STATE OF WISCONSIN PERSONNEL COMMISSION

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RALPH JACOBSEN,

Appellant/
Complainant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 91-0220-PC
92-0001-PC-ER

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INTERIM
DECISION
AND
ORDER

This matter is before the Commission following the promulgation of a proposed decision by the hearing examiner pursuant to §227.46(2), Stats. Respondent has filed objections to the proposed decision and the Commission has heard oral argument and consulted with the hearing examiner.

This case involves an appeal and a handicap discrimination complaint by an employe who was removed from employment under the auspices of §230.37(2), Stats. He participated in two psychological evaluations required by his employer. The evaluators provided the opinion that appellant's personality characteristics contributed to his interpersonal difficulties at work, and that without treatment he could not return to work without becoming involved in more inappropriate interpersonal behavior. Following these evaluations, respondent informed appellant he could not return to work before getting counseling and treatment, and changed his employment status from suspension with pay to a form of indefinite suspension under which he ended up in a leave without pay status once he had exhausted his paid leave accounts. The proposed decision reached the conclusion that appellant's de facto suspension was without just cause under §230.37(2), Stats., not only because it is not a personnel transaction that is authorized under this subsection, but also because respondent failed to establish that appellant was "physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his ... position by reason of infirmities due to age, disabilities, or otherwise." The proposed decision also concluded that respondent discriminated against

appellant on the basis of a perceived handicap, and failed to establish an affirmative defense under §111.34(2)(a), Stats., because it did not establish that "the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment."

The Commission agrees substantially with the proposed decision findings of fact. However, certain findings which are implicit in the proposed decision should be set forth as explicit findings. The Commission disagrees with the proposed conclusion that respondent discriminated against complainant on the basis of a perceived handicap. While the Commission agrees with most of the analysis of the §230.44(1)(c), Stats., civil service appeal, it has some additional observations about the issues raised in this area, in part in response to respondent's objections to the proposed decision. Therefore, in the interest of clarity, the Commission will issue a new decision which will incorporate parts of the proposed decision.

FINDINGS OF FACT

1. Appellant was employed by respondent from 1986 until the indefinite suspension of his employment in 1991. Appellant was employed by the Wisconsin Council on Developmental Disabilities (WCDD) in the Department of Health and Social Services (DHSS) with permanent status in class in a position classified as Management Information Specialist 3 (MIS 3). This position was unrepresented — i.e., it was not in a collective bargaining unit for which a representative was certified or with respect to which a collective bargaining agreement existed.

2. Appellant's work performance at WCDD was good with respect to the performance of his assigned tasks. He had some shortcomings with respect to interpersonal relationships which will be discussed below. Appellant's most recent formal evaluation dated June 22, 1991 (Appellant's Exhibit 1C) reflects an overall evaluation of "Exceeds Expectations."

3. During the period of his employment at WCDD, appellant was involved in a practice of listening to his radio in his office, and engaging other employes at work in conversations concerning current events, frequently in connection with news items he had heard on the radio, such as the Persian Gulf war and the Clarence Thomas confirmation hearings.

4. While some of these conversations were willingly engaged in by the other employes, over the course of time most of the employes involved became uncomfortable with these conversations, which were usually initiated by appellant. The other employes were concerned in part because these conversations became more frequent and kept them from their work. They also were concerned because appellant was very didactic in his views and very assertive in expressing himself. Many of the employes felt intimidated by appellant due to his demeanor and his large physical size, although he never made any threats. Appellant also had some positive interpersonal contacts with employes during his employment with WCDD, although by the time of his suspension the attitude of the staff toward appellant predominantly was negative, and ranged from fear to annoyance. Appellant's activities in this area became more frequent and intense in the period of approximately several months prior to his suspension.

5. During his employment at WCDD, appellant never was formally disciplined. He did receive some informal counseling regarding his interpersonal behavior.

6. On Friday morning, October 11, 1991, appellant approached Jackie Wood, another WCDD employe, three times and attempted to engage her in a conversation concerning the Clarence Thomas confirmation hearings, even though she evidenced that she did not want to get involved in this discussion by completely refusing to respond to him. After the third time, she complained to Steve Stanek, appellant's immediate supervisor. He called appellant into his office and directed him to stop interfering with other people's work and to turn off his radio. Appellant complied, but returned Stanek's office a few minutes later with a document he had prepared for Stanek. Appellant tossed this on Stanek's desk and said he considered it harassment that he wasn't allowed to have his radio on while other employes could. Stanek was apprehensive, at least in part because of appellant's agitated, aggressive demeanor.

