STATE OF WISCONSIN PERSONNEL COMMISSION

STEVEN FIGUEROA,
Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES [DEPARTMENT OF HEALTH AND FAMILY SERVICES][1],
Respondent.

Case No. 95-0116-PC-ER

FINAL ORDER

A proposed decision and order (PDO) in the above-noted case was issued on January 28, 1998, with an opportunity for the parties to file objections. Complainant filed written objections by letter dated February 22, 1998, to which respondent filed a written reply dated February 26, 1998. The Commission has considered the arguments filed by the parties and has consulted with the hearing examiner. The Commission adopts the PDO as its final decision and order, with the following amendments:

A. The final two sentences of paragraph 6 of the Findings of Fact are amended for clarification, as shown below:

> . . . Other buildings did not have a 2-shift coverage seven days a week because the client needs lessened ~~during the night shift~~ later in the day which enabled resident care technicians to perform some of the custodial work. The client needs in Highview did not lessen ~~during the night~~ later in the day.

B. Paragraph 10 of the Findings of Fact is amended to correct a date in subparagraph "b", as shown below:

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[1] Pursuant to the provisions of 1995 Wisconsin Act 27 which created the Department of Health and Family Services (DHFS), effective July 1, 1996, the authority previously held by the

b. On work schedule 7 covering the pay period ending 2/4/95, complainant was "pulled" to the 7 a.m. shift on ~~February~~ January 31, 1995.

C. Paragraph 1 of the Conclusions of Law is amended to articulate a clearer statement of the applicable legal standard, as shown below:

1. Complainant had the burden of proof to establish by a preponderance of the credible evidence that respondent terminated his employment because of his handicap.

D. A new, final paragraph is added to the Conclusions of Law to clarify the basis for the Commission's jurisdiction:

3. The Commission has jurisdiction over this matter pursuant to 230.45(1)(b), Stats.

The Commission has considered all arguments raised by complainant in his letter dated February 22, 1998. Several of the factual contentions (such as complainant's assertion that stress compounded problems with his diabetic condition and the assertion that he attempted to trade days off work with coworkers but was unsuccessful) were not mentioned at hearing. The Commission cannot consider information which was not made part of the hearing record.

Complainant's written arguments focus on a failure of respondent to accommodate his handicap by giving him a straight shift assignment. (See complainant's letter dated 2/22/98.) As noted in the PDO, the issue which the parties agreed upon for hearing was whether respondent's decision to terminate complainant was based on his handicap. The question of accommodation by granting a straight shift was not part of the defined hearing issue. The Commission wishes to note that even if accommodation had been part of the agreed-upon hearing issue the record does not support a conclusion that a straight shift assignment was necessary as an

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Secretary of the Department of Health and Social Services (DHSS) with respect to the position that is the subject of this proceeding is now held by the Secretary of DHFS.

accommodation to control complainant's diabetic condition. Complainant wished to have a straight shift to attend school and he may have believed a straight shift would have helped him to control his diabetes. The problem is the record lacks sufficient evidence to support his belief.

Complainant reviewed the information contained in paragraph 12 of the Findings of Fact in the PDO which places the dates of complainant's illness in context of the rotating schedules assigned. He sees a pattern in the absences in that most occurred on the fourth consecutive day of a particular schedule. (See p. 4 of complainant's letter dated 2/22/98.) His observation is insufficient to demonstrate a causal relationship between rotating schedules and aggravation of his diabetic condition.

Complainant also contests the accuracy of Ms. Thompson's testimony regarding the notes she took of her telephone conference with Dr. Shetty, as summarized in ¶15 of the Findings of Fact in the PDO. (Complainant's letter dated 2/22/98, p. 2.) Complainant failed to show at hearing that her testimony was unworthy of credence. He was informed of the substance of the telephone conversation at a meeting on May 4, 1995 (as noted in ¶17 of the Findings of Fact in the PDO). Yet he appeared at hearing (held over two years after he knew Ms. Thompson's version of events) without Dr. Shetty as a witness to refute Ms. Thompson's version of events.

