

**CHARLES L. WILLE,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
CORRECTIONS,**  
*Respondent.*

**FINAL  
DECISION  
AND  
ORDER**

Case No. 96-0086-PC-ER

A proposed decision and order was issued in this matter on October 23, 1998. Complainant filed written objections. The Commission has considered those objections and has consulted with the hearing examiner. The Commission adopts the proposed decision and order, a copy of which is attached, with those modifications described below.

a. The Commission adds the following italicized information to Finding of Fact 14, to indicate the source of the factual finding:

14. There is little movement of residents during the 3<sup>rd</sup> shift and the responsibilities of the Youth Counselors on that shift are primarily custodial. Respondent imposes a lockdown policy every evening at 9:00 p.m. Residents are locked in their rooms and the Youth Counselor on duty has the key. During the lockdown period, which includes nearly all of the 3<sup>rd</sup> shift, most residents are not allowed outside of their rooms. However, 3<sup>rd</sup> shift is high time for attempted escapes (*testimony of Supt. Schneider*) and there is only a skeleton crew on grounds for the 3<sup>rd</sup> shift, so flexibility in assignments is even more important than it is during other shifts.

b. The Commission adds the following italicized information to Finding of Fact 38, to indicate the source of the factual finding:

38. Respondent obtained an independent medical evaluation (IME) for complainant based on an examination of complainant on September 7, 1995. The report (Comp. Exh. 8, *which was placed into the record upon stipulation of the parties at the commencement of the hearing*) dated October 2, 1995, by Dr. Patel, states that complainant pres-

ents complaints of "pain right leg in the right calf and heel cord and numbness in the right foot and heel." Pursuant to the report, complainant states, he can sit for up to 45 minutes, can walk up to 3 miles, can climb, avoids bending, can squat and has not tried lifting. The reports states that complainant suffers a 50% limitation in forward flexion and side flexion for both right and left sides and no motor weakness in his lower extremities. The report reaches the following prognosis: "[G]uarded and certain restrictions of activities would be necessary to prevent further episodes of pain, regardless of causation." According to Dr. Patel, complainant "reached a healing plateau relative to the laminectomy September 7, 1995." Work restrictions should be a "lifting limit of 35 pounds and avoid repetitive bending." Dr. Patel concluded that the incident at work on January 2, 1995, did not relate to complainant's back problem.

c. The Commission revises Finding of Fact 46 as follows so that it accurately reflects the record:

46. On April 22, 1996, respondent received another evaluation by ~~Dr. Belt~~ a physician employed by the Veteran's Administration. *The physician's signature is illegible.* (Comp. Exh. 23 10, Resp. Exh. 113) The evaluation indicates complainant is permanently and "totally disabled" with respect to complainant's job, but not with respect to other work. In response to question as to "when will patient recover sufficiently to perform the essential duties," ~~Dr. Belt~~ the physician said "never." He *The doctor* noted that complainant was incapable of performing the following "duties of patient's job": "Lifting more than 50 lbs, repetitive bending, lifting, pushing, pulling" but that he "may work with above limitations." ~~Dr. Belt~~ *The physician* set complainant's work limitations as lifting, pushing, pulling and carrying a maximum of 35 to 50 pounds, and bending a maximum of 2 to 6 times per hour. *This physician would have been sent a copy of the YC2 position description for review in terms of deciding whether complainant was disabled. (Testimony of Supt. Schneider.)*

d. The Commission revises Finding of Fact 53 as follows so that it accurately reflects the record:

53. Complainant was an employe of DHSS at the time of his termination on June 21, 1996. Therefore, his reinstatement eligibility was with that agency. However, Ethan Allen School was transferred from DHSS to DOC as of July 1, 1996, so Ms. Marquardt no longer had

access to information from DHSS after that time. Complainant was notified of the transfer in a letter ~~dated June 3, 1996. (Resp. Exh. 117)~~ and during a conversation with Ms. Marquardt in a 30 day period around May or June of 1996.

In his objections to the proposed decision, complainant contended there was no evidence contrary to Mr. Wille's testimony that he did not receive Resp. Exh. 117 which was addressed to complainant at the institution. However, the Commission relies on the testimony of Ms. Marquardt to the effect that there had been *two* letters to complainant on this topic and that she also recalled having a conversation with complainant when she discussed and explained the fact of the transfer to the Department of Corrections.

e. The Commission modifies the first full paragraph on page 20 of the proposed decision and order (and the footnote to that paragraph) to reflect the changes in Finding of Fact 46 as noted above. The changes delete the references to "Dr. Bolt."

Complainant's physician at the Veterans Administration submitted an evaluation of complainant's condition to respondent in April of 1996. As noted in Finding 46, the physician's statement indicates complainant was permanently and "totally disabled" with respect to complainant's job, but not with respect to other work. In response to question as to "when will patient recover sufficiently to perform the essential duties," the doctor said "never." The physician noted that complainant was incapable of performing the following "duties of patient's job": "Lifting more than 50 lbs, repetitive bending, lifting, pushing, pulling" but that he "may work with above limitations." The doctor set complainant's work limitations as lifting, pushing, pulling and carrying a maximum of 35 to 50 pounds, and bending a maximum of 2 to 6 times per hour

Footnote 4 on page 20 is modified to read:

On the evaluation form, the box for "Is patient now totally disabled?" is scratched out for 'No' and 'Yes' is indicated. According to complainant, "when the doctor was initially filling out the form, I told him I was a Youth Counselor, and he says, 'Oh, you can do that.' Then he asked me what type of job did I do and that's when I explained to him that I was in a patrol position and security and the different things that are involved with the patrol position and he said I couldn't do that. That's the reason why he changed that mark." The doctor had a copy of the Youth Counselor position description. Respondent's witnesses stated that complainant never mentioned to them that the phy-

sician was referring to the YC patrol post. Respondent understood the evaluation (Resp. Exh. 113) to mean that complainant's restrictions were permanent, he was not expect to improve, and the restrictions precluded him from performing the YC 2 duties. Given the very specific reference in the position description to lifting 125 pounds, and the physician's specific reference to just 35 to 50 pounds, it would be unreasonable to conclude that the VA physician released complainant to perform all YC2 duties for posts other than patrol.