7. Stanek proceeded to discuss the situation with his immediate supervisor, Jayn Wittenmyer, WCDD Executive Director. After a discussion which also involved representatives from DHSS personnel, the decision was reached to send appellant home on pay status until a psychiatric evaluation could be done. This action was reflected in a letter to appellant dated October 16, 1991,

from Eloise Anderson, Administrator of the Division of Community Services (Appellant's Exhibit 9):

> Several recent situations have taken place so that we are concerned about the safety of Wisconsin Council on Developmental Disabilities employees. Under 230.37(2) we are mandating that you obtain a medical assessment to evaluate your suitability for employment. Examples of unacceptable behavior in the work place that caused us to schedule this medical assessment are as follows:
>
> 1. On Wednesday, September 25, 1991, you came into Jayn Wittenmyer's office at 2:00 p.m. to see what was happening following a verbal confrontation that you had had with another Council staff person on September 20, 1991. During this meeting with Jayn Wittenmyer, you informed her that you had intended to scare the other staff person into getting some mailing list information completed. You also mentioned that you had lost your temper during this confrontation.
>
> 2. Also during the week of September 23, 1991, during a meeting with Steve Stanek about the September 20 incident, you asked for permission (which was denied) to bring in a tape recorder and/or video camera to record the actions and conversations of other people in the office, because you felt that you were being discriminated against and treated unfairly.
>
> 3. On Tuesday, October 8, 1991, you came into Steve Stanek's office to further discuss the September 20 incident and follow-up to the incident (which you felt was "festering"). During this meeting, you reiterated that, on September 20, you had said some things that should not have been said. You also said that you did not want the incident (and the resolution of the incident) to continue to fester, because you did have a bad temper and you didn't know what might happen if this were to be allowed to fester too long.
>
> 4. On Wednesday, October 9, 1991, Marji Contrucci observed you approaching a particular staff person eighteen times during a half-hour period to engage that person in non-work-related conversation. Despite the other person's repeated attempts to let you know that they didn't want to get involved in such a conversation, you persisted again and again.
>
> 5. At 10:00 a.m. on Friday, October 11, 1991, Steve Stanek received a report from another staff person that you had approached that person three times already that morning to converse about news that you had been listening to on the radio (i.e., the Senate Thomas Hearings). Despite that per-

> son's overt attempts to avoid this conversation, you persisted to the point where the other staff person was clearly emotionally affected (e.g., close to tears). Steve Stanek called you into his office and directed you to (a) stop interfering with other people's work and (b) stop listening to the radio during work hours. A few minutes later, you returned to Steve Stanek's office in an agitated state and brusquely said that prohibiting him from listening to the radio constituted harassment.
>
> We have scheduled your medical assessment with Dr. Eric Hummel on Friday, October 18, 1991....
>
> The Department of Health and Social Services will pay for this assessment.
>
> It will be necessary for you to sign a release that will available at the doctor's office on Friday. You will continue to be in pay status until the results of the medical assessment are completed.

The factual assertions in this letter are essentially accurate.

8. Appellant met with Dr. Hummel (a licensed clinical psychologist) as scheduled, and signed the release form referred to in the foregoing letter.

9. Dr. Hummel conducted a standard psychological evaluation of appellant. He concluded that appellant's psychological status was within the normal range, but that he had certain personality characteristics, such as argumentativeness and manipulativeness, that contributed to the problems at work that had motivated respondent's action of removing appellant from the workplace and having him evaluated. He also decided that there was no basis upon which to conclude that appellant was physically dangerous. However, he also concluded that due to his personality characteristics and his reactions to the situation at work, he would not be able to interact with others in a non-inflammatory way.

10. Dr. Hummel reported his findings to respondent in letters dated October 28, 1991 (Respondent's Exhibit 3) and an addendum November 8, 1991 (Respondent's Exhibit 4), which included the following:

> RESULTS OF PSYCHOLOGICAL INVENTORIES
>
> Mr. Jacobsen completed the Multiphasic Personality Inventory-2 (MMPI-2), an instrument designed to be descriptive about one's personality characteristics. Mr. Jacobsen's responses resulted in a profile that is within relatively normal limits, suggesting that most of his difficulties are not as prominent as in psychiatric patients. However, several personality characteris-

tics were noted, such as an irritability, argumentativeness, and a tendency to transfer blame to others. All of these characteristics may result in difficulties with others from time to time. Mr. Jacobsen may also tend to manipulate others for his own advantage and interpersonal situations.

* * *

Mr. Jacobsen's Multidimensional Anger Inventory indicated no unusual characteristics in regard to the duration or intensity of his anger or for situations that may elicit anger in him. He does not perceive himself as a hostile individual nor do his stated values make him inherently susceptible to violence or jealousy.

* * *

SUMMARY

Mr. Ralph Jacobsen is a 44 year-old Caucasian male, who has been a Management Information Specialist 2 for several years with the Wisconsin Council of Developmental Disabilities. Recently he has alleged to be a participant in several matters in the office in which he has reported to have displayed anger, been intimidating, and has essentially bothered other employees. Mr. Jacobsen has ingrained personality characteristics such as irritability, argumentativeness, and a pattern of allaying blame to others which can result in problematic work relationships from time to time. He also displays tendencies toward manipulating others for his own advantage. This will give rise to work relationship difficulties from time to time, particularly in situations where Mr. Jacobsen perceives himself to be in charge or more knowledgeable than others or when he is supervised by others and asked to conform to methods or standards of behavior with which he does not agree. There is little evidence to suggest he has a significant problem controlling his anger in such a manner that would lead to aggressive behavior toward others.

