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JAMES K. KRUEGER,
 Complainant,

v.

Secretary, DEPARTMENT OF HEALTH
 and SOCIAL SERVICES¹,
 Respondent.

Case No. 92-0068-PC-ER

* * * * *

DECISION
 AND
 ORDER

A proposed decision and order (PDO) was mailed to the parties on April 15, 1996, and the parties were given opportunity to file objections. Mr. Krueger requested oral argument by letter dated May 13, 1996, which was received by the Commission on May 15, 1996. In the same letter he indicated that his address during the months of May, June and July was: c/o Glenn Steblow, W7221, Hwy 000, Fond du Lac, WI 54935. The Commission sent the parties a letter dated June 14, 1996, which scheduled oral arguments for July 17, 1996. Mr. Krueger's copy of the letter was sent to the Fond du Lac address noted in his letter of May 13th. Mr. Krueger did not appear for the scheduled oral argument.

The Commission considered the matters raised in Mr. Krueger's letter of May 13, 1996, and consulted with the hearing examiner. The proposed decision and order failed to recognize that the Commission's jurisdiction for constructive discharge claims under s. 230.44(1)(c), Stats., is superseded by the collective bargaining agreement for positions covered by a collective bargaining agreement. The following changes are made to correct the legal analysis.

¹ Effective 7/1/96, the DVR function of DHSS was transferred to the Department of Industry, Labor and Human Relations (DILHR). Also effective on the same date, the name of DHSS was changed to the Department of Health and Family Services. Also effective on the same date, the name of DILHR was changed to Department of Workforce Development.

1. Delete the first section of the DISCUSSION section and replace it with the following:

By February 14, 1992, Mr. Krueger had no appeal right under the Civil Service Code.

Mr. Krueger appeared at hearing to be somewhat confused about the nature of his appeal rights under the civil service code. Accordingly, further information is provided in the following paragraphs.

The DVR Administrator, Ms. Norman-Nunnery, had made the decision prior to February 14, 1992, that Mr. Krueger could not perform the duties of the VR Counselor position and would not be allowed to return to work as a VR Counselor. Even if the Commission considered this decision as a constructive demotion under s. 230.45 (1)(c), Stats., the Commission would not have had jurisdiction to review the issue. A constructive discharge claim may be reviewed by the Commission for unrepresented positions. Mr. Krueger's position, however, was covered under a collective bargaining agreement. As a result, the Commission's jurisdiction is superseded as to Mr. Krueger's represented positions by operation of s. 111.93(3), Stats. See, Wolfe v. UW System (Stevens Point), 85-0049-PC, (9/26/85); Tedford v. DHSS, 81-455-PC (3/4/82) and Matulle v. UW, 81-433-PC (1/27/82); aff'd by Winnebago County Circuit Court, Matulle v. State Pers. Comm., 82-CV-207 (11/19/82). In other words, the Commission lacked jurisdiction over a constructive discharge appeal in Mr. Krueger's case.

Mr. Krueger appeared to suggest at hearing that he had a right to file a civil service appeal under s. 230.444 (1)(a), Stats., the text of which is shown below.

(a) Decision made or delegated by administrator.
Appeal of a personnel decision under this subchapter made by the administrator or by an appointing authority under authority delegated by the administrator under s. 230.05 (2), Stats.

It is true that the decisions affecting Mr. Krueger were made by the DVR Administrator, Ms. Norman-Nunnery. However, the term "administrator" as used in s. 230.44 (1)(a), Stats. is defined as the Administrator of the Division of Merit Recruitment and Selection (DMRS) in s. 230.03 (1) & (10), Stats. The term does not include the DVR Administrator. Further, the decisions made by Ms. Norman-Nunnery regarding Mr. Krueger are not decisions delegated by the DMRS Administrator under s. 230.05 (2), Stats. Rather, they are

decisions made by DHSS/DVR as the appointing authority.
(See, s. 230.06 (1)(b), Stats.)