Dated: January 13, 1999 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

KMS:980086Cdec2

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

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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

**CHARLES L. WILLE,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
CORRECTIONS,**  
*Respondent.*

**PROPOSED  
DECISION  
AND  
ORDER**

Case No. 96-0086-PC-ER

This matter arises from a complaint filed under the Fair Employment Act, subch. II, ch. 111, Stats. The parties agreed to the following issue for hearing:

Whether respondent discriminated against complainant on the basis of handicap in connection with his termination, effective June 21, 1996.

Subissue: Whether respondent failed to accommodate complainant's handicap in violation of the Wisconsin Fair Employment Act.

The parties agreed that the hearing would not cover the question of remedy, but that in the event the Commission issued an interim decision favorable to complainant, the parties would then address that topic.

#### FINDINGS OF FACT

1. Ethan Allen School is a type 1, maximum-security institution operated by the State of Wisconsin. It provides for the care and maintenance, treatment, rehabilitation and education of juvenile males. The average age of the residents is 15. Approximately half of the residents have committed a series of felonies, while the other half were convicted of violent offenses.

2. Ethan Allen School is one of three juvenile correctional institutions operated by the State of Wisconsin. It was part of the Division of Youth Services in the Department of Health and Social Services through June of 1996. It became part of the Division of Juvenile Corrections in the Department of Corrections on July 1, 1996.

3. During the time period that is relevant to this proceeding, Mr. Jean Schneider served as Superintendent of Ethan Allen School, Joel Adams was the Security Director, and Rene Marquardt (formerly known as Rene Mulligan) was the Personnel Manager.

4. At any given time, a couple of Ethan Allen residents are typically on "suicide watch." There have been approximately 6 (unsuccessful) suicide attempts per year over the last several years. Some suicides have been prevented by the appropriate and timely intervention of Ethan Allen staff.

5. Most offenders at Ethan Allen reside in one of various cottages. Some of the rooms in the cottages have two residents and some have three. Not all of the rooms have bathrooms.

6. The work day at Ethan Allen is divided into three work shifts.

7. During the relevant time period, complainant was employed at Ethan Allen as a Youth Counselor 2 on the 3<sup>rd</sup> shift.

8. The position descriptions for all Youth Counselor 2s employed at all three juvenile correctional facilities are identical. The position description (Resp. Exh. 110) includes the following language from the "position summary":

This is the objective level for positions performing rehabilitation and security work in a juvenile correctional institution. Supervise youth's daily activities to ensure the basic safety and security of staff, youth, and the public in a correctional facility. This position may require physical intervention with assaultive and/or aggressive delinquent youth. Work is performed under the limited supervision of a Supervising Youth Counselor, Institution Unit Supervisor, or Youth Security Director.

Goals and worker activities include the following:

20% A. Ensure maintenance of cottage security and safety, ensure security of assigned area of responsibility, and ensure safety and security of youth in that area.

A1. Take and report required visual and physical counts pursuant to post orders.

A2. Perform random security checks of assigned youth and area of responsibility.

A3. Immediately notify shift supervisor (and Section Manager, if available) in the event of emergencies such as fire, accidents, run-aways or any unusual behavior or incidents which may endanger students or staff. . . .

30% B. Provide counseling, case management assistance and other treatment services to youth. . . .

20% C. Ensure that physical need of assigned youth are maintained in the areas of food, clothing and general health. . . .

20% D. Maintain order and discipline within the cottage as part of a team.

D1. Perform required personal searches of youth and their physical environment according to institution policy and procedure.

D2. Provide appropriate physical intervention and restraint for physical altercations involving youth.

D3. Provide necessary assistance to staff during disturbance situations.

D4. At the direction of supervisor staff, apply restraints to youth who are endangering themselves or others. . . .

D5. Responsible for proper handling and use of handcuffs and restraining devices pursuant to institution policies and procedures.

D6. Under supervision, participate in planned room entry.

D7. Enforce institution policies and procedures on a consistent and equitable basis in regard to youth conduct as set forth in Department of Health and Social Services Administrative Rules 333.

D8. Utilize deescalation techniques as taught in POSC (Principles of Subject Control).

D9. Complete paper work for youth and institution as required.

The PD includes the following "Knowledge, Skills and Abilities":

Knowledge of the proper techniques and uses of handcuffs and other restraints. . . .

Must have visual acuity and the physical ability to walk, stand, bend, squat, run, jump, climb and apply restraints.

Ability to lift resident weighing 125 pounds or more. . . .

Ability to perform subject control and self-defense techniques as identified in Principles of Subject Control (POSC) training.

The PD includes the following language under the heading of "physical requirements":



Amount of sitting and standing varies according to team tasks assigned. Sits at desk and cottage tables while working with colleagues and residents. Stands and walks while making routine rounds to check rooms and when moving from one cottage to another on 5, 10 and 30 minutes basis with occasional random visits. At times, it may be required to lift residents in the event of a suicide attempt, or, pulling a resident from a smoke filled room – either as apart of a team or while working alone. May have to physically control or restrain young and health[y] youths while trying to subdue fighting or resisting youths, or when applying restraints. Subject to sprains, strains and back injuries while physically interacting with youths. Visual acuity to the extent of being able to observe youths in darkened rooms at night.

The PD included the following statement: “Any employee, or applicant for employment, with a disability as defined by the Americans with Disabilities Act, must be able to perform the physical requirements outlined herein with or without a reasonable accommodation.”

9. Youth Counselors are required at times to run, jump or climb in emergency situations. Bending is involved in restraining an offender who is lying down or sitting. The duration of the bending depends on the response time of the emergency unit. Rendering first aid or CPR to a resident or other staff member may require bending if the person is sitting or lying down. Youth Counselors must access youth files located in 2-drawer file cabinets which require repetitive pulling and pushing to review or update file information. Youth Counselors are required to demonstrate cleaning techniques for various areas of the cottage. These demonstrations may require bending. On a daily basis, Youth Counselors employed on the 1<sup>st</sup> shift are required to search offenders’ rooms which includes bending to search under bunk beds and desks, and moving stools and bins to search behind them. Searching general areas of the cottage is also required from time to time. While room searches are also performed on 3<sup>rd</sup> shift, they are unusual.

10. Respondent does not test Youth Counselors to determine whether they are capable of meeting the 125-pound lifting requirement. Respondent’s practice is to specifically ask each candidate for a Youth Counselor position if the candidate can meet

all the requirements of the position. Respondent relies on the candidate's response to this question during the interview.

11. Respondent does not employ anyone in a Youth Counselor assignment who has a medical restriction preventing them from lifting 125 pounds or preventing them from performing any other YC responsibility. However, as noted below, respondent will give Youth Counselors temporary light duty assignments if the employe was injured on the job, is unable to perform 1 or more YC responsibilities and if there is an indication that the employe's work restriction is temporary.

12. Respondent expects all Youth Counselors to be able to perform the assignments at all Youth Counselor posts<sup>1</sup> so that respondent has maximum flexibility for responding to emergency situations.

13. In an average month, there may be 4 or 5 forced room entries in Ethan Allen. Forced room entries are performed by the SRT but during the 3<sup>rd</sup> shift, the Youth Counselor assigned to the unit in question also participates in the room entry.

14. There is little movement of residents during the 3<sup>rd</sup> shift and the responsibilities of the Youth Counselors on that shift are primarily custodial. Respondent imposes a lockdown policy every evening at 9:00 p.m. Residents are locked in their rooms and the Youth Counselor on duty has the key. During the lockdown period, which includes nearly all of the 3<sup>rd</sup> shift, most residents are not allowed outside of their rooms. However, 3<sup>rd</sup> shift is high time for attempted escapes and there is only a skeleton crew on grounds for the 3<sup>rd</sup> shift, so flexibility in assignments is even more important than it is during other shifts.

15. With the exception of utility positions, Youth Counselors typically do not rotate between posts. However, YCs can be pulled from one post to perform other duties not normally performed at that post.

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<sup>1</sup> The exception to this general policy is for positions on the institution's Special Response Team (SRT). Youth Counselors volunteer to serve on the SRT and they undergo special training. Respondent schedules its employes so that on any given shift, a specified number of SRT volunteers are on duty as Youth Counselors.

16. On 3<sup>rd</sup> shift, Youth Counselors work at one of the following posts: cottage, security unit, gatehouse or patrol.

17. While YCs on 3<sup>rd</sup> shift cottage duty have limited direct contact with the residents, from 1 to 3 or 4 offenders prepare breakfast in the cottage's kitchen area with the YC present and some residents are released from their rooms early in the morning to attend to jobs around the institution.

18. Residents in the security unit do not help prepare the breakfast and are not released for jobs elsewhere. However, there may be circumstances in which the offenders are not in a "lock down" mode and the YC may be present when the supervisor opens a room in a security unit during 3<sup>rd</sup> shift.

19. The YC assigned to the gatehouse monitors what is going on elsewhere in the institution and oversees persons entering and exiting the institution (including new residents) but does not have custody of residents. Typically, the gatehouse YC is to remain inside the gatehouse even in an emergency situation. However, the gatehouse YC may have to deal with irate and unruly visitors and assists in controlling offenders arriving at the institution.

20. Youth Counselors assigned to the two patrol positions on 3<sup>rd</sup> shift are responsible for checking buildings both on institution grounds and responding to requests for assistance from the Youth Counselors in the various cottages and security unit. One of the two patrol positions may check buildings outside of the institution's fence. The YCs in the patrol positions are always Special Response Team members who have received special training in responding to emergency situations.

21. Respondent maintains a series of procedures and devices in an effort to maximize the safety of residents and co-workers. These procedures and devices, which include daily lockdowns, emergency telephone numbers, plans for dealing with major disturbances, body alarms, radios, and Principles of Subject Control (or POSC), also have the effect of reducing the possibility of escape from the institution. During lockdowns, the general rule is that a Youth Counselor is not to enter a resident's room alone.

22. Prior to his employment at Ethan Allen School, complainant had suffered two herniated discs of the lower back while serving in the military. When discharged from Marine Corps, his back problems precluded him from safely performing the duties of his rate and rank and he had no prognosis of being able to return to full duty status.

23. Complainant was hired as a LTE Youth Counselor on May 4, 1992, and on January 27, 1993. He was hired as a permanent YC 1 on February 21, 1993. Complainant's applications for employment indicated he considered himself "a person with a disability" and was a disabled veteran. During his employment interview, complainant was asked: "Do you feel that you are qualified and capable of meeting the tasks and responsibilities of the position description?" Complainant answered, "Yes."

24. Complainant posted for 3<sup>rd</sup> shift utility pool on January 21, 1994, and he accepted this position on February 10<sup>th</sup>. People in these positions are used to fill in the staffing gaps as needed due to sick leave, vacation or other absences of other employees and may be assigned to different cottages or areas every day.

25. Complainant injured his back when moving food on institution grounds on January 2, 1995. At the time of the injury, complainant was a voluntary member of the institution's SRT.

26. Complainant returned to work after the injury.

27. Complainant was examined by his physician, Dr. Bolt, on January 20, 1995. After the exam, Dr. Bolt prepared a note that listed complainant's restrictions as "No lifts greater than 10 lbs. Limit to 8 hr/day." (Comp. Exh. 6, Resp. Exh. 101) The note also indicated a follow up visit was scheduled for 2 ½ weeks.

28. Shortly thereafter, complainant wrote a note to the scheduling supervisor that he could not work patrol. Ms. Marquardt, the personnel manager, told complainant that if he could not perform all YC2 duties, he could not work and that he needed to be released without restrictions in order to return to work.

29. Complainant spoke with Dr. Bolt again on January 23<sup>rd</sup> and pleaded with him to remove the work restrictions so that complainant would be able to continue

working. Based upon that discussion, Dr. Bolt issued a second note, dated January 23, 1995, that referred to the same examination date of January 20<sup>th</sup>, but said the complainant had no work restrictions except for an 8 hour day. The note (Comp. Exh. 7, Resp. Exh. 102) also indicated that complainant was ready to work on January 24<sup>th</sup>. Complainant was already scheduled for back surgery at that time. Before Dr. Bolt issued the second note, complainant told him that he could avoid potentially harmful situations at work and that he had to return to work because he needed the money.

30. Respondent's policy is to abide by the information set forth on the notes from the employe's physician.

31. Between January 24 and February 20, 1995, complainant worked in the utility position on 3<sup>rd</sup> shift. If he happened to be assigned to a patrol position during this period, he would talk to one of his co-workers assigned to the gatehouse, cottage or security positions and arrange a switch. Complainant's co-workers were aware of his back condition.

32. On February 20, 1995, complainant requested medical leave without pay for the following purpose:

I am going to have surgery to remove a herniated disc in my lower back, which was aggravated in the course of my job to a point where the nerve in my right leg has been pinched. This has caused loss of strength, feeling and reflex in my right foot, ankle and leg.

33. Complainant's position was within a bargaining unit, and under terms of the contract he had a right to medical leave up for to 6 months. Respondent's practice was to allow employes more than 6 months of leave and usually extended the leave up to 1 year.

34. On February 23, 1995, complainant requested that the leave be granted under the Family and Medical Leave Act, and indicated his anticipated leave dates were from February 27, 1995 through June 27, 1995. The accompanying doctor's statement indicated complainant would be unable to do any lifting for possibly 2-4 months.

35. Respondent formally granted approval for the leave on March 2, 1995.

36. Complainant underwent back surgery on February 28, 1995, was hospitalized for 6-7 days and never returned to work at Ethan Allen School.

37. On July 18, 1995, (Resp. Exh. 104) complainant requested an extension of his medical leave, stating as follows:

I had surgery on my lower back at the end of February. I wish to extend my leave without pay due to my rehabilitation is progressing slower than previously planned. *I am working very hard* at returning to work as soon as possible and *to achieve the 125 lb. Weight requirement*. Due to the type of work and weight requirement the doctor strongly hesitates on sending me back to work at this time. (Emphasis added)

The requested extension was from June 27, 1995 to approximately January 1, 1996. Respondent approved this request through January 8, 1996. The physician's supporting statement for the requested leave extension noted complainant was temporarily totally disabled, with expected improvement in 3-6 months. The physician noted that as of July 1995, complainant was unable to bend and squat and to lift more than 15-20 pounds.

38. Respondent obtained an independent medical evaluation (IME) for complainant based on an examination of complainant on September 7, 1995. The report (Comp. Exh. 8) dated October 2, 1995, by Dr. Patel, states that complainant presents complaints of "pain right leg in the right calf and heel cord and numbness in the right foot and heel." Pursuant to the report, complainant states, he can sit for up to 45 minutes, can walk up to 3 miles, can climb, avoids bending, can squat and has not tried lifting. The reports states that complainant suffers a 50% limitation in forward flexion and side flexion for both right and left sides and no motor weakness in his lower extremities. The report reaches the following prognosis: "[G]uarded and certain restrictions of activities would be necessary to prevent further episodes of pain, regardless of causation." According to Dr. Patel, complainant "reached a healing plateau relative to the laminectomy September 7, 1995." Work restrictions should be a "lifting limit of 35 pounds and avoid repetitive bending." Dr. Patel concluded that the incident at work on January 2, 1995, did not relate to complainant's back problem.

39. The IME was supplemented on October 16<sup>th</sup> (Comp. Exh. 9). At that time, Dr. Patel concluded that complainant had a 7% permanent partial disability.

40. Even though the Dr. Patel felt that Mr. Wille had reached the end of the healing period, complainant was not medically separated at this time because complainant's own physician felt he would still improve.

41. On January 8, 1996 (the projected return-to-work date), complainant's physician with the Veterans Administration Medical Center, Dr. Rubert, indicated complainant still was unable to lift, push or pull more than 50 pounds. The physician further indicated that a follow-up appointment was scheduled for April 22, 1996. Dr. Rubert's statement was submitted as support for complainant's January 2, 1996, request (Resp. Exh. 105) for leave extension through approximately May 1, 1996. Complainant stated as follows in this leave request:

I am still recovering physically from my surgery that I had February 28, 1995. I am working very hard to meet the requirements for the job even though all my doctors have informed me that I may not meet my intended goal. I will not stop trying. So I request an extension on my leave without pay status.

Respondent approved the request but only through February 27, 1996. No further extension was granted because complainant had "already used all of (his) leave benefits and has reached a full year of being on leave."

42. Complainant telephoned the personnel office at Ethan Allen School on March 5, 1996, and requested to return to work in a light duty position. The contemporaneous notes (Resp. Exh. 108) from that conversation include the following language:

Charles Wille called today and asked if he could come back to work in a light duty position, maybe working at the gate or something. He says he has lost 70 pounds and is feeling a little more like getting back to work. I explained to him that since the IME report stated that he had reached an end of healing from his work injury on September 7, we would not be able to accommodate him in a transitional work program (thinking this was the type of light duty he meant).

43. Complainant telephoned the personnel office again on March 8, 1996. The contemporaneous notes (Resp. Exh. 108) from that conversation reflect the following:

Charles called again! Said he was sure he could handle 3<sup>rd</sup> shift as not much lifting is required then. He knows that both the State Dr and his VA Dr have given him restrictions (although they differ as to # of pounds). He is to see his VA Dr on April 22. I suggested he get authorization releasing him to go back to work.

44. Jean J. Schneider, Superintendent of Ethan Allen School, sent complainant a termination letter dated March 26, 1996, stating as follows in pertinent part:

This letter is to confirm that effective April 5, 1996, you are being medically separated from state service due to continuing medical problems that preclude you from performing the job requirements of your position as a Youth Counselor 2. Your request for a leave of absence extension to approximately May 1, 1996, has been approved through February 27, 1996. The remaining days of extension have not been approved. Your 1995 absences qualified, and were credited to your contractual, State and Federal Family Leave benefits. You are not eligible to receive Family Leave benefits for 1996.

If our conclusions are incorrect, please submit medical information that releases you to return to work by 4:30 p.m. on Thursday, April 4, 1996. Otherwise, you will be medically separated on April 5, 1996.

The letter went on to explain complainant's separation benefits.

45. Rene Marquardt, the Personnel Manager at Ethan Allen School, sent complainant a letter dated April 5, 1996, extending his medical leave without pay to April 22, 1996, when complainant had his next appointment to see his physician. (Comp. Exh. 1) The letter further stated that if the doctor would not release complainant to return to work on April 23, 1996, that his employment would be terminated effective April 22, 1996. Complainant agreed to the language of the letter over the phone.

46. On April 22, 1996, respondent received another evaluation by Dr. Bolt. (Comp. Exh. 23, Resp. Exh. 113) The evaluation indicates complainant is permanently



and “totally disabled” with respect to complainant’s job, but not with respect to other work. In response to question as to “when will patient recover sufficiently to perform the essential duties,” Dr. Bolt said “never.” He noted that complainant was incapable of performing the following “duties of patient’s job”: “Lifting more than 50 lbs, repetitive bending, lifting, pushing, pulling” but that he “may work with above limitations.” Dr. Bolt set complainant’s work limitations as lifting, pushing, pulling and carrying a maximum of 35 to 50 pounds, and bending a maximum of 2 to 6 times per hour.

47. Superintendent Schneider sent complainant a second termination letter dated May 10, 1996. (Comp. Exh. 2, Resp. Exh. 114) The letter informed complainant that “it is our intention to terminate your employment as a Youth Counselor 2 as of June 21, 1996, due to continuing medical problems that preclude you from performing the essential functions of your position.” The letter included a chronology from September 7, 1995, stated that complainant’s “work restrictions prevent you from being able to perform the essential duties of your position,” and gave complainant until June 21 to “provide written information from your physician which indicates that you are able to perform the essential functions of your Youth Counselor position.” The letter stated that complainant could apply to the Division of Vocational Rehabilitation for evaluation and job placement services or retraining if he was found eligible, indicated how complainant could pursue disability retirement, and listed persons complainant should contact regarding job opportunities as consequence of lateral transfers or demotions. The letter was based on respondent’s conclusion that the work restrictions from complainant’s doctor on April 22, 1996, prevented complainant from performing the essential duties of his Youth Counselor 2 position. The letter included the following paragraph:

You are a Youth Counselor 2 which is a pay range “09”. There may be other positions in the state system which you may be eligible for later transfers or demotions. Please contact Ms. Mulligan regarding other possible job opportunities that may be available that commence (sic) with

your capabilities. Enclosed is a form where you can provide information as to the kinds of positions you are willing to seek employment in.

48. Ms. Marquardt and complainant met on May 10, 1996. Complainant received relevant documents at that time, and Ms. Marquardt went over a list of positions that were vacant and being filled. The lead time before the scheduled termination on June 21<sup>st</sup> gave time to work with complainant to find other employment. At the May 10<sup>th</sup> meeting, Ms. Marquardt gave complainant instruction regarding the codes he needed to know in terms of the entries on the roster of vacancies. Ms. Marquardt also told complainant that if he had some questions or wanted more information, he should contact her.