* * *

I do not at this time consider Mr. Jacobsen physically dangerous to the welfare of others. He is an individual of closely held beliefs and a limited ability to maintain cooperative working relationships with individuals whom he perceives are either above or below him in regard to management or supervision of tasks. He appears to be a hard worker who has a relatively good work history when it comes to performing the procedural components of his responsibilities.

It is unclear to me whether or not Mr. Jacobsen can return to the Wisconsin Council on Developmental Disabilities and work in a colleague [sic] fashion with other employees and accept supervision. I would want to have an opportunity to talk with the

people in the supervisory role prior to forming an opinion on the matter. Mr. Jacobsen could, however, benefit from psychological counseling or intervention in regard to his work relationships, including his ability to react and respond to the cues and comments people are giving him, the management of conflict situations, and to attempt to generally enhance his social skills. Mr. Jacobsen left a strong impression that he does not need such assistance, however, improvement in these areas are necessary if he is expected to have an improved work record in regard to his ability to function with other employees. (Respondent's Exhibit 3)

* * *

I met with Ms. Muriel Harper, Ms. Jayn Wittenmyer, and Mr. Steve Stanek in my office on November 6, 1991, to discuss specific questions generated as a result of my independent evaluation. The following were the questions and my responses:

1. Can Mr. Jacobsen return to work as a "team player" who can show cooperation, respect, and dignity to others without instilling fear?

   It is my opinion that at this time, Mr. Jacobsen cannot return to work and conduct himself in a cooperative, respectful manner toward his co-workers and do so without experiencing significant anger and frustration, which will impede the flow of work and emotionally affect others. Ms. Wittenmyer reported she had had a conversation with Mr. Jacobsen over the telephone within the last week, were he sounded "agitated" and "lashed out" at Ms. Wittenmyer. He apparently verbalized significant irritation and agitation at her. Ms. Wittenmyer said that Mr. Jacobsen ostensibly "put all the blame" on her for what has transpired in September and October of this year. She also reported a later conversation with Mr. Jacobsen where he sounded significantly more calm.

   I am also aware that at least three, if not four, coworkers of Mr. Jacobsen have continued to express feeling emotionally upset and very concerned about his returning to work. They continue to feel intimidated by what has transpired and furthermore, expressed concern about their welfare.

* * *

3. Does treatment need to take place before Mr. Jacobsen returns to work?

> Yes. It is my opinion that Mr. Jacobsen should avail himself for psychological treatment specifically related to his management of conflict, his ability to control anger, and to gain an understanding of additional factors in his personal life which may be impinging on his ability to interact with others at work in a cooperative, respectful, and non-threatening manner. It is my opinion that Mr. Jacobsen needs to begin a treatment process and make improvement in these areas prior to returning to work. (Respondent's Exhibit 4)

11. Ms. Wittenmyer consulted with Dr. Hummel on November 6, 1991. Later that day she informed appellant that he could not return to work before getting counseling and treatment, and that as of November 7, 1991, he would not longer be in regular pay status but would have to utilize sick leave or other leave if he wanted to continue to be paid.

12. Appellant also met with Dr. Peter Weiss, a licensed clinical psychologist of his own choosing, on November 22, 1991, and twice thereafter. His diagnosis was that appellant was within normal limits although angry and upset, and he also concluded that appellant did not pose a threat to himself or others, and that there was no reason why he could not return to the workplace as far as his mental condition was concerned.

13. Dr. Weiss spoke to Ms. Wittenmyer on November 22, 1991, and advised her essentially of his conclusions set forth above.

14. In response to Ms. Wittenmyer's request for a written evaluation of Mr. Jacobsen, he sent her a letter dated November 26, 1991 (Respondent's Exhibit 5), in which Dr. Weiss expressed the opinion that "I can see no reason why he cannot return to work," and that further treatment would be provided by Darald Hanusa, MSSW, but did not expressly address whether appellant posed a threat of physical harm.

15. Complainant had been referred to Mr. Hanusa, a specialist in the treatment of anger, by Dr. Hummel. Mr. Hanusa assessed appellant for a total of six hours during the period November 26, 1991, until December 11, 1991. Mr. Hanusa concluded that appellant did not have a "psychiatric syndrome" but did have "interpersonal behavioral difficulties" which created difficulties in the work environment and needed treatment to change.

16. In a December 11, 1991, memo to Ms. Wittenmyer from Mr. Hanusa (Respondent's Exhibit 6), he stated that it appeared that appellant "could ben-

efit from treatment focused on interpersonal relationships, anger and hostility in the workplace." The memo further stated that appellant's "motivation to make personal changes and deal with his interpersonal anger and hostility appears suspect." Mr. Hanusa went on to state, however, that since appellant had made some initial acknowledgements of his problems and had "indicated a willingness to change," Mr. Hanusa was recommending that appellant become involved in a 24 session treatment regimen, during which he would be allowed to return to work with his progress monitored.

