STATE OF WISCONSIN PERSONNEL COMMISSION

EUGENE HANEY,

Appellant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,

Respondent.

Case No. 93-0232-PC
94-0012-PC

DECISION AND ORDER

The Commission, having reviewed the Proposed Decision and Order and the objections and arguments of the parties in regard thereto, and having consulted with the hearing examiner, adopts the Proposed Decision and Order as its final resolution of this matter with the following changes:

I. Conclusion of Law #3 is modified to state as follows:

3) Respondent has met this burden of proof and had just cause for the discipline imposed.

II. Conclusion of Law #4 is modified to state as follows:

4) The predisciplinary process did not violate appellant's procedural due process rights.

III. Conclusions of Law #5 and #6 are deleted.

IV. The OPINION section is adopted from its beginning on Page 7 through the second full paragaph on Page 12. The remainder of the OPINION is deleted and the following substituted:

The final question under *Mitchell* is whether the degree of discipline imposed was excessive. Appellant received three and seven day suspensions and was then terminated after he, on three separate occasions, refused to obey respondent's psychological examination order. There was no intervening behavior on appellant's part between each order that created additional grounds for the underlying order. In each order, it was the same disputed behavior on appellant's part that respondent believed required an examination. Certain of the parties' arguments center on whether appellant's violation of respondent's order to submit to an examination constituted a single act of insubordination or three separate acts of insubordination. It will be assumed, for purposes of analysis only, that appellant's view that on ly a single act of insubordiantion occurred, will control. The question then becomes whether appellant's refusal to submit to the examination has the potential to so undermine respondent's functions as to warrant termination.

It has already been concluded above that the examination ordered by respondent was authorized by §230.37(2), Stats.; and that certain erratic behavior on appellant's part created a legitimate question about appellant's fitness "to continue in service" and, as a result, respondent's examination order was a reasonable one.

It seems only logical that, under these circumstances, where the respondent is prevented by appellant's actions from ascertaining whether appellant is able to continue in employment, respondent's only choice is to discontinue appellant's employment. The purpose of the examination, as stated in §230.37(2), Stats., is "to determine fitness to continue in service." This fitness is not a matter which is peripheral to or of secondary importance in an employment relaitonship--it is the foundation of the employee's role in this relationship, and, as a result, actions by an employee preventing an employer from determining fitness certainly have the potential to so undermine respondent's functions as to warrant termination. The employer really has no other choice--if the employer is unable to determine an employee's "fitness to continue in service" or "capacity to continue in employment," the only logical course of action is to discontinue such employment.

Appellant argues that repeated orders by respondent to submit to the examination demonstrated bad faith or a questionable motive on respondent's part. However, such actions on respondent's part are more consistent with a conclusion that respondent was trying to achieve compliance than with a conclusion that respondent wanted to inflict discipline. It should also be noted that this tactic had been successful in achieving compliacne with appellant in 1989 and had been successful with other employees as well.

The Commission concludes that there was just cause for respondent's termination of appellant's employment and that such termination was not excessive.

VI. The Order is modified to state as follows:

The actions of respondent are affirmed and these appeals are dismissed.

Dated: March 9, 1995 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:lrm

DONALD R. MURPHY, Commissioner

Dissent:

I agree with the majority's conclusion that the employer has a statutory right to require an employe to submit to a mental or physical exam to determine fitness to continue in service, pursuant to s. 230.37(2), Stats. I further agree it was reasonable for DOT to question Mr. Haney's fitness for duty after learning of the October 5, 1993, incident in Shawano County. (See pars. 19-21 of the Findings of Fact.)

I do not believe an employer's right to order physical and mental exams under the authority of s. 230.37(2), Stats., is without reasonable restrictions. Otherwise, as DOT acknowledged in oral arguments, an employer could order an employe in the morning to undergo a medical exam and impose discipline for refusal, then repeat the process twice more in the same day until termination was reached under the employer's progressive disciplinary procedure; effectively leaving the employe with no remedial recourse. Surely the Legislature did not intend to allow this to occur in circumstances present in Mr. Haney's case. Nor do I believe it is necessary to prove the element of an intent to abuse the process before protection from such potential abuse becomes appropriate.