ORDER

The proposed decision and order is adopted as the Commission's final decision with the above-noted amendments. Accordingly, this case is dismissed.

Dated: March 11, 1998. STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

Parties:

Steven Figueroa
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Eau Claire WI 54703

Joe Leann
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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

STEVEN FIGUEROA,
Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES [DEPARTMENT OF HEALTH AND FAMILY SERVICES],[1]
Respondent.

PROPOSED DECISION AND ORDER

Case No. 95-0116-PC-ER

BACKGROUND

A hearing was held in the above-noted case on November 10-11, 1997. At the close of hearing, the parties agreed to present a combination of oral and written arguments as follows: respondent presented an oral argument at the hearing, complainant submitted a written response and respondent submitted the final written reply. The final argument was received by the Commission on January 16, 1998.[2]

A prehearing conference was held on August 20, 1997, at which time the parties agreed to the following statement of the hearing issue:

> Whether complainant was discriminated against by respondent on the basis of handicap when he was terminated from his Custodian 2 position in June 1995.

FINDINGS OF FACT

1. Respondent hired complainant to work as a custodian at the Northern Wisconsin Center (NWC) beginning on January 3, 1995, with the requirement that he

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[1] Pursuant to the provisions of 1995 Wisconsin Act 27 which created the Department of Health and Family Services (DHFS), effective July 1, 1996, the authority previously held by the Secretary of the Department of Health and Social Services (DHSS) with respect to the position that is the subject of this proceeding is now held by the Secretary of DHFS.

[2] The briefing schedule was extended to accommodate complainant's request for additional time to file his brief.

serve a six month probationary period. He was terminated on June 14, 1995, while still on probation.

2. Respondent knew when complainant was hired that he suffers from Type 1 Diabetes, a permanent condition which is controlled by taking insulin and by following a strict regimen of diet and exercise. Complainant's supervisor, Marcelene Ruff (hereafter, "Supv. Ruff"), spoke with complainant on his first day of work asking what respondent could do to assist complainant in doing what he needed to do to control his diabetes. He indicated that refrigeration was unnecessary for the type of insulin he took. He was given a locker to store his insulin, as well as a container for used needles with instructions on what to do with the needles when the container was full. He was assured that he could take his meal time and breaks on a flexible basis at his own discretion. Supv. Ruff also told complainant that nursing staff were available if complainant had questions about his diabetes. Respondent's nursing staff are familiar with the needs of diabetics because many of NWC's clients are diabetic. Respondent also has several employees who are diabetic and who perform their jobs successfully.

3. NWC is an institution for the care and treatment of adults who are developmentally disabled. The adult clients live at the institution. Staffing levels for individuals responsible for client care, including custodial services, are subject to scrutiny under state and federal laws. Employe attendance requirements are enforced strictly due to these factors.

4. Complainant was hired to work in NWC's Highview building where clients live on three floors. He was hired knowing the position would be scheduled on a rotating shift basis. He told respondent at the time of hire that a rotating shift would not be a problem. Complainant had never worked a rotating shift in prior employment, but did not anticipate problems.

5. Five custodians, including complainant, worked in the Highview building. Many clients in Highview are in wheelchairs, some are incontinent and some exhibit destructive behavior such as breaking furniture. Some clients have a behavioral disorder which leads them to place inedible items in their mouth, a practice which

could lead to medical problems. All custodians were expected to help keep the building's living areas clean which included immediate clean up after incontinence episodes and immediate clearing away of broken items so clients would not put pieces of the broken objects in their mouths. Each custodian also had an additional specific assignment as follows: a) complainant was responsible for cleaning offices, b) a second custodian was responsible for deep cleaning (vacuuming vents, heavy cleaning, scrubbing, etc.) two living areas on 1st floor, c) a third custodian was responsible for deep cleaning the remaining living areas on 1st floor, d) a fourth custodian was responsible for deep cleaning two living areas on 2nd floor, and e) a fifth custodian was responsible for deep cleaning the remaining living areas on 2nd floor.