17. Appellant met with Mr. Hanusa on December 13, 1991. He became angry with Mr. Hanusa and refused to sign a treatment contract, and they mutually agreed to cease their relationship. In a December 13, 1991, memo to Ms. Wittenmyer (Respondent's Exhibit 7), Mr. Hanusa recounted this and further stated:

> During the treatment process I had recommended that Mr. Jacobsen be allowed to return to work. Today's events, no doubt, put that arrangement in jeopardy. I have recommended that Mr. Jacobsen seek out counseling with Dr. Peter Weiss and Group Health Cooperative, in whom he has expressed an interest.

18. In a December 28, 1991, letter from Dr. Weiss to Ms. Wittenmyer (Appellant's Exhibit 7), he stated as follows:

> This is additional information about Mr. Jacobsen. He will continue in treatment with me for an unspecified period & during which time addressing his work conflicts. I saw him on November 22, 1992 & will be seeing him again on January 6, 1992.

19. Mr. Wittenmyer believed that Dr. Weiss's letters never adequately addressed the question of appellant's potential danger if he returned to the workplace, and neither set forth an adequate treatment plan nor included (as she had previously requested) a release from appellant to permit Dr. Weiss to send her a copy of the treatment plan.

20. As a result of the aforesaid dissolution of the treatment program with Mr. Hanusa, and respondent's opinion that Dr. Weiss had not provided an adequate report on appellant's status, respondent has not allowed appellant to return to work.

21. Appellant has used up all of his available leave time and it is presumed and found that he has been on some kind of leave without pay status since then.

22. The psychological diagnosis of appellant, concurred in by Dr. Hummel and Mr. Hanusa, of within normal limits, with ingrained personality characteristics of irritability, argumentativeness and a tendency to transfer blame to others, is essentially correct.

23. Appellant's psychological condition, as aforesaid, did not make him "physically or mentally incapable or unfit for the efficient and effective performance of the duties of his ... position," §230.37(2), Stats.

CONCLUSIONS OF LAW

91-0220-PC

1. This matter is properly before the Commission pursuant to §230.44(1)(c), Stats.

2. Respondent has the burden of proof and must establish it had just cause under §230.37(2), Stats. for appellant's indefinite suspension.

3. Respondent has failed to sustain its burden

4. There was not just cause for appellant's indefinite suspension and respondent violated §230.37(2), Stats.

92-0001-PC-ER

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden of proof to establish that respondent suspended him because of a perceived handicap in violation of the Fair Employment Act.

3. Complainant has not sustained his burden.

4. Respondent did not suspend complainant from employment because of a perceived handicap in violation of the Fair Employment Act.

DISCUSSION

91-0220-PC

The stipulated issues for hearing with respect to this case are:

> 1) Whether the subject personnel transaction was a suspension within the meaning of §230.44(1)(c), Stats.
> 2) If so, whether there was just cause for this action.
> 3) Whether, in regard to the subject personnel transaction, respondent violated §230.37(2), Stats. Conference report dated February 6, 1992.

Section 230.44(1)(c), Stats., does not define the term "suspension," nor is it otherwise defined in the civil service code (Subchapter II, Chapter 230, Stats., and rules issued thereunder). The thrust of respondent's argument that what occurred in this case was not a suspension is that the process involved was not comparable to that followed in what might be characterized as a "typical" suspension. However, the fact that the employe did not follow a certain process is far less significant than the effect of the transaction in question on the employe's employment status, which is the focus of the available definitional material.

The Wisconsin Supreme Court in State ex rel Wendling v. Board of Police and Fire Commissioners, 159 Wis. 295, 297 (1915), characterized a suspension as an "ad interim stoppage or arrest of official power and pay." Black's Law Dictionary 1616 (Fourth Revised Edition 1968), defines "suspension" as: [t]o cause a temporary cessation, as of work by an employe." Webster's Third New International Dictionary 2303 (3d Ed. 1981), defines "suspension" as: "temporary forced withdrawal from the exercise of office, powers, prerogatives, privileges." In this case, once appellant was removed from normal pay status effective November 7, 1991, he in effect was suspended from employment. He was no longer allowed to work and to earn a salary, but his employment was not terminated.

Respondent acted against appellant under the auspices of §230.37(2), Stats., and in order to determine whether there was just cause for the action taken, it must be determined whether respondent's action was proper under the standards set forth in §230.37(2), Stats., see Smith v. DHSS, 88-0063-PC (2/9/89). Section 230.37(2), Stats., provides:

> (2) When an employe 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 employe to a position which requires less arduous duties, if necessary demote the employe, place the employe on a part-time service basis and at a part-time rate of pay or as a last

> resort, dismiss the employe from the service. The appointing authority may require the employe 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 employe may otherwise be eligible.

Initially, it should be noted that §230.37(2), Stats., makes no provision for an indefinite suspension such as was imposed here. Under this subsection, the employer's options, once it has been determined that the employe is "incapable or unfit for the efficient effective performance of the duties of his or her position, by reason of infirmities due to age, disabilities or otherwise," are either to transfer, to demote, to reduce to part-time status, or, as a last resort, to dismiss from state service. Therefore, while respondent's action of suspending appellant from pay status was less onerous and more favorable to appellant than outright dismissal, it was not an option permitted by §230.37(2), Stats.