Mention also was made at hearing to the Commission's jurisdiction to hear employee grievances. Such jurisdiction, however, is limited to the role of arbitrator in a final-step grievance for unrepresented employees. (See, s. 111.93, Stats., Ch. ER 46, Wis. Adm. Code, and Harley v. DOT & DPI, 80-77-PC (5/15/80.) Mr. Krueger was on leave from a represented position on February 14, 1992, and no grievance was ever filed regarding Ms. Norman-Nunnery's decision that he could not return to work as a VR Counselor or her decision to offer him the DDS demotion position.

2. Amend the final paragraph on page 10 of the proposed decision and order, as shown below:

It is undisputed that Mr. Krueger is handicapped within the meaning of the FEA. (See p. 23 of the Proposed Decision and Order issued on April 17, 1995.) Further, it appears that ~~Mr. Truesdale did not provide Mr. Krueger with a description of every potential appeal right Mr. Krueger had no right to appeal under the civil service code, but had a potential right to file a discrimination claim under the FEA.~~ However, the examiner believed Mr. Truesdale's testimony that he answered Mr. Krueger's questions to the best of his ability and knowledge. Furthermore, his failure to provide information about filing a discrimination claim was cured by Ms. Norman-Nunnery's follow-up letter. ~~The Commission concludes that an employer's failure to provide complete appeal information must include some evidence of wrongdoing, such as an intent to conceal information or a legal duty to fully disclose such information and absent such evidence Mr. Krueger failed to establish that DHSS took an adverse employment action.~~

3. Add the following sentence to the first full paragraph on p. 11 of the Proposed Decision and Order:

A third problem with his theory is he had no right to file an appeal under s. 227.44 (1)(c), Stats.

4. In the first full paragraph on page 11 of the Proposed Decision and Order, correct the citation from "s. 227.44 (1)(c), Stats.", to "s. 230.44 (1)(c), Stats."

ORDER

That the proposed decision and order as amended herein, be adopted as the Commission final decision and order.

Dated July 23, 1996.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

JMR

Parties:

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Richard C. Wegner
Acting Secretary,
Department of Workforce Development
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NOTICE

OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

² Mr. Krueger informed the Commission that his mailing address for the months of May, June and July is: c/o Glenn Steblow, W7221, Hwy 000, Fond du Lac, WI 54935.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95

* * * * *

JAMES K. KRUEGER,
 Complainant,

v.

Secretary, DEPARTMENT OF HEALTH
 and SOCIAL SERVICES,
 Respondent.

Case No. 92-0068-PC-ER

* * * * *

PROPOSED
 DECISION
 AND
 ORDER

PROCEDURAL HISTORY

Mr. Krueger filed a charge of discrimination with the Personnel Commission on March 30, 1992, alleging that respondent terminated his employment because of his handicap, refused to reasonably accommodate his handicap, and also retaliated against him for activities protected by the Fair Employment Act (FEA), all in violation of the FEA, Subch. II, Ch. 111, Wis. Stats. On September 28, 1993, an Initial Determination (ID) was issued which found no probable cause existed to believe discrimination occurred as alleged. Mr. Krueger filed a timely appeal.

A probable cause hearing was held on November 1-2 and December 12, 1994, to provide the parties an opportunity to present evidence on all matters raised in the complaint. A proposed decision and order was mailed on February 27, 1995, which found no probable cause on all but one allegation raised in the complaint. The Commission adopted the proposed decision and order as its own, with some changes. The Commission's decision¹ was issued on April 17, 1995, and contained the following Order:

That a status conference be scheduled to establish a date for a hearing on the merits in regard to the probable cause portion of this decision, meaning the hearing on the merits will be limited to the question of whether handicap discrimination existed in

¹ The Commission's decision of April 17, 1995, was issued as an Interim Decision and Order (as opposed to a final decision and order) to retain jurisdiction on the one issue for which probable cause was found.

relation to Mr. Krueger's telephone conversation with Mr. Truesdale (as discussed on p. 25 of the proposed decision²); and that the Commission retain jurisdiction over all of the complainant's claims until such time as a final decision is issued on the one claim for which probable cause was found.