6. Due to the severity of the medical problems of clients in Highview, custodial coverage was required seven days a week, two 8-hour shifts a day. The first shift started at 7 a.m., and the second at 2 p.m. Other buildings did not have 2-shift coverage seven days a week because the client needs lessened during the night shift which enabled the resident care technicians to perform some of the custodial work. The client needs in Highview did not lessen during the night.

7. Supv. Ruff posted the custodial working schedules. (Exh. R-121) Each schedule covered a two-week period (which corresponded to the pay periods). She posted the schedule 5 days before the schedule took effect. She advised complainant that he could trade days on an informal and voluntary basis with the other custodians, an option which complainant never pursued.

8. Complainant was absent on scheduled days of work as shown in the table below, which also indicates the reason for the absence. (Exh. R-111)

1/06/95	Ill at work, went to emergency room for diabetic condition
2/03/95	Car trouble in Milwaukee
2/13/95	Hospitalized for diabetic condition
2/14/95	Hospitalized for diabetic condition
5/23/95	Sick due to diabetic condition[3]

[3] Complainant testified he was absent on May 23, 1995, due to his diabetic condition. Respondent's records indicate he was absent due to illness, but do not reflect the type of illness. The hearing examiner accepted complainant's testimony as to the cause of this absence.

6/11/95 Reason for absence disputed (discussed in later ¶s)

9. Each custodian working in the Highview building was given a rotating schedule following the basic pattern of six consecutive days on one shift (i.e., starting at 7 a.m.), followed by two days off work, followed by six consecutive days on the other shift (i.e., starting at 2 p.m.). A minimum of one custodian had to work each of the two shifts every day. It was necessary to deviate from the basic pattern of rotating shifts at times to ensure minimum or adequate coverage. The union contract pertinent to custodial workers required that the least senior employee be "pulled" to fill in where deviations from the usual rotating shift patterns were needed. The practice of "pulling" resulted in a quick change of schedule for the "pulled" custodian. Complainant was the custodian with the least seniority and occasions arose where he was "pulled." Other custodians also were "pulled" when they were the least senior employe available. (Exh. R-121) The deviations from the usual rotating pattern were built into or already noted on the schedule posted by Supv. Ruff five days in advance of the schedule's effective date.

10. Complainant was the least senior person "pulled" on eight days over the course of his employment at NWC, as summarized below from Exh. R-121:

a. On work schedule 6 covering the pay period ending 1/21/95, complainant was scheduled to work on January 10-13, 1995, starting at 2 p.m., and was "pulled" to the 7 a.m. shift on January 14-15, 1995.
b. On work schedule 7 covering the pay period ending 2/4/95, complainant was "pulled" to the 7 a.m. shift on February 31, 1995.
c. On work schedule 1 covering the pay period ending 2/18/95, complainant was "pulled" to the 7 a.m. shift on February 16, 1995.
d. On work schedule 2 covering the pay period ending 3/4/95, complainant was "pulled" to the 2 p.m. shift on February 24, 1995.
e. On work schedule 2 covering the pay period ending 3/4/95, complainant was "pulled" to the 7 a.m. shift on March 4, 1995.
f. On work schedule 5 covering the pay period ending 4/15/95, complainant was "pulled" to the 7 a.m. shift on April 6, 1995.
g. On work schedule 6 covering the pay period ending 4/29/95, complainant was "pulled" to the 7 a.m. shift on April 23, 1995.

h. On work schedule 7 covering the pay period ending 5/13/95, complainant was "pulled" to the 2 p.m. shift on May 1, 1995.

i. On work schedule 7 covering the pay period ending 5/13/95, complainant was "pulled" to the 7 a.m. shift on May 9, 1995.

11. The dates complainant was absent because of illness related to his diabetic condition (see ¶8 above) do not coincide with the dates complainant's shift changed due to quick schedule changes (see ¶10 above).

12. The dates complainant was absent because of illness related to his diabetic condition (see ¶8 above) also do not coincide with usual changes in his rotating shift. His absence on January 6, 1995, occurred on the fourth consecutive day working the 7 a.m. shift, a period which had been preceded by 3 days scheduled off work. His hospitalization on February 13-14, 1995, occurred on the third and fourth consecutive days working the 2 p.m. shift, a period which had been preceded by two days scheduled off work. His absence on February 23, 1995, occurred on the fourth consecutive day working the 2 p.m. shift, a period which had been preceded by 2 scheduled days off work. His absence on June 11, 1995, occurred on the sixth consecutive day of working the 2 p.m. shift, a period preceded and followed by two scheduled days off work.

13. Some time prior to March 17, 1995, complainant asked Supv. Ruff if he could work one set schedule on either shift because he wished to return to school. Supv. Ruff explained that his request could not be granted. Pursuant to the union contract, individuals compete for custodial positions which include a description of the shift expectations. All custodians at Highview had applied for the positions as rotating shifts. Granting complainant a straight shift would impact negatively on the rights of these other custodians.

14. A meeting was held on March 17, 1995, to discuss complainant's absences which at this point in time involved 4 occurrences and 31 hours of unanticipated absences. (Exh. R-104) Complainant suggested for the first time at this meeting that the rotating shift requirement of his position caused problems with his insulin usage

and made it more difficult for him to control his diabetic condition. He requested one shift on a permanent basis because he felt the quick changes (where he was "pulled" for a different shift) made it more difficult for him to control his diabetic condition. Respondent told complainant that attendance was important to the job. Respondent requested medical information to determine if complainant had a permanent disability which affected his ability to perform his job with or without accommodations. Complainant felt Dr. Shetty was most familiar with his diabetic condition, so arrangements were made to obtain his medical opinion. (Exh. R-105)

15. Respondent received Dr. Shetty's written response on April 14, 1995 (Exh. R-106). He confirmed that complainant had been a Type I Labile Diabetic for 17 years and the condition was permanent. He noted he had not seen complainant for more than one year so he could not say if complainant's medical condition restricted his ability to perform the custodial work. He noted that complainant's diabetic condition had been unstable in the past because complainant failed to sustain the required regimen of diet, sleep and exercise. Dr. Shetty made the additional comment that complainant would not need work restrictions if complainant kept his diabetes under control. He then stated: "However, it is important to have the same work schedule and consistent physical activity because he is a labile diabetic."

16. NWC's Employee Services Manager, Carolyn Thompson, reviewed Dr. Shetty's medical statement and spoke with him to obtain clarification. The doctor informed her that a schedule change and/or elimination of quick changes would not be needed if complainant maintained the required regimen of diet, sleep and exercise.

17. A meeting was held on May 4, 1995, to continue discussion regarding the frequency of complainant's absences. (Exh. R-107) Complainant was informed as to Dr. Shetty's opinion that rotating shifts and quick changes should not be a problem if complainant maintained a regimen of diet, sleep and exercise. Based on this information, complainant was informed that he did not have a medical condition which triggered an accommodation duty by the employer. Complainant was told he could make a formal request for an accommodation but the request must include supporting medical

documentation. Respondent indicated at the meeting that if complainant did submit a formal request for a set schedule as an accommodation, the request likely could not be granted in NWC's Highview building because of the resulting negative impact on the other four custodians. Custodial positions existed elsewhere at NWC and there may have been 1-2 vacancies at the time involving set schedules. Complainant did not file a formal request for accommodation because he felt there was no point in doing so due to his probationary status to which transfer rights did not attach.

18. A probation meeting was held on June 2, 1995. (Exh. R-109) Complainant indicated he was taking his insulin more regularly and doing better with his eating. He continued to maintain that rotating shifts were causing problems with his diabetic condition. As of this meeting he had 5 occurrences and 39 hours of unanticipated absences. Respondent expressed concern for complainant's health in that he was not receiving regular medical treatment for his serious diabetic condition. Complainant said this would not be a problem once he passed his initial 6 months of employment and received health insurance. Health insurance had been available to him as a NWC employe all along, but at a higher cost than would apply after six months of employment when respondent would begin paying a portion of the premium. Complainant was told at this meeting that a decision would be made shortly on whether he would be terminated for excessive absenteeism under NWC's attendance policy.