Respondent's decision also fails to satisfy the requirements of §230.37(2), Stats., on another basis. A prerequisite to action under this subsection is that the employe be "physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position by reasons of infirmities due to age, disabilities, or otherwise." This entails three elements. The employe must have "infirmities due to age, disabilities, or otherwise," the employe must be "physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position," and this incapability or unfitness must be "by reason of" — i.e., caused by — the infirmities.

With respect to the first element, the proposed decision concluded that the employe had to have a condition "akin to a disability," or a serious condition that in itself rendered the employe unfit, and that appellant's "personality characteristics" did not fit within this category of conditions. In its objections to the proposed decision, respondent contends that "[a]pplication of 'esjusdem generis,' or the precise version of 'noscitur a sociis' requires that 'otherwise' be defined or limited in terms of a class defined by the enumeration of 'age' and 'disabilities.'" The Commission agrees with this proposition, but respondent goes on to argue that.

> These words [age and disabilities] do not define a class in terms of "seriousness" of incapacity or imply or connote a minimal level of debilitation .... there is no objective test to determine what degree of seriousness would define the class.
>
> The class defined by "age" and "disabilities" should be restricted only insofar as limiting "infirmities" [to] a condition which is caused by a dynamic internal to the employe rather than the work environment. "Infirmity," defined as unsound, unhealthy or debilitated state, and imperfection or weakness, in Webster's New International Dictionary of the English Language (1936), could include conditions resulting from environmental or situational factors. The clause "due to age, disability or other" restricts this to weaknesses with a cause internal to the individual.

The Commission agrees with respondent up to a certain point. To the extent that the proposed decision could be interpreted as limiting the application of the statute based on the relative degree of seriousness of the particular condition involved, this would not be warranted by the statutory language. For example, if an employe had a very mild form of arthritis which nonetheless prevented the employe from being able to perform effectively the particular tasks of his or her job, this situation should be covered under the terms of the statute. However, the Commission does not agree with the remainder of respondent's position — i.e., that the "class defined by 'age' and 'disabilities' should be restricted only insofar as limiting 'infirmities' [to] a condition which is caused by a dynamic internal to the employe rather than the work environment." While it is no doubt correct, as respondent contends, that the language in §230.37(2), Stats., "due to age, disability, or otherwise" limits the word "infirmities" to conditions "internal or the individual," it does not follow from this or from anything else that any condition internal to the individual which causes an inability to adequately perform satisfies the requirement of §230.37(2), Stats , that the employe's inability be "by reason of infirmities due to age, disabilities, or otherwise." The term "infirmity" is defined as "an unsound, unhealthy, or debilitated state." Webster's New International Dictionary 1159 (1981). The term "disability" is defined as: "deprivation or lack esp. of physical, intellectual or emotional capacity or fitness ... the inability to pursue an occupation or perform services for wages because of physical or mental impairment." Id. at 642. These terms define a more limited category of conditions than, as respondent contends, any situation where: "the employe is incapable due to conditions internal to himself or herself, of controlling or changing unacceptable job-related behavior." Objections to pro-

posed decision, 17. An employe may become unable to perform effectively for reasons which are internal to the employe and over which the employe has no control, but which by no stretch of the imagination could be characterized as being caused by "infirmities due to age, disabilities or otherwise." For example, an employe simply may lack the manual dexterity or intelligence to be able to cope with changes in the duties of his or her position. Another example which certainly does not fall within this statutory categorization set forth in §230.37(2) would be an employe who is too short to handle new duties assigned to a position. Cf. American Motors Corp. v. LIRC, 119 Wis. 2d 706, 350 N.W. 2d 120 (1984) (short stature not Wisconsin Fair Employment Act handicap).[1]

In the Commission's opinion, it is unnecessary to attempt to restate the statutory formulation contained in §230.37(2), as the proposed decision apparently did. The question that needs to be addressed is whether appellant's mental condition falls within the commonly accepted meaning of the term "infirmities due to age, disabilities or otherwise." Appellant's "ingrained personality characteristics" simply do not fall within the meanings of "infirmity": "an unsound, unhealthy, or debilitated state." Webster's Third New International Dictionary 1159 (1981); or "disability": "deprivation or lack esp. of physical, intellectual or emotional capacity or fitness ... the inability to pursue an occupation or perform services for wages because of physical or mental impairment." id. at 642. See Daley v. Koch, 892 F. 2d 212, 214, 51 FEP Cases 1077, 1078 (2d Cir., 1989) ("Appellant's personality traits [poor judgment, irresponsible behavior and poor impulse control, in the absence of a diagnosis of a particular psychological disease or mental disorder] could be described as commonplace; they in no way rise to the level of an impairment.") This conclusion is supported by policy considerations.