A hearing on the merits was held on November 27, 1995, to consider the one issue for which probable cause was found.³ The issue was as stated in the Conference Report dated May 25, 1995, and shown below.

Whether respondent discriminated against complainant because of his handicap in regard to complainant's telephone conversation with Mr. Truesdale on February 14, 1992.

Both parties submitted written arguments and an issue exists regarding the timeliness of the final argument submitted by Mr. Krueger.

FINDINGS OF FACT

Findings related to Mr. Krueger's final brief

1. The hearing ended on November 27, 1995, at which time the parties agreed to submission of written briefs under the following timetable: Mr. Krueger's initial brief by January 8, 1996, respondent's response by February 9, 1996, and Mr. Krueger's final brief by February 21, 1996.

² Page 25 of the proposed decision contained the following relevant passage.

Feb. 14, 1992 telephone conversation between Mr. Krueger and Truesdale: . . . The focus of this allegation is unclear. It appears Mr. Krueger believes Mr. Truesdale provided incorrect information about his appeal rights . . . which, if true, would involve an adverse employment action. This allegation was not addressed by respondent at hearing.

Mr. Krueger could have filed a complaint regarding Ms. Norman-Nunnery's decision that he could not return to his evaluator position after he received her letter dated February 4, 1992. Since the record does not contain any explanation why Mr. Truesdale provided contrary advice to Mr. Krueger on February 14, 1992, Mr. Krueger has met his burden at the probable cause level of proof to show that discrimination occurred.

³ The hearing on the merits was not held until November 1995, at Mr. Krueger's request.

2. Mr. Krueger did not file his initial brief by the agreed-upon due date of January 8, 1996. The examiner sent the parties a letter dated January 18, 1996, which stated as follows:

Mr. Krueger's daughter, Tina, telephoned this morning and spoke with Barbara Wedel of the Commission's office. According to Tina, Mr. Krueger thought his post-hearing brief was due January 28, 1996, rather than January 8, 1996. I telephoned Attorney Harris [respondent's attorney] who stated he had no objection to Mr. Krueger's brief being due January 28, 1996, but he would object to further requested extensions.

Based on the foregoing, Mr. Krueger's request for an extension is granted to January 29, 1996, but no later. (January 29 is the due date because January 28 is a Sunday.) I confirmed this information by telephone with Mr. Krueger today. (Emphasis appears in the original document.)

DHSS's responsive brief is now due by February 29, 1996. Mr. Krueger's reply to DHSS' brief is now due by March 11, 1996.

3. Mr. Krueger telephoned the examiner on January 29, 1996, asking if the due date could be measured by postmark rather than receipt date. The examiner granted the request and informed Paul Harris, Attorney for the Department of Health and Social Services (DHSS), the same day. The examiner further told Attorney Harris that DHSS' time for filing would not commence until Attorney Harris received Mr. Krueger's initial brief.
4. DHSS timely filed its brief on February 29, 1996. Mr. Krueger did not file his reply by March 11, 1996.
5. On or about March 19, 1996, Mr. Krueger telephoned the examiner because he was concerned that insufficient time existed for him to have his final brief typed. The examiner explained that he had missed the due date already despite the examiner's letter to the parties which set forth the revised deadlines. He offered no reason for failing to meet the deadline except for his mis-remembering what the deadline was. Mr. Krueger did not request an extension, nor did the examiner grant one. The examiner did suggest that he file his hand-written brief as soon as possible. He filed the hand-written brief on March 20, 1996. On the same date, Attorney Harris filed a written objection as shown below.

At 4:00 pm today I received Jim Krueger's reply brief. Although he called me a couple days ago, he never asked my approval for late filing, and I never gave approval.

I object to his late filing.