19. A second probationary meeting was held on June 8, 1995, at which time complainant was informed that NWC would request a one-year extension on his probation. (Exh. R-109) NWC's reasoning was that the additional period with the lower-cost of health insurance would provide complainant an opportunity to get his diabetic condition under control and for respondent to assess whether his attendance problems would improve. NWC informed complainant that the final decision on NWC's recommendation would be made by respondent's central office and by the Department of Employment Relations.

20. After the second probationary meeting, NWC learned that complainant would need to sign a formal request to have his probation extended. A meeting was

scheduled for June 14, 1995, at 10:00 a.m., to obtain the required signatures. (Exh. R-109)

21. Ms. Thompson learned before the scheduled meeting of June 14, 1995 (see prior par.) that complainant had taken an additional sick day on Sunday, June 11, 1995, and had told Darrell Arndt, NWC's Management Services Director, he was ill because of lingering effects from drinking alcohol the prior day. Absences due to drinking alcohol are considered an abuse of sick leave which is a work rule violation. Ms. Thompson also learned that a NWC employe had overheard complainant using the telephone in the Highview lobby saying he felt kind of depressed with a 10 a.m. meeting coming up to determine if he would be fired. She further overheard complainant say "right now I feel like a postal employee." The employe who overheard the conversation was frightened by the postal employe statement. Such statements made where others can overhear is a work rule violation, whether intended as an indication of violence, as a joke, or as something else. The meeting previously scheduled for 10:00 a.m., was changed to 2:00 p.m. (Exh. R-109)

22. A termination meeting was held on June 14, 1995, at 2:00 p.m. (Exhs. R-109 and R-110) At this point in time, complainant had six occurrences and 47 hours of unanticipated absences. Respondent also felt he had violated the work rule on sick leave abuse and on intimidating behaviors, as noted in the prior paragraph. Complainant explained that the telephone conversation in the lobby had been with his attorney who asked how he felt and this generated the postal worker response. Complainant also denied telling Mr. Arndt that complainant missed work because he had been drinking alcohol. Complainant's version of events as explained at the termination meeting were that : a) he told Mr. Arndt he was sick because of illness, b) he told Mr. Arndt that while he had purchased a bottle of alcohol he had not drunk any of it, and c) he requested from Mr. Arndt a referral to the Employee Assistance Program (EAP) to ensure that complainant would not start drinking. Before the 2:00 p.m. meeting ended, Ms. Thompson attempted to reach Mr. Arndt to clarify what complainant had told him but he was unavailable. The decision was made during the meeting to terminate com-

plainant. The termination letter was changed to eliminate the reference to sick leave abuse on June 11, 1995, due to the immediate inability to confirm the conversation from Mr. Arndt. The revised termination letter (Exh. R-122), accordingly, noted excessive absenteeism as the reason for termination.

23. On June 19, 1995, complainant telephoned Ms. Thompson and asked whether he would be paid for his absence on June 11, 1995. Ms. Thompson said he would not be paid because Mr. Arndt had confirmed that complainant told him the absence was due to drinking alcohol. Complainant replied that "he would not argue on that one." (Thompson testimony, as supported by Exh. R-109.)

24. Respondent's belief that complainant was absent from work on June 11, 1995, due to the effects of drinking alcohol was reasonable based on the information provided from Mr. Arndt who had no vested interest in the issue. Respondent's belief that complainant's telephone conversation in the lobby of Highview was inappropriate and intimidating to another worker was reasonable. However, respondent did not know whether complainant had a background of violence and complainant's work performance would not support a conclusion that he had a tendency toward violence.

CONCLUSIONS OF LAW

1. Complainant had the burden of proof to establish by a preponderance of the evidence that respondent terminated his employment because of his handicap.

2. Complainant failed to meet his burden of proof.

OPINION

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct.

1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

In *Harris v. DHSS*, 84-0109-PC-ER, 85-0115-PC-ER, 2/11/88, the Commission described the handicap discrimination analysis as follows:

> [A] typical discrimination case will involve the following analysis:
> 1. Whether the complainant is a handicapped individual;
> 2. Whether the employer discriminated against complainant because of the handicap;
> 3. Whether the employer can avail itself of the exception to the proscription against handicap discrimination in employment set forth at §111.34(2)(a), Stats., -- i.e., whether the handicap is sufficiently related to the complainant's ability to adequately undertake the job-related responsibilities of his or her employment (this determination must be made in accordance with §111.34(1)(b), Stats., which requires a case-by-case evaluation of whether the complainant "can adequately undertake the job-related responsibilities of a particular job");
> 4. If the employer has succeeded in establishing its discrimination is covered by this exception, the final issue is whether the employer failed to reasonably accommodate the complainant's handicap.

It is undisputed that complainant has a severe diabetic condition which meets the definition of a handicap under the Fair Employment Act (FEA), §111.32(8), Stats. The defined hearing issue speaks solely to the adverse action of termination. The record does not show that respondent terminated complainant because of his handicap. To the contrary, respondent took many steps to accommodate complainant's handicap (see ¶¶2 & 7 of the Findings of Fact) with the one exception being to grant him a regular shift, the need for which was unsupported by his pattern of absences (see ¶¶8, 10, 11 & 12 of the Findings of Fact) or by the medical opinion of his own physician (see ¶¶15-17 of the Findings of Fact). Significant also is NWC's recommendation that complainant's probationary period be extended (see ¶19 of the Findings of Fact). The sole intervening factors between the recommended extension and the change to termination were his absence of June 11, 1995, due to the effects of drinking alcohol and the postal worker comment overheard in the Highview lobby. Neither of these intervening

factors were related to his diabetic handicap. Accordingly, complainant's case fails at the second step of the *Harris* analysis.

Other Issues Raised by Complainant

Complainant did not submit any witness list or exhibits prior to hearing as required under §§ PC4.02 and 6.02(2), Wis. Adm. Code. Complainant indicated at hearing that he thought the information submitted during the investigation of his case would be included as hearing exhibits automatically. The hearing examiner rejected complainant's argument as contrary to the exchange requirements noted previously about which complainant should have known and had been warned (as noted in the following paragraph). The hearing examiner allowed complainant to testify but did not allow him to call other witnesses because of his failure to exchange the names of witnesses prior to hearing.

Complainant attempted to shift fault for his failure to exchange exhibits onto the examiner in his post-hearing brief. Specifically, on page 1 of his brief which the Commission received on December 17, 1997, complainant alleged as follows:

> (1) I would like to bring up the question of my exhibits. At the hearing I was informed that I could not use the information that I sent . . . to open this case. I did receive the Instructions for Unrepresented parties[4] .

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[4] A document entitled "Instructions for Unrepresented Parties" was mailed to complainant along with his copy of the prehearing Conference Report dated August 25, 1997. The mailing states in pertinent part (with same emphasis as shown in the original document):

> Exchange of witness lists and exhibits. Both parties are required to exchange witness lists and exhibits at least 3 working days prior to hearing. This is an important deadline you do not want to miss because failure to comply could result in exclusion of testimony from your witnesses and/or exclusion of your exhibits. Please refer to the Conference Report for further details.

The Conference Report on the same topic states as shown below with the same emphasis as appears in the original document:

> The parties are reminded that pursuant to s. PC 4.02 and PC 6.02(2), Wis. Admin. Code, copies of exhibits and names of witnesses must be exchanged at least 3 working days before the day established for hearing, or will be subject to exclusion. **This means the information must be exchanged at or before 4:30 p.m. on November 5,**

> . . and I did have some questions. I was in the hospital at this time so I had my mother call and ask for Ms. Judy M. Rogers . . . to clear up these questions. She was told that she would be called back later in the day or in a few days. Nobody called back. I believe this could be verified by old telephone bills. I know that these exhibits would have helped my case.