The civil service code provides two different approaches to issues of employe misconduct or inadequate performance. An appointing authority can, pursuant to §230.34(1)(a), Stats., take disciplinary action, which can include discharge, against an employe manifesting these problems, on the basis

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[1] By analogizing to a case decided under the WFEA, the Commission is not attempting to equate the scope of that law with that of §230.37(2), Stats. However, it is at least instructive to compare the situation in the instant case to the Supreme Court's application of the concept of handicap, defined as "a physical or mental disability that makes achievement unusually difficult or limits the capacity to work," 119 Wis. 2d at 712, in American Motors.

of a "just cause" standard. See Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974). However, if the employe's problems are attributable to "infirmities due to age, disabilities or otherwise" which render the employe "physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position," §230.37(2), Stats., he or she is still subject to a type of discipline, but in some respects is afforded more protection than is provided under §230.34(1)(a), Stats. The employe may be dismissed from the civil service pursuant to §230.37(2) only as a "last resort" if the less onerous options are not feasible.

An interpretation of §230.37(2), which would permit employes with personality characteristics like appellant's[2] which could be shown to be causal with respect to their performance or conduct problems, to be entitled to the statute's relative leniency has the potential to significantly impair the employer's disciplinary authority. On the other hand, as is observed in the proposed decision, extension of §230.37(2)'s coverage to these kinds of personality characteristics carries the possibility of potential abuse by the employer under certain circumstances.

In Daley v. Koch, 892 F. 2d 212, 215, 51 FEP Cases 1077, 1079 (2d Cir. 1989), the Court observed: "Appellant's personality traits [of poor judgment, irresponsible behavior and poor impulse control without a diagnosis of a particular psychological disease or disorder] could be described as commonplace." The same undoubtedly could be said of appellant's personality traits in this case. There are many other rather commonplace personality characteristics that impede the success of many employes. On the basis of respondent's interpretation of §230.37(2), Stats., and under the right circumstances, such employes would be subject to being removed from the workplace and even discharged for behavior that normally would involve relatively minor discipline under a progressive discipline process. On the other hand, an employe may manifest extremely problematical performance problems that have not been corrected after extensive efforts by the employer, yet could argue that he or she is entitled to the less severe options short of discharge, under §230.37(2), Stats., based on a showing that his or her ingrained personality characteristics are the cause of the problematic behavior. For example, an employe may be

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2 "[I]rritability, argumentativeness, and a pattern of allaying blame to others." (Respondent's Exhibit 3)

performing inadequately due to a tendency to procrastination. If this tendency could be attributed to ingrained personality characteristics, conceivably the employing agency could be prevented from a normal course of progressive discipline against that employe.

Even if the Commission were to accept respondent's interpretation of §230.37(2), Stats., respondent would not have established just cause under §230.37(2), Stats., because respondent has not sustained its burden of establishing that appellant's ingrained personality characteristics have caused him to be "physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position," §230.37(2), Stats. In the opinion of Dr. Hummel, a clinical psychologist, appellant's "ingrained personality characteristics such as irritability, argumentativeness, and a pattern of allaying blame to others ... can result in problematic work relationships from time to time." (emphasis added) (Respondent's Exhibit 3). After conferring with management, Dr. Hummel went on to say:

> It is my opinion that at this time, Mr. Jacobsen cannot return to work and conduct himself in a cooperative, respectful manner toward his co-workers and do so without experiencing significant anger and frustration, which will impede the flow of work and emotionally affect others. Ms. Wittenmyer reported she had had a conversation with Mr. Jacobsen over the telephone within the last week, where he sounded "agitated" and "lashed out" at Ms. Wittenmyer. He apparently verbalized significant irritation and agitation at her. Ms. Wittenmyer said that Mr. Jacobsen ostensibly "put all the blame" on her for what has transpired in September and October of this year. She also reported a later conversation with Mr. Jacobsen where he sounded significantly more calm.
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> 3. Does treatment need to take place before Mr. Jacobsen returns to work?
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> Yes. It is my opinion that Mr. Jacobsen should avail himself for psychological treatment specifically related to his management of conflict, his ability to control anger, and to gain an understanding of additional factors in his personal life which may be impinging on his ability to interact with others at work in a cooperative, respectful, and non-threatening manner. It is my opinion that Mr. Jacobsen needs to begin a treatment process and

> make improvement in these areas prior to returning to work. (Respondent's Exhibit 4)

This opinion, which is based in part on appellant's actual interactions with other staff, is not an opinion that appellant was incapable per se of controlling his behavior. It cannot be determined from Dr. Hummel's opinion the extent that appellant's behavior was attributable to volitional factors which he conceivably could have changed if he were sufficiently motivated.

Mr. Hanusa's testimony was very similar to Dr. Hummel's. Mr. Hanusa testified that his diagnosis of appellant was the same as Dr. Hummel's, and he also testified as follows:

> I think he [appellant] has difficulty with anger, I think he has interpersonal behavioral difficulties which put him into a position to come across in a way that's hostile and irritable and puts a strain on working relationships ... I wouldn't say there's a psychiatric syndrome in play here, but there certainly are behavioral features that are causing him some difficulty.

Mr. Hanusa testified as follows concerning his proposed treatment for appellant's "interpersonal behavioral difficulties."