6. Mr. Krueger filed a reply to DHSS' objection which the Commission received on March 25, 1996, as shown below.

I received today Mr. Harris's 3-20-96 correspondence to you. He returned a call to me the same day I'd spoken to you. When I explained you had already made me aware of my misunderstood time I took Mr. Harris's reply that this was way too late for the Commission to mean it was now solely up to the Commission. I avoided presenting you had indicated I should proceed to avoid any distraction of argument. My back was painful enough from the pickup truck accident the prior week that I just didn't feel I could take on a disagreement that I didn't most likely have a say on anyway. I in no way intended to slight Mr. Harris. I just knew I still had to finish and rewrite as fast as possible sitting with a miserable back.

I apologize for any offense I caused Mr. Harris. Had I realized I would have done so in person when I was at the legal counsel office and spoke with you. You may confirm with Mr. Tom Puddy, Rural Insurance (phone number provided).

Findings on issue addressed on the merits at hearing on November 27, 1995

7. Mr. Krueger worked for DHSS in the Janesville office of the Division of Vocational Rehabilitation (DVR), as a Vocational Rehabilitation Counselor 3 (VR Counselor). He began a medical level on January 8, 1990, and never returned to work prior to his termination date of February 26, 1992.
8. The DVR Administrator, Judy Norman-Nunnery, sent Mr. Krueger a letter dated February 4, 1992, which included the following pertinent information. (Exh. R-35, emphasis shown appears in the original.)

After reviewing the psychological evaluation completed by Dr. Donna Rifken . . . we have determined that it would not be possible for you to retain employment as a (VR) Counselor 3 in the (DVR). . . .

We have reviewed positions currently available within the (DHSS) for which you might be considered. Taking into consideration the recommendations of Dr. Rifken, we are offering you a voluntary demotion to a Disability Determination Specialist 1-Trainee (DDS) . . .

A copy of the position description is enclosed for you to review. If you are interested in further information . . . please call Barb Blatterman, DVR Personnel Assistant . . .

Your decision whether or not you want to accept this position must be submitted in writing to me no later than the end of the workday Friday, February 14, 1992. (Emphasis in original.)

9. Mr. Krueger received Ms. Norman-Nunnery's letter "several days" after the date appearing on the letter. He then spent "several days" in Madison talking with people over the phone trying to figure out the import of the letter. He also contacted "several attorneys" and spoke with them for 15-20 minutes trying to find out how he should go about addressing the Ms. Norman-Nunnery's decisions that: a) he could not return to work as a VR Counselor, and b) he could take the voluntary demotion offered in her letter.
10. As part of his efforts described in the prior paragraph, Mr. Krueger telephoned the Personnel Commission and spoke with two females (names unknown), including the receptionist and someone else to whom the receptionist referred him. He read Ms. Norman-Nunnery's letter (Exh. 35) to the Commission and asked about his appeal rights. The Commission told him the letter appeared to express the decision that he was demoted (apparently within the meaning of s. 230.44(1)(c), Stats.), and explained the procedure for appealing the demotion. Mr. Krueger also asked what his options to accepting the demotion to the DDS position were. The Commission said the options should be either stated in the letter or he should be able to obtain such information through DVR. Mr. Krueger further asked how he could appeal these decisions to DVR, in response to which the Commission indicated he would need to contact DVR to obtain information about any internal appeal procedures within DVR.⁴

⁴ Mr. Krueger's testimony regarding his conversation with the Personnel Commission was confusing and conflicting. For example, at first he said the

11. Mr. Krueger then telephoned DHSS' Bureau of Personnel and Employee Relations (BPER) and spoke to someone (name unknown). BPER referred him to DVR personnel.
12. On February 14, 1992, Mr. Krueger telephoned Barbara Blatterman (Bronte), the DVR Personnel Assistant named as his contact in Ms. Norman-Nunnery's letter. She gave him more information about the offer of voluntary demotion to the DDS position. He had two questions he wanted to ask her: a) how to appeal Ms. Norman-Nunnery's decision that he could not return to work as a VR Counselor, and b) what his options were to accepting the DDS position. As to the first matter, the question specifically asked by Mr. Krueger was "how someone in the bargaining unit appealed a decision like this", in response to which Ms. Blatterman indicated "it was a bit premature to appeal anything at this point in time". (Exh. R-29, Ms. Blatterman's notes of the conversation.) As to the second question, Ms. Blatterman indicated she only had authority to speak with him about the option to voluntarily demote to the DDS position. She referred him to Raymond Truesdale for further questions.
13. Mr. Krueger took the time to write out his two questions after he spoke to Ms. Blatterman and before he called Mr. Truesdale on February 14, 1992. He did so because he felt frustrated that he did not receive the requested information from Ms. Blatterman despite his attempts to rephrase his two questions several times. He also acknowledged that he might have switched the name of the "Personnel Commission" with "BPER" during his conversation with Ms. Blatterman due to a "life-long tendency to confuse nouns".
14. Mr. Krueger spoke by telephone to Mr. Truesdale twice on February 14, 1992. He asked Mr. Truesdale how he could appeal the demotion. Mr. Truesdale responded that Mr. Krueger had "nothing to appeal yet" because the only appeal route Mr. Truesdale was aware of would have been through the union contract grievance route which Mr. Truesdale

Commission explained its appeal procedures to him. Minutes later he testified that the Commission told him his appeal would be to DVR and that he should contact DVR for further information. The recitation of facts in this paragraph was pieced together by the examiner from the credible aspects of Mr. Krueger's confused testimony.

understood would arise as a union contract issue only if Mr. Krueger accepted the DDS position and then filed a grievance over the demotion if he did not like the work.⁵

15. Mr. Truesdale acknowledged at hearing that on February 14, 1992, Mr. Krueger did have a right to file a grievance under the union contract regarding the Division Administrator's decision that Mr. Krueger would not be allowed to return to work as a VR Counselor. Mr. Truesdale did not mention this appeal right on February 14, 1992, because he thought Mr. Krueger was asking about appeal rights regarding the demotion opportunity to the DDS position (as discussed in the prior paragraph).
16. Mr. Krueger also asked Mr. Truesdale on February 14, 1992, whether he could appeal the demotion decision to the Division Administrator, Ms. Norman-Nunnery. No such appeal process existed within DHSS or DVR.
17. Mr. Krueger also asked Mr. Truesdale during one of the telephone calls on February 14, 1992, what his options were. Mr. Truesdale responded that the voluntary demotion to the DDS position was an option and suggested that Mr. Krueger concentrate on responding to that option as the deadline for accepting the position was the same day. Mr. Krueger then asked what options existed other than a voluntary demotion to the DDS position, to which Mr. Truesdale replied: "I suppose we could always consider dismissal as an option".
18. Ultimately, Mr. Krueger did not accept the DDS position and DHSS terminated him effective February 26, 1992.
19. Mr. Krueger had the impression from speaking with Mr. Truesdale on February 14, 1992, that Mr. Truesdale intentionally failed to disclose certain appeal rights to Mr. Krueger because Mr. Truesdale wanted to avoid the hearing efforts which would result from a filed appeal. Mr. Krueger testified that he felt this would have been Mr. Truesdale's

⁵ Mr. Truesdale's opinion that a demotion had not occurred yet has an arguable basis in law pursuant to s. ER-MRS 17.04 (3), Wis. Adm. Code, which was interpreted by the Commission in Craft v. DHSS, 80-159-PC (6/11/81); Affirmed by Dane Co. Cir. Ct. DHSS v. Pers. Comm., 81-CV-3310 (6/28/83) to mean that a demotion does not occur until after the employe submits a written request, the employer responds in writing and the employe submits a written acceptance of the lower-classified position.

answer and motive even if Mr. Krueger's potential basis for filing a complaint would have been his race, rather than his handicap.

20. Mr. Truesdale did not inform Mr. Krueger about potential appeal rights under the Civil Service Code (Ch. 230, Stats.) or under the Fair Employment Act (FEA) (Ch. 111, Stats.), because Mr. Truesdale felt Mr. Krueger was asking about appeal rights under the union contract. Further, Mr. Truesdale was unaware on February 14, 1992, of rights Mr. Krueger might have had to file an appeal under the Civil Service Code. Mr. Truesdale did not realize the potential for an FEA claim until after his calls with Mr. Krueger on February 14, 1992, when he discussed those calls with Ms. Blatterman and either Ms. Norman-Nunnery, Jan Van Vleck or another person. Ms. Norman-Nunnery sent Mr. Krueger a follow-up letter to specifically mention the potential of filing an FEA claim. (Exh. R-31)

FINDINGS OF FACT

1. It was Mr. Krueger's burden to show by a preponderance of the evidence that Mr. Truesdale discriminated against him due to his handicap by failing to present all his appeal rights and options during the two telephone calls on February 14, 1996.
2. Mr. Krueger failed to meet his burden of proof.
3. DHSS did not discriminate against complainant as alleged.

DISCUSSION

By February 14, 1992, Mr. Krueger may have had an appeal right under the Civil Service Code.

Mr. Krueger may have had grounds for filing an appeal under the civil service code by the time he posed questions to Mr. Truesdale on February 14, 1992. Mr. Krueger appeared at hearing to be somewhat confused about the nature of these rights and, accordingly, it may be helpful to provide further explanation.

The DVR Administrator, Ms. Norman-Nunnery, had made the decision prior to February 14, 1992, that Mr. Krueger could not perform the duties of VR

Counselor position and would not be allowed to return to work as a VR Counselor. It could be argued that he had a right to appeal this decision to the Personnel Commission, pursuant to s. 230.44 (1)(c), Stats., the text of which is shown below.

230.44 Appeal procedures. (1) Appealable actions and steps. Except as provided in par. (e), the following are actions appealable to the commission under s. 230.45 (1)(a):

* * *

(c) Demotion, layoff, suspension or discharge. If an employe has permanent status in class . . . the employe may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.

It is correct that as of February 14, 1992, Mr. Krueger had not yet accepted any demotion position. However, the Commission may have interpreted Ms. Norman-Nunnery's decision not to allow him to return to a VR Counselor position as a constructive demotion, for purposes of s. 230.45 (1)(c), Stats. This would be a principle established by case law as such conclusion would not necessarily be evident from reading the statutory language. (See, for example, Davis v. ECB, 91-0214-PC (ruling dated 6/12/92 and IDO dated 6/21/94.)

Accordingly, the examiner was not surprised that Mr. Truesdale was unaware of this potential appeal right.⁶

Mr. Krueger appeared to suggest at hearing that he had a right to file a civil service appeal under s. 230.44 (1)(a), Stats., the text of which is shown below.

(a) Decision made or delegated by administrator. Appeal of a personnel decision under this subchapter made by the administrator or by an appointing authority under authority delegated by the administrator under s. 230.05 (2), Stats.

⁶ The Commission has not yet had the opportunity to resolve whether a constructive discharge has occurred within the meaning of s. 230.45 (1)(c), Stats., under the circumstances presented in Mr. Krueger's case.

It is true that the decisions affecting Mr. Krueger were made by the DVR Administrator, Ms. Norman-Nunnery. However, the term "administrator" as used in s. 230.44 (1)(a), Stats., is defined as the Administrator of the Division of Merit Recruitment and Selection (DMRS) in s. 230.03 (1) & (10), Stats. The term does not include the DVR Administrator. Further, the decisions made by Ms. Norman-Nunnery regarding Mr. Krueger are not decisions delegated by the DMRS administrator under s. 230.05 (2), Stats. Rather, they are decisions made by DHSS/DVR as the appointing authority. (See, 230.06 (1)(b), Stats.)