49. Complainant received workers compensation for his injury.

50. On May 15, 1996, respondent received a document (Resp. Exh. 115) entitled "Transfer As an Accommodation Referral Information" from complainant. The document indicated that complainant was willing to transfer to a position in the same pay range as YC2, and was willing to work on a permanent part-time basis, both within and outside of his current employing unit. However, complainant indicated he was not willing to accept a reduction in pay or a demotion to a position in a lower pay range. Under the heading of "all classifications that you believe you are qualified for," complainant listed Teaching Assistant, Supervisor, and Counselor. All of those classifications are in the same pay range and schedule as Youth Counselor 2. Complainant indicated he did not have the clerical skills typically required for a Program Assistant 2 position.

51. Complainant did not contact other state agencies, including the Department of Employment Relations, in order to pursue transfer opportunities on his own.

52. By letter from Mr. Schneider dated June 24, 1996, (*Comp. Exh. 3, Resp. Exh. 116*) complainant was informed his employment had been terminated on June 21<sup>st</sup> "due to continuing medical problems that precluded you from performing the essential functions of your position." The letter informed complainant that his accommodation request was being referred to respondent's central personnel office "for a 12 month pe-

riod of time to be apprised of appropriate position vacancies in DH&SS for reinstatement” under respondent’s policy governing transfer as an accommodation. The letter further advised that complainant had reinstatement eligibility to positions at or below pay range “09” for a period of 3 years from his termination date.

53. Complainant was an employe of DHSS at the time of his termination on June 21, 1996. Therefore, his reinstatement eligibility was with that agency. However, Ethan Allen School was transferred from DHSS to DOC as of July 1, 1996, so Ms. Marquardt no longer had access to information from DHSS after that time. Complainant was notified of the transfer in a letter dated June 3, 1996. (Resp. Exh. 117)

54. Other Youth Counselors have been terminated after receiving permanent work restrictions which meant they could not perform the essential elements of the job.

55. At all times after his surgery, had complainant been employed as a Youth Counselor 2 at Ethan Allen School and had been asked by his supervisor to leave a cottage assignment to provide assistance to deal with a large-scale problem outside of the cottage, he would have declined the supervisor’s request due to his physical status and restrictions. (Testimony of complainant)

56. Respondent has consistently applied a policy (Resp. Exh. 107) permitting temporary assignment of light duty to Youth Counselors who have been injured at work, during their healing period. Once the end of healing is reached, the Youth Counselor may not have any permanent medical restrictions that are inconsistent with the listed physical requirements for the job.

57. Respondent gave another injured Youth Counselor a temporary light duty assignment performing gatehouse duty, but he was serving as an extra person on that post, rather than as the sole person.

58. Management at Ethan Allen School would have a reduced ability to respond to emergencies if Youth Counselor positions had permanent light duty restrictions, and it would increase response time in terms of suicides, fires, batteries to other Youth Counselors and other emergency situations. It would also make it more difficult for supervisors to make assignments.

59. If respondent chose to assign someone with restrictions inconsistent with the YC position description to a regular Youth Counselor post on a permanent light duty status, respondent would have to assign a second YC in the same post.

#### CONCLUSIONS OF LAW

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

2. At all times relevant to this proceeding, the complainant was handicapped pursuant to §111.32(8).

3. Complainant has the burden of showing that his employment was terminated because of his handicap.

4. Complainant has sustained that burden of proof.

5. Respondent has the burden of establishing that the employment in question involves a special duty of care for the safety of the general public and that complainant's handicap was reasonably related to complainant's ability to adequately undertake the job-related responsibilities of his employment.

6. Complainant's employment as a Youth Counselor 2 at Ethan Allen School involved a special duty of care for the safety of the general public.

7. Respondent has the burden of establishing it did not refuse to reasonably accommodate complainant's handicap.

8. Respondent has sustained this burden.

9. Respondent did not violate the Fair Employment Act when it relied on appellant's employment restrictions as the basis for terminating complainant's employment as a Youth Counselor.

## OPINION

There are three essential elements in a handicap<sup>2</sup> discrimination claim. First, the Complainant must establish that the condition at issue is a handicap within the meaning of the Wisconsin Fair Employment Act. Second, the complainant must show that the employer's employment action was taken because of the complainant's handicap. Third, it must appear that the employer cannot justify its alleged discrimination under the exception set forth in sec. 111.34(2), Wis. Stats. *Racine Unified School Dist. v. LIRC*, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991); *Boynton Cab Co. v. DILHR*, 96 Wis. 2d 396, 291 N.W.2d 850 (1980).

It is undisputed that complainant's back condition caused him to be "handicapped" within the meaning of the Fair Employment Act, at all times relevant to this proceeding. It is also undisputed that respondent terminated complainant's employment as a Youth Counselor 2 because of his handicapping condition.

The burden of proof now shifts to respondent. In typical employment situations, respondent's burden is to prove that the appellant's handicap is reasonably related to the appellant's ability to adequately undertake the job-related responsibilities of the position. However, special provisions apply where complainant's position is one that relates to public safety. Pursuant to §111.34(2)(c):

If the employment . . . involves a special duty of care for the safety of the general public, including but not limited to employment with a common carrier, this special duty of care may be considered in evaluating whether the employe or applicant can adequately undertake the job-related responsibilities of a particular job . . . . However, this evaluation shall not be made by a general rule which prohibits the employment or licensure of handicapped individuals in general or a particular class of handicapped individuals.

The stringent "reasonable probability" standard is eased where the employer's line of business is such that a number of persons could potentially be harmed by the handi-

capped employe. Where the employment involves a "special duty of care for the safety of the general public," the employer need only show that the otherwise discriminatory practice bears a "rational relationship" to its safety obligations to the public and the employe's co-workers. *Racine Unified School Dist. v. LIRC*, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

The Commission concludes that Youth Counselor positions have a "special duty" of care for the safety of the general public. This conclusion is based, in part, on the fact that Youth Counselor positions have "protective occupation status." Pursuant to §40.02(48)(a):

"Protective occupation participant" means any participant whose principal duties. . . involve active law enforcement or active fire suppression or prevention, provided the duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning."

The applicable bargaining agreement (Resp. Exh. 177c) also includes language supporting a finding that Youth Counselor positions involve "a special duty of care." In the section<sup>3</sup> entitled Hazardous Employment Status, the agreement states:

It is expressly understood that bargaining unit employes not specifically listed in Section 230.36 who work at institutions . . . are eligible for benefits under this provision. A Correctional Officer or Youth Counselor who is injured as a result of an act of a visitor while attempting to maintain or enforce the institution's security regulations shall be eligible for coverage under the provisions of this section.

Pursuant to 2/1/3 of the same agreement, the Security and Public Safety bargaining unit includes Youth Counselor classifications.

Youth Counselors at Ethan Allen School carry out security responsibilities at a maximum security institution. Their roles are comparable to those of correctional officers employed at a prison. In *Conley v. DHSS*, 84-0067-PC-ER, 6/28/87, the Person-

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<sup>2</sup> Effective April 30, 1998, the Fair Employment Act was modified by replacing "handicap" with "disability." 1997 Wis. Act 112 This change occurred after complainant filed the present case and it had no substantive effect on the statute.

<sup>3</sup> Page 161, 13/16/1, in Section 16 of the agreement.

nel Commission reviewed a handicap discrimination claim filed by a correctional officer employed at Kettle Moraine Correctional Institution and held there was a special duty of care:

In §53.07, Stats., the responsibility for maintaining order in state prisons is assigned as follows:

Maintenance of order. The warden or superintendent shall maintain order, enforce obedience, suppress riots and prevent escapes. For such purposes he may command the aid of the officers of the institution and of persons outside of the prison; and any person who fails to obey such command shall be punished by imprisonment in the county jail not more than one year or by a fine not exceeding \$500. The warden or superintendent may adopt proper means to capture escaped inmates.

According to an attorney general's opinion, correctional staff have the authority of peace officers in pursuing and capturing escaped inmates. 68 OAG 352.

These provisions suggest that there is a special duty of care associated with the safety of the general public that applies to employment in the prison setting. The special duty is derived from the dangerous nature of the inmates within the institution. In addition, correctional officers have a special duty of care based upon the manner in which their responsibilities affect the safety of their co-workers. Correctional officers must be able to rely upon each other for protection from dangerous inmates.

Only "common carriers" are referenced in the language of §111.34(2)(c) as an example of an occupation that falls within the scope of "special duty of care." If common carriers are to be covered by this provision, Youth Counselors, with their responsibility to perform security work in a juvenile correctional institution, should also be included within the scope of the provision.

Therefore, the next question is whether respondent has shown that its decision to rely on complainant's work restrictions as the reason for terminating his employment as a Youth Counselor bears a "rational relationship" to respondent's safety obligations to the general public.

When respondent decided to discharge the complainant, it relied on the requirement that a Youth Counselor be able to perform all the duties set forth in the standard Youth Counselor position description and not just on the duties associated with a specific posting. Respondent also relied on the statements found in the materials completed by physicians familiar with complainant's condition. Some of the key duties mentioned in the YC2 position description are:

This position may require physical intervention with assaultive and/or aggressive delinquent youth. . . .

Ensure maintenance of cottage security and safety, ensure security of assigned area of responsibility, and ensure safety and security of youth in that area. . . .

D2. Provide appropriate physical intervention and restraint for physical altercations involving youth.

D3. Provide necessary assistance to staff during disturbance situations.

D4. At the direction of supervisor staff, apply restraints to youth who are endangering themselves or others.

D5. Responsible for proper handling and use of handcuffs and restraining devices pursuant to institution policies and procedures.

D6. Under supervision, participate in planned room entry.

D7. Enforce institution policies and procedures on a consistent and equitable basis in regard to youth conduct as set forth in Department of Health and Social Services Administrative Rules 333.

D8. Utilize deescalation techniques as taught in POSC (Principles of Subject Control).

Respondent viewed these duties in the context of statements by physicians who were familiar with complainant's condition. The physician statements included comments from Dr. Patel after an independent medical exam. Dr. Patel reported:

[G]uarded [prognosis] and certain restrictions of activities would be necessary to prevent further episodes of pain, regardless of causation. . . . [Complainant] reached a healing plateau relative to the laminectomy September 7, 1995. . . . [Work restrictions should be a] lifting limit of 35 pounds and avoid repetitive bending.



Dr. Bolt submitted his evaluation of complainant's condition to respondent in April of 1996. As noted in Finding 46, Dr. Bolt's statement indicates complainant was permanently and "totally disabled" with respect to complainant's job, but not with respect to other work. In response to question as to "when will patient recover sufficiently to perform the essential duties," Dr. Bolt said "never." He noted that complainant was incapable of performing the following "duties of patient's job": "Lifting more than 50 lbs, repetitive bending, lifting, pushing, pulling" but that he "may work with above limitations." Dr. Bolt set complainant's work limitations as lifting, pushing, pulling and carrying a maximum of 35 to 50 pounds, and bending a maximum of 2 to 6 times per hour.<sup>4</sup>

The record supports the conclusion that the complainant was physically unable to perform the Youth Counselor 2 duties as they are (accurately) reflected in the relevant position description.<sup>5</sup>

Substantial testimony was offered regarding the various individual posts available on 3<sup>rd</sup> shift. Complainant contended he was capable of performing at the cottage, security unit and gatehouse posts, but acknowledged he was unable to perform the 3<sup>rd</sup> shift patrol duties. Complainant notes that he actually performed the duties of various . . .

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<sup>4</sup> On the evaluation form, the box for "Is patient now totally disabled?" is scratched out for 'No' and 'Yes' is indicated. According to complainant, "when the doctor was initially filling out the form, I told him I was a Youth Counselor, and he says, 'Oh, you can do that.' Then he asked me what type of job did I do and that's when I explained to him that I was in a patrol position and security and the different things that are involved with the patrol position and he said I couldn't do that. That's the reason why he changed that mark." Complainant also testified that his doctor had a copy of the Youth Counselor position description. Respondent's witnesses stated that complainant never mentioned to them that Dr. Bolt was referring to the YC patrol post. Respondent understood Dr. Bolt's evaluation (Resp. Exh. 113) to mean that complainant's restrictions were permanent, he was not expect to improve, and the restrictions precluded him from performing the YC 2 duties. Given the very specific reference in the position description to lifting 125 pounds, and Dr. Bolt's specific reference to just 35 to 50 pounds, it would be unreasonable to conclude that Dr. Bolt released complainant to perform all YC2 duties for posts other than patrol.

<sup>5</sup> Supt. Schneider, who has more than 25 years of experience as a Youth Counselor, supervisor and superintendent, suggested that the 125 pound limit is a "minimum" and indicated that a higher figure might be more appropriate.

3<sup>rd</sup> shift posts during the period between January 2, 1995, and his surgery on February 28, 1995. Although he was in a utility position during this period, which meant he could be assigned to any of the posts during the shift, he was able to trade with his co-workers so that he did not have to serve in either of the two patrol positions.

The Commission has previously recognized that emergency situations arise in a correctional institution that will pull an employe away from the duties at a given posting. In *Conley v. DHSS*, 84-007-PC-ER, 6/29/87, the Commission noted:

In a correctional setting, the need to respond to an emergency that might transcend the parameters of a given post is always present. . . . [t]he need for a correctional institution to have the latitude to utilize its security staff to respond to emergency situations is clear and cannot be gainsaid.

In his own testimony, the complainant acknowledged that he would have to decline a supervisor's request to provide assistance with a large-scale disturbance at Ethan Allen.

Complainant also contends that there was no case-by-case evaluation by respondent of complainant's circumstances, which violated the following language in §111.34(2)(c): "This evaluation shall not be made by a general rule which prohibits the employment . . . of handicapped individuals in general or a particular class of handicapped individuals." There is no general prohibition against employing handicapped individuals in Youth Counselor 2 positions, nor is there a prohibition against employing persons with certain identified medical conditions. Respondent relied on the specific medical restrictions imposed by an employe's medical condition, rather than on the name of the handicapping condition, to determine whether to employ an individual as a YC2. Respondent will employ handicapped individuals in a Youth Counselor position if the handicap does not prevent them from performing the duties assigned to the classification. The record reflects that respondent employs a YC2 who has an artificial leg but can perform the duties of the position without restriction.

The final issue relates to accommodation and whether respondent refused to reasonably accommodate complainant's handicapping condition.

After having provided complainant with an extensive leave of absence after his surgery in February 1995, respondent ultimately terminated his employment on June 21, 1996. Complainant contends that he should have been allowed to return to work as a YC2 with a permanent assignment to the gatehouse, cottage and/or security unit posts on the 3<sup>rd</sup> shift. However, respondent has shown that it would need to assign a second Youth Counselor to the same post as complainant, given his work restrictions. Otherwise, respondent would suffer a reduction in its ability to insure safety and security within the facility. It is not a reasonable accommodation to require an employer to hire another employe to work alongside a handicapped employe and to duplicate the handicapped employe's responsibilities.

Complainant also contends that it would not have posed a hardship for respondent to transfer complainant, possibly to a teacher's assistant position or a scheduling assistant position. A transfer may serve as a reasonable accommodation. However, complainant was provided a 40 day period, from May 10 until June 21, 1996, to pursue a variety of options, including lateral transfers and demotions. Respondent's personnel manager met with complainant and provided him information relating to the transfer process and invited him to contact her if he had any questions. Complainant indicated he was not willing to accept a reduction in pay or a demotion and no vacant positions existed at the YC2 pay level at the time of complainant's termination that could have been filled by complainant. Complainant was notified of two Teacher Assistant vacancies later in the fall of 1996 at Ethan Allen and he interviewed for them but the positions were frozen by the Department of Administration before they could be filled. Otherwise, complainant did not follow up on any transfer options, there is no showing there were any options in fact available that complainant was not informed about and he did not contact DHSS after the institution was spun off, even though he was notified of that action.

For the reasons set forth above, respondent did not discriminate against the complainant.

ORDER

This complaint is dismissed.

Dated: \_\_\_\_\_, 1998. STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson

KMS:980086Cdec1

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DONALD R. MURPHY, Commissioner

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JUDY M. ROGERS, Commissioner