> I don't think Mr. Jacobsen had an opportunity throughout his lifetime, given his family background and his social learning history, to learn how to deal with conflict in a real effective way. Without that kind of training, I think it's probably going to the kind of thing where he's going to repeat some of the same behavior. That's why I elected this particular kind of approach for him, because it really helps him learn some more constructive ways to deal with conflict, interpersonally.

Furthermore, neither witness addressed the fact that, notwithstanding appellant's ingrained personality characteristics, his interpersonal behavior had been within the parameters of respondent's expectations until a relatively short period before this suspension.

In conclusion, since respondent did not establish either that appellant had a condition that is covered by §230.37(2), or that the condition caused his work place difficulties, it failed to establish just cause under these criteria.

Turning to the discrimination claim, in La Crosse Police Comm. v. LIRC, 139 Wis. 2d 740, 761, 407 N.W. 2d 510 (1987), the Supreme Court held that there is a two step process of analysis involved in the determination of whether a handicap has been established:

> 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 such 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.

Thus, the first step in the process is to determine whether there is a real or perceived impairment. If so, it must be determined whether the actual or perceived impairment makes, or is perceived to make, "achievement unusually difficult or limits the capacity to work." §111.32(8)(a), Stats.

With respect to the first step, the Court held that "the element of 'impairment' is satisfied by showing either an actual lessening, deterioration or damage to a normal bodily function or bodily condition which makes achievement unusually difficult or limits the capacity to work ... or by showing that the condition perceived by the employer would constitute an actual impairment if it in fact existed." 139 Wis. 2d at 760. In the Commission's opinion, the kind of problematic personality characteristics found in a person such as complainant whose mental status otherwise is considered within the normal range would not fall within these parameters.

In American Motors Corp. v. LIRC, 119 Wis. 2d 706, 713-714, 350 N.W. 2d 120 (1984), the Supreme Court held that a complainant who was four feet, ten inches tall and who was not hired because of her height, was not handicapped:

> These definitions indicate that a "handicap" is an injury, deterioration or lessening that could impede a person's normal functioning in some manner and preclude the full and normal use of one's sensory, mental or physical faculties. Thus, a handicap within the meaning of the Act is a physical or mental condition that imposes limitations on a person's ability to achieve and capacity to work beyond the normal limitations that might render a person unable to make certain achievements or perform every possible job. All persons, given their individual characteristics and capabilities, have inherent limitations on their general ability to achieve or to perform certain jobs. All persons have some mental or physical deviations from the norm However, such inherent limitations or deviations from the norm do not automati-

> cally constitute handicaps. A handicap is a mental or physical *disability or impairment* that a person has in addition to his or her normal limitations that makes achievement not merely difficult but *unusually* difficult, or that limits the capacity to work.

It may also be said that every person has a particular set of personality characteristics, some of which help and some of which hinder that person in life's endeavors, including the workplace. A person who has certain problematical personality characteristics, but whose psychiatric diagnosis is "well within the normal range" (testimony of Dr. Hummel) does not appear to fit within the concept of a handicapped individual envisioned by the Supreme Court in American Motors Corp. Another case from a different jurisdiction adds support to this conclusion. Daley v. Koch, 51 FEP Cases 1077, 892 F.2d 212 (2d Cir. 1989), involved a claim under the Rehabilitation Act of 1973, which defines a handicapped person as one who:

> (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. 706 (8) (B) (Supp. V 1987). The plaintiff had been rejected for employment by the New York City Police Department after a psychological screening reached the conclusion that he:

> [S]howed "poor judgment, irresponsible behavior and poor impulse control" which rendered plaintiff "unsuitable to be a police officer." Plaintiff was not diagnosed as having any particular psychological disease or disorder.
>
> In a subsequent review of [plaintiff's] file and Dr. Udanis' report, the Coordinator of the Psychological Services Testing Program agreed with the doctor that appellant had "significant personality traits" that would prevent him from effectively functioning as a police officer.

51 FEP Cases at 1078, 892 F.2d at 214 (emphasis supplied). The Court held:

> In *Forrisi*, the Court of Appeals for the Fourth Circuit noted that the Rehabilitation Act was intended to protect the disabled from discrimination in employment and stated that:
>
> > [i]t would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and

> whose relative severity of impairment was widely shared. Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage in his or her search for satisfactory employment.

794 F.2d at 934 (citation omitted). Appellant's personality traits could be described as commonplace; they in no way rise to the level of an impairment.

> This Court holds that "poor judgment, irresponsible behavior and poor impulse control" do not amount to a mental condition that Congress intended to be considered an impairment which substantially limits a major life activity and therefore a person having those traits or perceived as having those traits cannot be considered a handicapped person within the meaning of the Act.

51 FEP Cases at 1079, 892 F.2d at 215. The meaning of the term "mental impairment" under the Rehabilitation Act of 1973 is illuminated by a federal regulation which provides the definition of: "'any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.' 45 C.F.R. §84.3(j)(2)(i)(B) (1988)." id. However, the general thrust of the Court's holding, which focuses on the commonplace nature of the personality traits involved, is consistent with the Wisconsin precedent established in American Motors and LaCrosse Police and Fire Commission.