Complainant's mother did call the Commission on October 27, 1997, and left the message that her son wanted the hearing in Madison and not at NWC. Respondent's counsel, however, later spoke directly with complainant who agreed to hold the hearing at NWC. Since the matter appeared resolved, the hearing examiner did not return the call to complainant's mother but instead wrote directly to complainant by letter dated October 28, 1997.

The hearing examiner's letter dated October 28, 1997, further noted as follows:

> I understand Mr. Figueroa has been ill and his illness has required him to stay at a hospital and a nursing home at various times. It is my further understanding that he told [counsel for respondent] that his health will not prevent his ability to prepare for and to appear at hearing as scheduled. If this is incorrect, Mr. Figueroa should call me immediately. He might wish to review my prior letter dated September 25, 1997, regarding hearing instructions as a reminder as to what is involved in preparing for hearing.[5]

The letter was returned to the Commission by the post office stamped "Return to Sender, No longer living here." The letter had been sent to complainant's address of record. On November 3, 1997, it was re-mailed to the veteran's hospital in Tomah, Wisconsin, a temporary address of which complainant failed to apprise the Commission.

1997. A timely exchange occurs if the Commission and opposing party each receive said information by the stated deadline.

[5] The hearing examiner's letter dated September 25, 1997, reminded the parties of the requirement to exchange witness lists and exhibits prior to hearing and requested that each party mark their exhibits prior to the required exchange.

There is no Commission record that complainant's mother called on a separate occasion or at any time regarding questions about hearing exhibits. There was a subsequent call from complainant on November 6, 1997, when he spoke with the Commission's Legal Secretary asking what he should do if his car broke down on the way to the hearing. He did not ask to speak with the examiner for any guidance and did not inquire about the exchange requirements for witness lists and exhibits. In short, complainant's attempt to shift blame onto the examiner for his own failure to comply with known requirements is inappropriate.

Complainant similarly attempted to shift fault to respondent's attorney for complainant's own failure to comply with the requirement to exchange witness lists prior to hearing. Specifically, complainant noted as shown below in his post-hearing brief:

> (2) The witness list that [respondent's counsel] submitted on October 30, 1997. On this list he had 13 names of witnesses and additional witnesses he may call. On this list he had Craig Lindgren a union representative or Dan Goettle who I also believe was and is now president of the union. If I knew that [respondent's counsel] was not planning to call these two witnesses I would have. I know these two witnesses are very important for my case because they would know how the union would have reacted to (my) request for accommodation.

For reasons discussed previously, complainant should have known of his own responsibilities regarding the disclosure of witnesses. Furthermore, both the prehearing conference report and the Instructions for Unrepresented parties contained information about each party's duty to secure the presence of their own witnesses.[6]

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[6] The Instructions for Unrepresented Parties states in pertinent part as shown below, with emphasis as it appears in the original document:

> Witness Attendance. Each party is responsible for seeing that their own witnesses are present for the hearing. Please see the Conference Report for details.

The Conference Report includes the following information regarding witness attendance:

> You are reminded that each party is responsible for securing the presence at the hearing of his or her own witnesses by either formal (appearance letter or subpoena) or voluntary means (witness' agreement to attend). In general, it is in the best interests of all

ORDER

This case is dismissed.

Dated: _____, 1998.

STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

JMR
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DONALD R. MURPHY, Commissioner

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JUDY M. ROGERS, Commissioner

Parties:
Steven Figueroa
P. O. Box 21924
Milwaukee, WI 53221

Joe Leann
Secretary, DHFS
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concerned to provide the earliest possible notice of the hearing date to all witnesses. The Commission will issue appearance letters to require the attendance of state employes if a party submits a written request for such letter with the names and addresses of the witnesses. The Commission, upon written request, also will provide subpoenas for non-state employes but service of the subpoenas is the responsibility of the requesting party. The Commission requests at least 2 weeks advance notice for issuing appearance letters or subpoenas.