Mention also was made at hearing to the Commission's jurisdiction to hear employe grievances. Such jurisdiction, however, is limited to the role of arbitrator in a final-step grievance for unrepresented employes. (See, s. 111.93, Stats., Ch. ER 46, WAC, and Harley v. DOT & DPI, 80-77-PC (5/15/80).) Mr. Krueger was on leave from a represented position on February 14, 1992, and no grievance was ever filed regarding Ms. Norman-Nunnery's decision that he could not return to work as a VR Counselor or her decision to offer him the DDS demotion position.

Merits of the Discrimination Issue

It was Mr. Krueger's burden to establish by a preponderance of the evidence that respondent discriminated against him because of his handicap in regard to the telephone conversations with Mr. Truesdale on February 14, 1992. Specifically, it was Mr. Krueger's burden to establish the following elements: 1) that complainant is handicapped within the meaning of the FEA, s. 111.32(8), Stats.; 2) that DHSS took an adverse employment action against him because of his handicap; and 3) DHSS' action was not legitimate under the FEA. See, Samens v. LIRC, 117 Wis. 2d 646, 657-58 (1984), citing Boynton Cab Co. v. ILHR Dept., 96 Wis. 2d 396, 406 (1980).

It is undisputed that Mr. Krueger is handicapped within the meaning of the FEA. (See p. 23 of the Proposed Decision and Order issued on April 17, 1995.) Further, it appears that Mr. Truesdale did not provide Mr. Krueger with a description of every potential appeal right. However, the examiner believed Mr. Truesdale's testimony that he answered Mr. Krueger's questions to the best of his ability and knowledge. The Commission concludes that an employer's failure to provide complete appeal information must include some evidence of wrongdoing, such as an intent to conceal information or a legal duty to fully

disclose such information, and absent such evidence Mr. Krueger failed to establish that DHSS took an adverse employment action.

Furthermore, Mr. Krueger failed to show that such action was based on his handicap or was otherwise not legitimate under the FEA. The examiner asked Mr. Krueger at hearing what motive he would attribute to his conclusion that Mr. Truesdale concealed appeal information. Mr. Krueger responded that Mr. Truesdale would have been motivated to conceal appeal rights in a desire to avoid more than one hearing. Also, Mr. Krueger felt he would have prevailed if he had filed an appeal under s. 227.44 (1)(c), Stats., and that Mr. Truesdale may have been trying to prevent Mr. Krueger from taking an appeal where his chances to prevail might be greater. One problem with Mr. Krueger's theory is he failed to prove that Mr. Truesdale was motivated by the alleged factors. Another problem with his theory is that the specified motives are not based on Mr. Krueger's handicap.

Late Brief filed by Mr. Krueger

Mr. Krueger's final brief was filed late because he failed to take adequate steps to ensure that he remembered the due date correctly. This failure occurred despite the examiner's letter to the parties which recited the revised due dates. Accordingly, the Commission did not consider the final brief filed by Mr. Krueger.

The Commission further notes that Mr. Krueger submitted the following statement with his initial brief.

The brief's summary of my testimony on information I learned from BPER and the personnel commission staff is not fully accurate. The content was there and sources attributed wrong. I decided to leave it. My law students, daughter and her friend, were getting quite testy with changes and corrections. I had no intention to deceive and didn't see it made any difference. They got quite involved in extensive editing and then development of practically a different brief, especially the argument. My having to modify and drop parts of that seemed to develop a touchiness in them.

The examiner appreciated Mr. Krueger's straight forward and honest disclosure regarding the initial brief. The examiner, however, was concerned that she would be unable to determine if her notes of the hearing testimony

were faulty for failing to include information recited in the brief, or whether her notes did not include the information because such testimony was not given. The examiner, therefore, listened to the hearing tapes to ensure that her hearing notes were complete before drafting this decision.

ORDER

That the complaint be dismissed in its entirety.

Dated _____, 1996.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

Parties:

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