis. Adm. Code Ch. PERS 22 was followed and was the layoff of the employee otherwise authorized by applicable law.

Section 16.28(2), Stats., and Ch. PERS 22, Wis. Adm. Code, are those relating to the requirements for effecting a layoff. The Court states in the quoted language that the inquiry need not be limited to the law relating to the requirements for effecting a layoff per se but extends as well to whether the layoff was "otherwise authorized by applicable law."

While respondent's actions, when viewed in isolation, were proper, they cannot be considered in isolation because §230.37(2), Stats., imposes certain requirements[1] that must be met before an employe can be terminated from employment under circumstances like this. There is precedent for considering whether the requirements of s. 230.37(2), Stats., have been met in the context of a just cause determination. See Mahoney v. State Personnel Board, 25 Wis. 2d 311 (1964). Furthermore, the Court in Weaver mandated that respondent show not only that it "acted in accordance with the administrative and statutory guidelines," but also that "the exercise of that authority has not been arbitrary and capricious." 71 Wis. 2d at 52.

---

[1] §230.37(2), Stats., provides as follows:

(2) When an employee becomes physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position by reason of infirmities due to age, disabilities, or otherwise, the appointing authority shall either transfer the employee to a position which requires less arduous duties, if necessary demote the employee, place the employee on a part-time service basis and at a part-time rate of pay or as a last resort, dismiss the employee from the service. The appointing authority may require the employee to submit to a medical or physical examination to determine fitness to continue in service. The cost of such examination shall be paid by the employing agency. In no event shall these provisions affect pensions or other retirement benefits for which the employee may otherwise be eligible.

Failure to comply with the statutory mandate of §230.37(2), Stats., prior to effecting the separation from employment of an employe who has become physically or mentally unfit to perform the duties of her position also would be arbitrary and capricious.

Respondent could argue in this regard that, despite repeated requests, not enough information was provided to enable respondent to determine which "less arduous duties" appellant was capable of performing. However, Dr. Vattakattcherry's letter of February 17, 1988, (See Finding of Fact 15) states in part:

> Mary Smith, as I have discussed in my notes in the past, is a brain injured black female who returned to work as the patient was significantly motivated to do so, although psychologic testing, including WAIS-R, have shown problems in cognitive, as well as memory skills ... In my previous notes, I have also stated that she should avoid any significant lifting over 25 pounds because of a chronic back pain problem.
>
> She was also recently evaluated by orthopedic surgeons for the knee giving out on her, however, my objective evaluations have not shown any functional derangements, including instability problems or strength deficits or neurologic residuals,...
>
> ... it is still our opinion that Mary should not have any significant stress in her job.
>
> In referring to her job description, it is my opinion that she will not be able to handle hostile and unstable clients as this is especially frustrating to her because of her cognitive level of functioning. Her WAIS-R testing has identified impairment in planning, interpretation of social situations, visual sequencing, short-term auditory memory attention, concentration, verbal comprehension and long-term memory. These are skills that she would need to adequately do her job.
>
> Although it is not a severe involvement, when activities are time limited and requiring deadlines, this can cause frustration and lead to further depression ... I do not feel that she will be able to carry out her current job in a long-term fashion and it is in the best interest of both the client and state that she be placed in a job that requires reduced cognitive demands.

This information from Dr. Vattakattcherry not only raised the issue of providing a less arduous position for appellant but also certainly could

have provided a starting point for a dialogue between respondent and appellant and Dr. Vattakattcherry regarding the availability of a less arduous position for appellant. However, the record does not show that respondent ever considered the option of placing appellant in another position. Respondent would have had to consider such option in order to satisfy the requirements of s. 230.37(2), Stats. The Commission concludes that, in failing to comply with the requirements of s. 230.37(2), Stats., respondent has failed to show that the action taken was authorized by applicable law and was not arbitrary and capricious and has failed, therefore, to show just cause for the action taken. Therefore, appellant is entitled to reinstatement with back pay and benefits, less appropriate mitigation, §230.43(4), Stats.

ORDER

Respondent's action terminating appellant from employment is rejected and this matter is remanded to respondent for action in accordance with this decision. The Commission will retain jurisdiction over this matter for the limited purpose of resolving any dispute over remedy, if the parties are unable to reach agreement as to the amounts involved.

Dated: _____, 1988 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

LRM:jmf
JMF08/3

_____
DONALD R. MURPHY, Commissioner

_____
GERALD F. HODDINOTT, Commissioner

Parties:

Mary L. Smith
4350 N. 53rd Street
Milwaukee, WI 53216

Patricia Goodrich
Secretary, DHSS
P. O. Box 7850
Madison, WI 53707