STATE OF WISCONSIN | CIRCUIT COURT BRANCH 14 | DANE COUNTY

RAYMOND R. CHAVERA,

Petitioner,

vs.

WISCONSIN PERSONNEL COMMISSION,

Respondent.

DECISION and ORDER
Case No. 93-CV-2441

DECISION and ORDER

This matter comes before the court on a petition filed pursuant to Chapter 227, Wis. Stats. to review a final decision and order of the Wisconsin Personnel Commission dated May 21, 1993. Raymond Chavera filed two actions with the Personnel Commission: (1) an appeal of the Department of Industry, Labor and Human Relations' (hereinafter, "DILHR") decision to terminate his employment and (2) a complaint of race and/or handicap discrimination by DILHR against the petitioner. Case Nos. 90-0404-PC and 90-0181-PC-ER. The Personnel Commission affirmed DILHR's decision to discharge Chavera and found no probable cause to believe that Chavera was discriminated against.

Based on review of the record and relevant law, the court concludes that the Personnel Commission's decision must be affirmed.

FACTS

Raymond Chavera (hereinafter, "Chavera") was hired in 1982 by the Governor's Employment and Training Office, which became DILHR's Division of Employment and Training Policy in 1985. Prior to 1982,

Chavera had been employed in the DILHR Migrant Bureau. In 1985 Chavera was employed as a Community Service Specialist, a classified civil service position. Before Chavera's dismissal effective December 31, 1990, he was transferred to a Program Analyst 3 position.

In 1980, Chavera fell down a flight of stairs injuring his back and since then has suffered severe chronic back pain. In January 1986, Chavera underwent a laminectomy. Due to his back pain and on advise of doctors, Chavera was granted extended unpaid medical leaves of absence including: 5 weeks between 2/10/86 and 3/30/86, 11 months between 5/6/87 and 4/4/88, 2 weeks between 5/15/88 and 6/1/88, and 19 1/2 months between 5/12/89 and 12/31/90.

When Chavera returned to work in early 1987 he was not required to work more than a part-time schedule. When Chavera returned to work in June 1988, he also returned to work on a half-time basis. Both of these times Chavera was not required to work more than part-time based on doctors' advise. Additionally, after Chavera returned to work in June 1988, DILHR approved a change in Chavera's position and assisted in a lateral move to a Program Analyst 3 position. The change in duties eliminated car travel which was an activity that exacerbated Chavera's pain. After April 1989, Chavera did not perform any work for DILHR.

On September 27, 1990, per the direction of DILHR, Chavera underwent a physical examination by Dr. John Yost, a doctor selected by DILHR. Dr. Yost indicated in his report dated October 10, 1990 that Chavera was barely able to ambulate and that his

overall condition was "very guarded." Specifically, Dr. Yost stated:

> In regards to any permanent functional limitations, I would certainly note at this point he is almost at a level where he can do very little. As I mentioned in my report, he arrived on crutches and had a lot of difficulty changing positions, and seemed to be in extreme pain. I do not believe he could return to a full-time job at this point because of his current and escalating symptoms and somewhat downward trend since May, 1990. (Letter from Dr. John Yost to June Suhling, Division Administrator, DILHR, October 10, 1990).

Additionally, Dr. Yost stated that he a difficult time examining Chavera because even minimum movement caused Chavera pain. Moreover, Dr. Yost did not test Chavera as to his functional limits because he believed a risk existed of making Chavera's conditions worse. Finally, Dr. Yost also stated that he was unable to predict the end of Chavera's healing.

DILHR sent a letter dated November 20, 1990 to Chavera terminating his employment on medical grounds based on Dr. Yost's report. DILHR reasoned in this letter that because Chavera's current position was already a very sedentary job, other jobs in DILHR would not be less physically demanding. Moreover, DILHR believed that Chavera was unable to work on either a full-time or part-time basis because Chavera was only able to work part-time for intermittent periods of time between the series of leaves of absence granted to accommodate Chavera's medical condition.

Chavera appealed this decision to the Wisconsin Personnel Commission (hereinafter, "Commission") and additionally filed a

complaint of discrimination based on handicap.[1] The Commission found that DILHR had discharged Chavera for cause and that Chavera failed to show probable cause that DILHR had discriminated against him.

STANDARD OF REVIEW

The scope of judicial review of an administrative agency's decision is defined by sec. 227.57, Wis. Stats. That section provides that the court must affirm an agency's decision unless the court finds that: 1) the fairness of the proceedings or correctness of the agency's actions have been impaired by a material error in procedure, sec. 227.57(4), Wis. Stats.; 2) the agency erroneously interpreted a provision of law, sec. 227.57(5), Wis. Stats.; 3) the agency's action depends on findings of fact not supported by substantial evidence in the record, sec. 227.57(6), Wis. Stats.; or 4) the agency's exercise of discretion is outside the range delegated to it by law or is otherwise in violation of a constitutional or statutory provision, sec. 227.57(8), Wis. Stats. The court cannot, however, substitute its judgment for that of the agency on an issue of discretion. Id.

The standard of review for an administrative decision depends on whether the issue presented involves questions of fact or law. A court will uphold an agency's fact finding if it is supported by

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[1] Chavera originally included a complaint of discrimination based on race in his action filed with the Commission. However, Chavera presented no evidence to the Commission supporting a claim of race discrimination and makes no argument as to race discrimination on appeal. Thus, this specific issue must be treated as abandoned by Chavera. Becker v. Automatic Garage Door Co., 156 Wis. 2d 409, 419, 456 N.W.2d 888 (Ct. App. 1990).

credible and substantial evidence found on the record as a whole. Wehr Steel Co. v. ILHR, 106 Wis. 2d 111, 117, 315 N.W.2d 357 (1982). "Substantial evidence" necessary to support an administrative decision is such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. City of La Crosse Police and Fire Comm'n v. Labor and Industry Review Comm'n, 139 Wis. 2d 740, 407 N.W.2d 510 (1987). In determining whether an agency's factual findings are supported by substantial evidence, it is not required that the evidence be subject to no other reasonable, equally plausible interpretations. Hamilton v. Department of Industry, Labor & Human Relations, 94 Wis. 2d 611, 288 N.W.2d 857 (1980).

However, a court is free to review a question of law ab initio when it is as competent as an agency to interpret the relevant law, or when material facts are undisputed. Dept. of Revenue v. Milwaukee Refining Corp., 80 Wis. 2d 44, 48, 257 N.W.2d 855 (1977). Nonetheless, a court gives great weight to agency decisions when the agency's expertise is significant to the determination of a legal issue. County of Milwaukee v. LIRC, 139 Wis. 2d 805, 830, 407 N.W.2d 908 (1987); Nottelson v. DILHR, 94 Wis. 2d 106, 117, 287 N.W.2d 763 (1980). A court will also sustain a reasonable legal conclusion even if an alternative view may be equally reasonable. United Way v. DILHR, 105 Wis. 2d 447, 453, 313 N.W.2d 858 (Ct. App. 1981). Thus, a court should hesitate to substitute its judgement for that of an agency on a question of law if the agency's conclusion has a rational basis. American Motors Corp. v. LIRC,

119 Wis. 2d 706, 710, 350 N.W.2d 120 (1984).

DECISION

In this case, the factual findings of the Commission are not at issue. Chavera does not dispute any of the 22 findings of fact made by the Commission as set forth in the Proposed Decision and Order incorporated into the Final Order on May 21, 1993. Significantly, neither side disputes that Chavera is afflicted with a debilitating injury nor that this disability has made full-time work in his original position untenable. Moreover, the court has reviewed the record and finds that the Commission's findings of fact are conclusive on this review because they are supported by substantial evidence. Sec. 227.57(6), Wis. Stats. Consequently, whether or not the findings of fact are supported by substantial evidence is not at issue in this case.

Chavera argues that the Commission's conclusions of law are unreasonable. Chavera disputes whether DILHR explored all the statutorily required avenues of employment under sec. 230.37(2), Wis. Stats.[2] before resorting to termination as the "last resort." The Commission concluded that DILHR had "just cause" under sec.

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[2] Sec. 230.37(2), Stats. provides in part:

> 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 service.

230.34(1)(a), Wis. Stats.[3] for dismissing Chavera because he was physically unable to work. Additionally, the Commission found that the evidence supported DILHR's argument that it had complied with the steps proscribed in sec. 230.37(2), Wis. Stats. In reviewing this case, the court must determine whether the Commission's factual findings support reasonable conclusions of law under secs. 230.34(1)(a) and 230.37(2), Wis. Stats. Determination of whether facts meet a particular legal standard is a question of law. Nottelson, 94 Wis. 2d at 116.

As a question of law, the court may review such ab initio because the material facts are undisputed. Dept. of Revenue v. Milwaukee Refining Corp., 80 Wis. 2d at 48. Nonetheless, some deference should be given to the administrative agency's decision. The supreme court has stated that "(w)here a legal question is intertwined with factual determinations or with value or policy determinations..., a court should defer to the agency which has primary responsibility for determinations of fact and policy." West Bend Education Ass'n v. WERC, 121 Wis. 2d 1, 12, 357 N.W.2d 534 (1984). In particular, the supreme court has held that determination of good cause for employment termination calls for a value judgement, and in reviewing such a value judgement, the court

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[3] Sec. 230.34(1)(a), Stats. provides:
An employe with permanent status in class or an employe who has served with the state or a county, or both, as an assistant district attorney for a continuous period of 12 months or more may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.

should give the agency's decision weight. Nottelson, 94 Wis. 2d at 117. Moreover, deference should be given to the Commission because it has a legislative mandate to review personnel decisions and has expertise in the area of reviewing personnel decisions. Sec. 230.44(1)(a), Wis. Stats.; Phillips v. Wisconsin Personnel Commission, 167 Wis. 2d 205, 215, 482 N.W.2d 121 (1992).

Here, Chavera argues that the Commission erred as a matter of law by upholding DILHR's termination for "just cause" under sec. 230.34, Wis. Stats. because the Commission did not determine that DILHR failed to accommodate Chavera under sec. 230.37(2), Wis. Stats. Under sec. 230.3(2), if an employe becomes physically incapable of performing the duties of his or her position, the appointing authority must transfer the employe to a position with less arduous duties and if necessary demote, place the employe in a part-time position, and as a last resort dismiss the employe from service. Chavera asserts that DILHR did not adequately determine whether Chavera was capable of some type of part-time position.

In support of Chavera's argument, he cites the deposition of Ellen Hansen, the director of the bureau in which Chavera was employed (Petitioner's Exhibit 4 at the Commission Hearing).[4] Hansen testified at her deposition that she had not made any independent search into other divisions for positions for Chavera that were less physically demanding. (Hansen Deposition, p. 12). Hansen also stated that she only sent the description for Chavera's

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[4] Hansen's deposition was admitted as an exhibit at the Commission hearing.

then full-time position and did not send other available job descriptions for full or part-time positions to Dr. John Yost for the medical evaluation of Chavera's ability to perform work. (Id., p. 13-14). Thus, Chavera argues that Dr. Yost's evaluation and DILHR's decision to terminate is specific to the position he last held at DILHR and not based on possible demotions or part-time employment.

Chavera also cites his own testimony at the Commission hearing. At the hearing, Chavera stated that his physician, Dr. James Huffer, told him that with treatment he would be able to continue to work. (Commission Hearing Transcript, p. 8). Chavera also testified that, although DILHR had ordered a special orthopedic chair, he was unable to test whether it would have helped his ability to work because the chair arrived after he was no longer working for DILHR. (Id., p. 31).

Moreover, Chavera argues that the law requires that DILHR search within other state agencies for available positions. In support, he cites decisions by the State Personnel Board and the Commission. Kelm v. Schmidt, Case No. 19, April 23, 1974; Schilling v. UW-Madison, Case No. 90-0064-PC-ER and 90-0248-PC (November 6, 1991). However, in this case, the Commission found it unnecessary to reach the decision of whether DILHR should have searched for available positions in other state agencies. The Commission reasoned that "Dr. Yost's medical report makes it clear that complainant (Chavera) simply was unable to work in a sedentary job at that time, and even if there had been a duty to consider

alternative employment outside DILHR, complainant would have been unable to work in any capacity." (Commission's Final Order, p. 1).

As to the issue of whether DILHR adequately considered part-time employment for Chavera, the Commission found that Ellen Hansen also testified that she had consulted with the division's affirmative action officer, Joan Larson. (Hansen's Deposition, p. 12). Hansen and Larson reviewed comparable positions in the division and vacancies to determine whether a position was available for Chavera. (Id.) The Commission also found that the DILHR Employment Relations Manager, Lee Issacson, corroborated Hansen's testimony. In Issacson's testimony at the Commission Hearing, he stated that alternatives other than termination were considered. (Transcript of September 29, 1992 Commission Hearing, p. 22). In particular, Issacson testified that other positions and part-time employment were considered and that the conclusion was made that Chavera would be medically unfit to perform any other job either full-time or part-time. (Id. at 23). Issacson explained that even part-time employment seemed to be out of the question for Chavera due to Chavera's prior unsuccessful attempts to work part-time and the medical evidence DILHR had in the fall of 1990. (Id.)

If this court decided this case ab initio without deference, the court may have required more substantial proof that DILHR had adequately attempted to accommodate Chavera in a part-time position. However, when deference to an agency's decision is appropriate in a case, the courts of this state should affirm the agency's decision if it is reasonable and even if another

conclusion would be equally reasonable. DILHR v. LIRC, 161 Wis. 2d 231, 238, 467 N.W.2d 545 (1991). In DILHR v. LIRC, the supreme court affirmed LIRC's decision to grant unemployment compensation because LIRC's interpretation of the applicable statute was reasonable. Id.

In this case, the court finds that the Commission's legal conclusions as to secs. 230.34(1) and 230.37(2) are reasonable. The Commission found, and Chavera does not dispute, that Chavera was transferred to another position to accommodate his back pain and allowed to work on a part-time basis. The Commission also considered that DILHR had Chavera submit to a medical examination to determine his fitness to continue work as permitted under sec. 230.37(2), Wis. Stats. In sum, the Commission fully considered the accommodation mandates under sec. 230.37(2), Wis. Stats. and found evidence on the record to support DILHR's argument that DILHR had complied with sec. 230.37(2), Wis. Stats. and thus could terminate Chavera's employment.

Chavera's arguments merely dispute the adequacy of the factual findings. Chavera claims that DILHR did not give Chavera a chance at part-time employment or to try the special orthopedic chair that DILHR ordered for Chavera but that arrived after Chavera was no longer working for DILHR. Additionally, Chavera argues that Dr. Yost's letter to DILHR did not give DILHR sufficient rationale for not allowing Chavera to make a further attempt at part-time employment because Dr. Yost was not requested to consider part-time employment.

However, the court finds that there is sufficient evidence in the record to support the Commission's decision to uphold DILHR's decision to dismiss Chavera due to his physical incapacity to perform even part-time employment. The Commission based its decision in part on the medical opinion of Dr. Yost and in part on the testimony of DILHR administrators (Hansen and Issacson) that indicated DILHR had discussed available part-time positions for Chavera. These administrators concluded that based on Chavera's past unsuccessful attempts to work part-time and Dr. Yost's medical opinion, Chavera would be unable to work at all.

ORDER

The court AFFIRMS the Commission's decision to sustain DILHR's discharge of Chavera for just cause based on the medical doctor's evaluation of Chavera and Chavera's employment history as to part-time employment. The court also AFFIRMS the Commission's conclusion that Chavera had failed to meet the burden proving he was discriminated against due to race and/or handicap.

IT IS SO ORDERED.

Dated this 25 day of August, 1994.

BY THE COURT:

George W. Northrup, Judge
Circuit Court Branch 14

cc: Atty. Richard V. Graylow
Atty. Stephen M. Sobota