DOT previously had ordered Mr. Haney to undergo a mental exam in October 1989, the results of which were available in December 1989, and indicated no abnormality. (pars. 1 and 6 of the Findings of Fact) The subsequent order on October 28, 1993, was precipitated by the Shawano incident which was of the same nature as the incidents leading to the 1989 order. The record did not persuade me that DOT had reason to believe the results of a mental exam would be different than before. DOT faced with this dilemma could have reasonably ordered Mr. Haney to undergo a physical examination to determine if a non-mental medical condition existed to explain Mr. Haney's behavior.

I did not conclude from the preponderance of the record that DOT's alleged concerns regarding Mr. Haney's safety to himself and others were real at least to the degree alleged by DOT. Nor did the hearing examiner resolve this credibility issue in her proposed decision. If such concerns had been real to an extent where DOT felt Mr. Haney was unfit for duty because he posed a threat to himself or others, DOT would have addressed the problems when they occurred by either discipline or order for medical examination to explore the cause of these newly-exhibited behaviors.

As a final point, I disagree with the majority's decision statement that DOT had no choice but to terminate Mr. Haney for failure to undergo the mental exam. The parties do not contest that DOT had the right to pursue discipline for the Shawano County incident or any of the other alleged behaviors which DOT says it relied upon in ordering Mr. Haney to undergo a mental examination.

Dated March 9, 1995.

Judy M. Rogers
JUDY M. ROGERS, Commissioner

Parties:

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c/o Michael Plaisted
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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.

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

STATE OF WISCONSIN PERSONNEL COMMISSION

EUGENE HANEY,

Appellant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,

Respondent.

Case Nos. 93-0232-PC & 94-0012-PC

PROPOSED DECISION AND ORDER

This is an appeal, pursuant to §230.44(1)(c), Wis. Stats., from decisions by the respondent twice suspending the appellant (Case No. 93-0232-PC) and finally terminating his employment (Case No. 94-0012-PC). The hearing was conducted on March 30, 1994.

FINDINGS OF FACT

1. Appellant was employed as an Auditor Senior in respondent's Bureau of Accounting and Auditing, Division of Business Management from 1987 to 1994. His general responsibility was to conduct assigned field audits of entities that contracted or wished to contract with respondent. Appellant's immediate supervisor since 1989 was Donald R. Dorn (Audit Supervisor, Audit Section) who reported to Dennis Schultz (Chief, Audit Section) who was supervised by Jane A. Czeshinski (Bureau Director).

2. Appellant's 1988-89 performance evaluation reflected that his general performance did not meet normal standards. The "Performance Summary" stated, in part:

> In general, these areas [of unsatisfactory performance] include the quantity and quality of work produced, unwillingness to accept supervision of lead auditors, and mangement's receipt of complaints from auditees.

3. In October 1989, Czeshinski consulted with appellant's supervisor and Myron Bacon (at that time, one of respondent's Administrators) and they decided to send appellant for a medical evaluation. Respondent ordered the evaluation because: (a) on a number of occasions, appellant claimed to perform audits that he, in fact, had not done (and relatedly, appellant alleged that

respondent was trying to discredit his work by destroying the evidence of those audits) and (b) the appellant used excessive sick leave.

4. Appellant refused to attend the medical examination and he was suspended for three days. The suspension letter first recounted appellant's past behaviors which resulted in a letter of reprimand and a one day suspension. The letter went on to cite appellant for violating respondent's insubordination work rule.

5. After the suspension, respondent again ordered appellant to attend a medical examination which he did.

6. In December, 1989, Cephus Childs (at that time, respondent's Employee Assistance Officer and coordinator of employe independent medical evaluations) informed Schultz and Dorn that all tests showed "normal" on appellant's examination. Childs indicated that he would pass on the report to Schultz; however, he never did. Czeshinski understood that there was no medical basis for appellant's behavior. The report was destroyed when Childs later left respondent's employ.

7. In February 1990, appellant was placed on a six month performance improvement plan which outlined specific goals related to the performance issues brought up in appellant's 1989-90 performance evaluation including improving the quantity of work produced, improving the quality of work, improving his personal skills of dealing with people including communicating with fellow auditors, management and auditee personnel.

8. Appellant's 1989-90 performance evaluation (given on June 19, 1990) reflected that his performance had improved and his general performance met normal standards. He was continued on the performance improvement plan for a number of additional months to demonstrate continued satisfactory performance.

9. In December 1990, appellant indicated he had audited Ashland and Iron Counties the prior year; but he had never audited those entities.

10. Appellant's 1990-91 performance evaluation (given on May 30, 1991) reflected that his general performance met normal standards; however, he still was encouraged to continue improving the quality of his work.

11. In January 1992, respondent instituted a new policy that auditors were to copy to floppy diskette all files relating to the audit and leave these disks in the audit file. Supervisors asked appellant to comply with this policy, but he did not follow it until December 1992. The appellant was not disciplined for this behavior.

12. During 1992, when appellant left his work area, he would take his audit file diskette with him.

13. In February 1992, Carol J. Simon, an individual with an adjoining office to appellant's, complained to respondent that appellant was using sexually explicit language that she believed was directed at her. In May 1992, Simon complained to respondent that appellant was rubbing his genitals when he talked to her. Finally, on August 10, 1992, she renewed her concerns about appellant's behavior around her and wrote a memorandum to respondent complaining.

14. In response to Simon's complaints, Demetri Fisher (respondent's Affirmative Action Officer) met with Czeshinski, Schultz and a third person. Appellant was moved so his office was no longer adjacent to Simon. Respondent did not confront appellant about his alleged inappropriate behavior. Simon did not complain about appellant's behavior after August 1992.

15. Appellant's 1991-92 performance evaluation (given on June 9, 1992) reflected that his general performance met normal standards. The "Performance Summary" stated:

> Gene's overall performance was satisfactory. He has continued to improve and work at his communication skills. He should continue to work on the areas noted above to improve the overall quality of his work.

16. In May 1993, appellant told his supervisor that he had been been at McMann and Associates, but he had not.

17. Appellant's 1992-93 performance evaluation (given on June 7, 1993) reflected that his general performance met normal standards. The "Performance Summary" stated:

> Gene's overall performance was satisfactory. He has improved on his communication skills with his supervisor. He should continue to work on improving these skills with auditees and other staff members and also continue to improve in the areas noted.

18. Paulette Dyer is the Bureau's payroll coordinator. She complained to respondent about appellant after appellant yelled at her about a change she made to his time sheet. Thenceforward, Dyer had appellant's supervisors initiate changes to his time sheet.

19. On October 5, 1993, respondent received a complaint about appellant from Marilyn J. Berkvam (Director, Shawano County Office on Aging) regarding an audit appellant conducted of her agency in December 1992. During the course of the audit, Berkvam suggested to appellant that respondent should train agencies on how to keep their books. Appellant told her that he had told her two years before when he was there how to keep the books and that she was not

complying with his prior directions. Appellant had never spoken to Berkvam nor been at her agency previously and she asked him why she would lie to him about that. Appellant told her she must be hiding something. Appellant got louder during the course of the hour discussion and the encounter occurred in front of Berkvam's staff and their clients. During the remainder of the two-day audit, appellant was polite and appropriate in his interactions.

20. After receiving Berkvam's complaint, Dorn met with appellant who refused three times to write a letter of apology to Berkvam. Among other things appellant told Dorn: that Berkvam was lying and that "she is some kind of sick in the head," that appellant previously had been to the Shawano County Office of Aging, and that "this is just a continuation of the situation which occurred in 1989."

21. Czeshinski was not as worried when appellant claimed to be places he had not when his assertions were made internally. However, when he made these declarations to outside people, this was evidence that perhaps something was wrong. She did not know how to correct that behavior.

22. Dorn and Schultz discussed with respondent's Human Resources Services (including Cynthia Morehouse, respondent's Director of the Bureau of Human Resources, and Fisher) whether appellant should be disciplined for his actions. The Human Resources people suggested sending appellant for a psychological examination.

23. The final decision to order appellant for an evaluation was made by Czeshinski, Dorn and Schultz because of the Berkvam complaint, because there were other occasions when appellant claimed to have been at a site which he never previously audited, because of his excessive use of sick leave, because appellant did not want to give his computer disks to the audit supervisor, and because appellant's co-workers were uncomfortable working with him (based on Carol Simons' complaints and Paulette Dyer's complaint).

24. In a letter dated October 28, 1993, Czeshinski directed appellant to attend an independent medical examination under §230.37(2), Wis. Stats scheduled for November 16, 1993. She stated, in part:

> We recently received and shared with you an evaluation from Marilyn Berkman [sic], Director of the Shawano County Office on Aging. Her comments and accusations directed to you were very serious. The behavior you demonstrated with Ms. Berkman [sic] and her staff was very non-professional and was out of line. As you are aware, we have had numerous other instances dating back to 1989 where you have claimed to have been places where you have not previously been to. In all instances, we have documented evidence

> that you have never been to these places prior to your recent assignment. We are very concerned about your behavior in the field and the impression you are leaving with auditees.
>
> We are also concerned with your: 1) excessive use of sick leave, as your balance is at or near zero most of the time, 2) paranoia regarding the files of the audits you work on, 3) working relationships with other staff members and the management of the audit staff.
>
> * * *
>
> The purpose of this evaluation is to provide a complete psychiatric evaluation based upon a comprehensive review of your existing medical records and whatever new tests and evaluations are deemed necessary by Dr. Hummel. For these reasons, you are being required to have your current health care providers send your medical records to Dr. Hummel by November 15, 1993....

25. On November 17, 1993, an investigatory meeting, and immediately thereafter a pre-disciplinary meeting, were conducted between the appellant, Czeshinski, and Dorn to discuss his failure to appear for the psychological examination. During the investigatory meeting, appellant confirmed that he received the order to attend the examination and did not attend. During the pre-disciplinary meeting, appellant did not provide any additional information regarding the situation. Czeshinski conducted both meetings.

26. Respondent's order to appellant to attend a medical examination under §230.37(2) was a reasonable order.

27. Morehouse and James W. Van Sistine (Administrator, Division of Business Managment) reviewed and concurred in Czeshinski's recommendation that appellant be suspended for three days. In a memorandum dated November 18, 1993, appellant was suspended for three days by Czeshinski for violating respondent's insubordination work rule when he failed to appear for a "psychological-social examination" that respondent directed him to attend.

28. In a letter dated November 23, 1993, Czeshinski again directed appellant to attend an "independent medical examination" under §230.37(2), Wis. Stats. scheduled for December 6, 1993.

29. In a letter dated November 26, 1993, appellant indicated to Czeshinski:

> This letter is a response to your request for me to submit to a psychological-social examination. You did not provide support for items mention [sic] in your formal request, dated October 28, 1993, ordering me to be examined by a psychologist. As I told you at [sic] on November 19, 1993, that [sic] I will not submit to the examination at any time. I told you that my answer was firm. I am fully aware of previous orders of this nature by you. This is an obvious attempt to distort the true reasons for your requests. In response to another request by you, dated November 23, 1993, the answer is the same. I will not submit to another psychological exam.

30. On December 6, 1993, an investigatory meeting, and immediately thereafter a pre-disciplinary meeting, were conducted between appellant, Michael Plaisted (appellant's union representative), Czeshinski, and Dorn to discuss his failure to appear for the psychological examination. During the investigatory meeting, appellant confirmed that he received the order to attend the examination and did not attend. During the pre-disciplinary meeting, Plaisted asked the basis for respondent's request that appellant attend an examination. During one of the meetings, Plaisted provided to respondent a copy of what he identified as appellant's 1989 medical report. Czeshinski conducted both meetings.

31. Morehouse and Van Sistine reviewed and concurred in Czeshinski's recommendation that appellant be suspended for seven days. In a memorandum dated December 8, 1993, appellant was suspended for seven days by Czeshinski for violating respondent's insubordination work rule when he failed to appear for a "psychological-social examination" that respondent directed him to attend.

32. In a letter dated December 8, 1993, Czeshinski again directed appellant to attend an "independent medical examination" under §230.37(2), Wis. Stats. scheduled for December 22, 1993.

33. In a letter dated December 9, 1993 and in response to a request from appellant, Czeshinski provided specific examples of her concerns about appellant's behavior that prompted her demand that he receive a psychological examination. She provided specific examples within the categories of "Claims to have been places where you have not previously been," "Paranoia regarding audit files," "Working relationships with management, staff and auditees," and "Excessive use of sick leave." Czeshinski also listed the questions that were being asked of the health care provider who was to assess appellant.

34. In a letter dated December 21, 1993, appellant indicated that he would not attend the December 22, 1993 examination.

35. On December 22, 1993, an investigatory meeting, and immediately thereafter a pre-disciplinary meeting, were conducted between the appellant, Plaisted, Czeshinski, and Dorn to discuss his failure to appear for the psychological examination. During the investigatory meeting, appellant confirmed that he received the order to attend the examination and did not attend. During the pre-disciplinary meeting, appellant did not provide additional information regarding the situation. Czeshinski conducted both meetings.

36. Following the pre-disciplinary meeting, Czeshinski met with Van Sistine, Morehouse and other people. They discussed appellant's 1989 order to get an evaluation. Nobody could find the 1989 report so Morehouse did follow-up calls

to the provider who conducted the evaluation to attempt, without success, to get a copy of that earlier evaluation.

37. Morehouse, Van Sistine, and Terry D. Mulcahy (respondent's Deputy Secretary) reviewed and concurred in Czeshinski's recommendation that appellant be terminated. In a letter dated January 11, 1994, appellant was terminated by Czeshinski for violating respondent's insubordination work rule when he failed to appear for a "psychological-social examination" that respondent directed him to attend.

38. Morehouse testified that during the period 1989-93, respondent sent more than twenty people for independent medical examinations (IME). In 1993, an employe received suspensions and later termination when he attended an IME but did not provide the report to respondent. Another employe who refused to attend an IME was suspended for three days for insubordination.

CONCLUSIONS OF LAW

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

2) Respondent has the burden to prove by the preponderance of the evidence that it had just cause to suspend appellant for three days, to suspend appellant for seven days, and to terminate appellant.

3) Respondent has met this burden of proof with respect to the three day suspension, but not with respect to the seven day suspension and termination.

4) Respondent had just cause for appellant's three day suspension.

5) Respondent lacked just cause for appellant's seven day suspension and termination.

6) The predisciplinary process did not violate appellant's procedural due process rights.

OPINION

Appellant believes that he was denied procedural due process and that respondent lacked just cause for his suspensions and termination.

I. Procedural Due Process

Appellant contends that he was denied procedural due process. He does not argue that he was unaware of what he was charged with, what evidence respondent had and/or that he was denied the opportunity to present his side of the story. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 84 L.Ed. 2d 494, 105 S.Ct. 1487 (1985). Instead, appellant argues that he was denied an impartial decisionmaker as alluded to in *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, 25 L.Ed. 287, 300 (1970). Appellant contends that Jane Czeshinski was not an

impartial decisionmaker because she made the work order, conducted the investigation of its alleged violation, conducted the pre-disciplinary proceeding, recommended discipline to her superiors, and imposed discipline.

Combining investigative and adjudicative functions is not a due process violation unless there are special circumstances in the case which make "the risk of unfairness" "intolerably high." *Withrow v. Larkin*, 421 U.S. 35, 58, 95 S.Ct. 1456, 1470, 43 L.Ed. 2d 712, 730 (1975). The facts in this case do not appear to present such special circumstances. Appellant was disciplined for a fairly routine and clearly delineated violation of a work rule; nothing that would suggest a special circumstance.

Appellant cites two cases to support his contention that he lacked an impartial decisionmaker. Neither case is on point. In *Fofana*, the Personnel Commission did not criticize the decisionmaker's impartiality because of his participation at each phase of the disciplinary process, but instead the Commission cited his "long standing acrimonious relationship" with the appellant which included a former personal/social relationship beyond the workplace. *Fofana v. DHSS*, Pers. Comm., Case No. 90-0120-PC (6/28/91). In *Guthrie*, the Wisconsin Court of Appeals found improper a decisionmaker's participation in a Wisconsin Employment Relations Committee decision (of which he was a member) because he, in his former employment as an assistant attorney general, had consulted with the grievant's attorney regarding an earlier appeal on this same case. These circumstances (abbreviated from the original) created "a compelling appearance of impropriety." The court noted that all showings of impropriety should not disqualify a judge and they should be considered on a case-by-case basis. *Guthrie v. Wis. Employment Relations Comm.*, 107 Wis. 2d 306, 320 N.W. 2d 213, (Wis. Ct. Appeals, 1982), *aff'd* 111 Wis. 2d 447 (1983).

Both of these cases present examples of what might be characterized as decisionmaker conflicts of interest. Appellant's situation does not fall into this category. Czeshinski has been appellant's supervisor's supervisor's supervisor since about the time he started with respondent. There is no evidence in the record that Czeshinski's and appellant's relationship was anything other than a regular working relationship which might have included past criticisms of appellant's performance and discipline. The extent of appellant's and Czeshinski's familiarity with each other derives exclusively from each of them working at the same jobs with respondent for a number of years. Similarly, within the context of their working relationship, there is no evidence that Czeshinski displayed, for

instance, vituperative behavior towards appellant. Appellant's case is not similar to *Fofana* or *Guthrie*.

Appellant received the required procedural due process with respect to his suspensions and termination.

II. Just Cause for Discipline

Respondent contended that it had just cause for appellant's three day suspension, seven day suspension, and termination. The Commission uses the following three questions as guides in discipline cases: (1) whether the greater weight of the credible evidence shows that appellant committed the conduct alleged by respondent in its disciplinary document, (2) whether the greater weight of credible evidence shows that that chargeable conduct, if true, constitutes just cause for discipline, and (3) whether the imposed discipline was excessive. *Mitchell v. DNR*, Case No. 83-0228-PC (8/30/84).

With respect to the first question, it is undisputed that appellant refused to submit to an evaluation under §230.37(2), Wis. Stats. and, as a consequence, he was disciplined for insubordination on three separate occasions that resulted in a 3 day suspension, 7 day suspension and termination. Appellant committed the conduct alleged in each of his discipline letters.

With respect to the second question, the just cause standard requires that appellant's misconduct must sufficiently undermine the performance of his job duties. *Safransky v. Personnel Bd.*, 62 Wis. 2d 464, 472, 215 N.W. 2d 379 (1974). However, it is not misconduct to refuse to obey an unreasonable order. *Lyons v. DHSS*, Case No. 79-81-PC (7/23/80), p. 7.

Appellant contends that the underlying order (that resulted in his insubordination charge) that he submit to a psychological evaluation under §230.37(2), Wis. Stats. was unreasonable. Section 230.37(2), Wis. Stats. states:

> 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.....

To enlist the statute, a threshold must be crossed. The employe must demonstrate inefficiency and ineffectiveness in the performance of his or her duties under circumstances that would impel the employer to seek an evaluation of the employe to see if age, disability or otherwise is the reason for the observed

performance issue(s). The question is: would a reasonable supervisor believe that the employe demonstrates performance problems that may be attributable to some disability?

Looking at appellant's situation, he received a medical evaluation in 1989 because respondent contended that he had used excessive sick leave and he had claimed to perform audits that he had not done (and, relatedly, he had alleged that respondent had been trying to discredit his work by destroying the evidence of those audits). Although none of the current actors actually saw the report at that time, the Employe Assistance Officer informed them that appellant's test results were "normal."

Since the 1989 evaluation which determined that appellant was "normal," the following incidents occurred.[1]

1. In December 1990, appellant stated that he had audited Ashland and Iron Counties' programs the prior year; but, in fact, he had never audited those programs.

2. During most of calendar year 1992, appellant refused to comply with respondent's newly instituted policy requiring auditors to include working papers in the form of a computer disk in audit files. During his non-compliance, appellant kept his disks in his possession. In December 1992, appellant complied with respondent's policy.

3. In February, May and August, 1992, one of appellant's co-workers, Carol Simon, complained that appellant was using sexually explicit language within her ear shot and rubbing his genitals when speaking to her. Appellant was never confronted about his alleged behavior instead his office was moved and presumably after August 1992, respondent received no further complaints from Simon.

4. In May 1993, appellant told his supervisor he had been to McCann and Associates; but, in fact, he had never been to that firm.

5. In October 1993, respondent received Marilyn Berkvam's complaint about appellant's behavior at her agency in December 1992 (the encounter is described in ¶19). When presented with these circumstances by respondent, appellant indicated that Berkvam was lying, that he previously had audited the agency and he hearkened back to the situation

[1] The Paulette Dyer incident (noted in ¶18) is not included in this list because the record does not reflect when it occurred.

being like 1989. Appellant, in fact, had never audited Berkvam's agency previously.

The five incidents occurred over the course of four years. During that period of time appellant's performance evaluations reflected that his performance met minimum standards and that it was improving. Appellant was never reprimanded in any way for Incidents 1-4. The turning point came with the Berkvam complaint. As Czeshinski noted, for the first time appellant demonstrated his behavior in front of clients of the agency rather than fellow employes. Under those circumstances, respondent could hardly know what to expect with appellant's erratic behavior and that certainly impacts the impression appellant could make in the field (and thereby reflect back on respondent). This incident alone creates a question about appellant's fitness for duty.

While it may be true that appellant's prior evaluation had been "normal," there was no reason to believe that adding on a few more instances that were similar to 1989 plus appellant's new and unexpected behavior toward an auditee could not result in different evaluation findings. It is not like nothing happened in the intervening four years. There might be some question about the timing of respondent's order in light of the fact that it had been about five months (incident 4) since appellant last displayed his unexpected behavior. However, when appellant was confronted with the Berkvam incident in October 1993, he renewed the questionable behavior he demonstrated toward Berkvam (almost one year earlier) by reiterating to his supervisors that he had audited her previously plus he added on that she was lying. It should be noted that no evidence was presented that appellant actually audited any of the sites he claimed to have audited. A reasonable supervisor when presented with these facts could have questioned appellant's fitness for duty and considered whether they might be attributable to a disability.

Appellant also argues that a "psychological-social evaluation," as quoted from the work order letter, does not fall within the parameters of a "medical or physical examination" identified in the statute. Appellant concedes that a psychological evaluation may comply; but not a social evaluation. Appellant may be right that a "social evaluation" standing alone, may not fulfill the requirement of the statute. While appellant has honed in on the words "psychological-social evaluation," the three work order letters also refer to "independent medical examination," "a complete psychiatric evaluation," and "a complete psychological evaluation." There was ample suggestion of the nature of the examination

required and that it fell within the parameters of the law. Relatedly, in one of appellant's refusal letters, he refers to a "psychological examination." Thus, there did not appear to be any misunderstanding on either party's part as to what was being sought.

It also appears that appellant disputes respondent's authority to order him for an evaluation because it is not a part of his position description. The position description is not relevant to this issue. The existence of this statute (§230.37(2), Wis. Stats.) indicates the legislature's intent to permit agencies to send employes for examinations when it has concerns about the employe's fitness for service.[2] Respondent had the authority to order appellant for an examination.

Having established the reasonableness of respondent's order, then the issue becomes whether respondent had just cause for disciplining appellant. It is undisputed that appellant refused the reasonable work orders so respondent had just cause for discipline.

The final question under *Mitchell* is whether the degree of discipline imposed was excessive. Appellant received three and seven day suspensions and was then terminated after he, on three separate occasions, refused to obey respondent's psychological examination order. There was no intervening behavior on appellant's part between each order that created additional grounds for the underlying order. In each order, it was the same disputed behavior on appellant's part that respondent believed required an examination. Appellant repeatedly refused to carry out a single order, and this was not three separate and distinct acts of insubordination. *Dept. of Health & Social Services v. Wis. Personnel Commission (Lyons)*, Case No. 80CV4948 (Dane Co. Circuit Ct., July 14, 1981), p.8. The question then becomes whether appellant's refusal to submit to the examination has the potential to so undermine respondent's functions as to warrant the various levels of discipline imposed. *Id.*, p. 8.

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[2] When the examination portion of the statute was proposed, the Department of Administration commented with respect to this section:

> This section authorizes department heads to order and pay for medical examinations for employes when there is some doubt about their capacity to continue in employment. This is intended to provide more objective evaluation of the employe's capacity when there is a question of his physical or mental condition in relation to his employment.

DOA, Bureau of Personnel, *Comments on Bill 452, A, Relating to the Organization of and Operation of the Personnel System*, Section 33, March 1961.

Respondent has an interest in having its reasonable work orders obeyed and an employe's failure to do so undermines its authority. The work order involved in this case is different from most ordinary work orders that are clearly tied to the responsibilities of an employe's position. Appellant's was a work order to submit to a psychological evaluation, not to perform, for instance, a neglected job responsibility. By ordering appellant for a §230.37(2), Wis. Stats. examination, respondent essentially invited appellant to use the defense that his alleged performance/behavior problems were attributable to some disability. Appellant declined the offer. Appellant made it clear to respondent a number of times, both in writing and verbally, that he would not submit to the examination. Throughout the time period of the orders and refusals, appellant continued to perform his job responsibilities. Under these circumstances, there is a limited extent to which appellant's refusal undermined respondent's functions.

In addition, respondent was not without recourse to deal with appellant's activities underlying its order for an examination. The statutes provide two approaches to employe misconduct or inadequate performance: §230.37(2), Wis. Stats. and discipline under §230.34(1)(a), Wis. Stats. *Jacobsen v. DHSS*, Case Nos. 91-0220-PC & 92-0001-PC-ER (10/16/92). Thus, respondent had another alternative once appellant refused the protection of §230.37(2), Wis. Stats. It was then free to follow whatever level of discipline was required for any or all of the alleged performance problems identified in Incidents 1-5. Similarly, by refusing to submit to an examination under §230.37(2), Wis. Stats., appellant effectively waived the protection afforded by that statute and agreed to be subject to the other form of discipline available under statute.

A comparison of similar cases can be helpful in evaluating whether a penalty is excessive. Respondent presented examples in which an employe's refusal to submit to an examination was met with a three day suspension for insubordination. One of respondent's employes declined to attend an examination and he was suspended for three days for insubordination. Appellant was suspended for three days for insubordination in 1989 when he refused to submit to an ordered medical evaluation. Appellant's 1993 three day suspension followed this pattern. The degree of discipline with respect to the three day suspension was not excessive.

Respondent's refusal to submit to the examination does not so undermine respondent's functions as to warrant the seven day suspension and termination. They are excessive. Based on the circumstances noted in prior paragraphs, respondent knew that appellant would not submit to the examination and it had

other alternatives for dealing with his allegedly objectionable behavior/performance. In essence, respondent terminated appellant for an ancillary reason rather than for the reasons related to appellant's performance with which respondent had issue.

ORDER

The action of respondent suspending appellant for three days is affirmed. The action of respondent suspending appellant for seven days and terminating him is rejected and this matter is remanded to respondent for action in accordance with this decision.

Dated:_____, 1994 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

JE:Prop Dec-Haney

_____
DONALD R. MURPHY, Commissioner

_____
JUDY M. ROGERS, Commissioner

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