The proposed decision concluded, however, that complainant established a perceived handicap under the LaCrosse Police Commission test:

> Respondent perceived (incorrectly) that complainant fell within the coverage of §230.37(2), Stats., which means respondent concluded he was "mentally incapable of or unfit for the efficient and effective performance of the duties of his ... position by reason of infirmities due to age, disabilities, or otherwise." Such a perceived incapacitating infirmity meets the court's definition of a "perceived lessening or deterioration or damage to a normal bodily function or bodily condition." Since respondent concluded that complainant's mental condition made him "incapable of or unfit for the efficient and effective performance of the duties of his or her position," this obviously satisfies the second element of a perception that the perceived handicap makes "achievement unusually difficult or limits the capacity to work."

This approach is flawed because it relies on the general language found in a civil service statute (§230.37(2)) under which respondent sought to justify its actions, to supply the first criterion — the existence of a perceived handicap.

That is, since respondent obviously had reached the conclusion for purposes of §230.37(2), Stats., that appellant had an incapacitating "infirmity," the proposed decision reasons that this means respondent perceived a "lessening or deterioration or damage to a normal bodily function or bodily condition," 139 Wis. 2d at 760. However, it does not follow that because respondent contends that appellant's condition would satisfy the criteria in §230.37(2), Stats., that the condition would constitute a perceived handicap in the sense, set forth in La Crosse Police Commission, "that the condition perceived by the employer would constitute an actual impairment if it in fact did exist." 139 Wis. 2d at 760. (emphasis added) This requires a focus on the factual nature of the perceived condition itself, not on the legal implications respondent attempted to attach to the condition in attempting to justify its actions in the context of another statute. Appellant's "condition" consisted of certain personality characteristics that were part of his psychological makeup that was within normal limits. From a factual standpoint, respondent's perception of this condition was not different from his actual condition. Since, as discussed above, the proposed decision correctly concluded that appellant's personality characteristics do not fall within the meaning of the term "impairment," there is neither an actual nor a perceived handicap. This absence is not remedied by the fact that respondent contends, for §230.37(2), Stats., purposes, that appellant's condition is an "infirmit[y] due to age, disabilities, or otherwise" which renders him "physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his ... position."

This point is illustrated to a certain extent by a comparison of these facts to those found in La Crosse Police Commission. In that case, the employer perceived that the employe had a weak back based on its evaluation of his score on a "Cybex" machine test. The record demonstrated that the Cybex machine was not a reliable indicator. The Court held:

> 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. 139 Wis. 2d at 763. (emphasis added)

Here, the employer did not perceive a nonexistent condition that would have constituted an impairment if it did exist, but rather perceived that a condition that did not constitute an impairment was interfering with appellant's capacity to function appropriately in the workplace. An example of a perceived handicap in the instant case would have been a perception by respondent that appellant actually had a mental disease.

Since appellant failed to establish the existence of a real or perceived handicap, his WFEA claim of handicap discrimination must be dismissed.

Dicta

In order to allay possible concerns about the ability of an agency to deal with troublesome employes and because this decision requires appellant's restoration to his employment at WCDD, the Commission makes a number of points as dicta. It should be obvious that an agency does not have to put up with an employe who listens to his radio all day, and wanders around the office repeatedly attempting to engage other employes in conversations about current events, while behaving in a querulous, intimidating manner. Such behavior clearly provides a basis for just cause for disciplinary action under the test enunciated in Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974). However, rather than proceeding under more conventional disciplinary procedures, in this case respondent chose to invoke §230.37(2), Stats. If the diagnosis of appellant had involved a psychological condition that had met the requirements of §230.37(2), Stats., respondent presumably could have proceeded under that subsection to have transferred or demoted appellant, placed him on part-time status, or discharged him. However, respondent took an action (indefinite suspension) that was not authorized by §230.37(2), Stats., on the basis of a condition (appellant's personality characteristics) that does not satisfy the criteria set forth in that subsection. Therefore, although it appears that respondent's actions were in good faith and motivated both by a genuine concern about what had been happening in the workplace and by the very real fears of appellant's coemployes, it unfortunately proceeded along a course of action that was not authorized by the civil service code.

Finally, to the extent this has not already been made obvious, the Commission suggests that complainant not interpret this decision as in any

way a condonation of his behavior in the workplace, but that he attempt to correct his behavioral problems in a cooperative effort with management.

ORDER

Respondent's action suspending appellant from employment is rejected and this matter is remanded for action in accordance with this decision. Appellant is entitled to restoration with back pay and benefits, less mitigation.

The Commission rejects the proposed order's requirement for the payment of reasonable attorney's fees. This part of the proposed order was based on the incorrect conclusion that appellant had prevailed on his WFEA discrimination complaint. However, appellant will have the opportunity to petition for attorney's fees pursuant to §227.485(5), Stats. Therefore, pursuant to §227.485(5), appellant has 30 days from the date of this interim decision either to petition for costs or to advise in writing that his previously filed petition shall stand as his petition under §227.485, and respondent will have 15 working days from receipt thereof in which to respond.

Dated: October 16, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:rcr:gdt

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner