STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CYNTHIA J. BAINBRIDGE, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case 149
No. 71670
PA(gen)-8

DECISION NO. 33901-B

Appearances:

Sean Daley, Field Representative, AFSCME Wisconsin Council 32, P.O. Box 19, Ashippun, Wisconsin, appearing on behalf of Cynthia J. Bainbridge.

William Ramsey, Deputy Legal Counsel, Wisconsin Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin, Department of Corrections.

DECISION AND ORDER

This matter is before the Wisconsin Employment Relations Commission as an appeal of the Respondent's action placing the Appellant on administrative leave without pay. Examiner Kurt Stege issued a proposed decision, rejecting the Respondent's action of having placed the Appellant on leave. The Respondent objected to the proposed decision and briefs relating to the objection were received and exchanged by December 21, 2015.

Being fully advised in the premises, the Commission makes and issues the following:

FINDINGS OF FACT

1. The Department of Corrections ("DOC") employs Cynthia Bainbridge as a licensed psychologist at the Fox Lake Correctional Institution.

2. By the beginning of 2012, several Fox Lake management employees, including Warden Marc Clements, had noticed unusual behavior by Bainbridge that raised the question of whether she was fit to carry out her duties satisfactorily. In February of 2012, DOC began to restrict Bainbridge's therapeutic contacts with inmates because of these concerns.

3. On March 14, 2012, Bainbridge voluntarily initiated a period of medical leave to address her mental health. Bainbridge's personal psychiatrist and therapist both treated her during this period of leave.

4. While Bainbridge was out on medical leave, Warden Clements directed her, by letter dated April 9, 2012, to participate in a medical evaluation. The evaluation was scheduled for May 1, 2012.

5. As required, Bainbridge submitted to the May 1, 2012 medical evaluation. The physician who conducted the evaluation, Dr. Donald Feinsilver, notified DOC of the results in a letter dated May 16, 2012.

6. Relying solely on Dr. Feinsilver's letter, Warden Clements notified Bainbridge, by letter dated May 18, 2012, that she would be placed on an administrative leave without pay based upon her medical condition.

7. Bainbridge returned to work on July 21, 2012. During her approximately two months of administrative leave, she had used personal leave, holiday leave, sick leave, vacation leave, and she took leave without pay.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following:

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has the authority to review this matter pursuant to § 230.44(1)(c), Stats.

2. The Department of Corrections has established just cause for its decision to place Cynthia Bainbridge on administrative leave based upon her medical condition.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following:

ORDER

The Department of Corrections' action of placing Cynthia Bainbridge on administrative leave is affirmed.

Signed at the City of Madison, Wisconsin, this 14th day of April 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Subject Matter Jurisdiction and Burden of Proof

This case arises under § 230.37(2), Stats, which provides the following:

> **230.37 Standards of performance and ratings.**
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> * * *
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> **(2)** When an employee becomes physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position by reason of infirmities due to age, disabilities, or otherwise, the appointing authority shall either transfer the employee to a position which requires less arduous duties, if necessary demote the employee, place the employee on a part-time service basis and at a part-time rate of pay or as a last resort, dismiss the employee from the service. The appointing authority may require the employee to submit to a medical or physical examination to determine fitness to continue in service. The cost of such examination shall be paid by the employing agency. In no event shall these provisions affect pensions or other retirement benefits for which the employee may otherwise be eligible.

Although there has been a significant amount of argument between the parties (not to mention a certain amount of ambiguity in the proposed decision) with regard to this statutory provision, there really is no question that it applies here. The record contains no evidence indicating that a disciplinary objective played a role in DOC's interaction with Bainbridge. In the pre-appeal phase, DOC expressly took the position that Bainbridge's administrative leave was a "fitness for duty" matter; DOC required Bainbridge to submit to a medical examination as permitted under § 230.37(2), Stats.; and both parties ultimately[1] acknowledged in their written arguments that it is appropriate to evaluate this matter under that provision.

There also is no question in our minds as to whether a temporary dismissal such as Bainbridge's can occur under § 230.37(2), Stats. Where the provision uses the term "dismiss," we disagree with the conclusion set forth in the proposed decision (relying on *Jacobsen v. Department of Health and Social Services*, 91-0220-PC and 92-0001-PC-ER (10/1992)), that the provision only allows for permanent dismissals. The term "dismiss" is not defined in

[1] DOC has taken a variety of positions with regard to this issue, but in the end unequivocally acknowledged that it is proper to evaluate this matter under § 230.37(2), Stats.

ch. 230, Stats., and we find no indication that the legislative intent was to make the use of the term "dismiss" in § 230.37(2), Stats., strictly synonymous with "discharge." Based on our reading of the provision, a dismissal can be either be temporary or permanent. This conclusion fits with the practical reality that employees sometimes are unfit for duty only on a temporary basis.

There is no statutory provision that expressly grants us jurisdiction to review actions taken under § 230.37(2), Stats. However, the provision clearly authorizes an agency to "demote" and "dismiss" employees, and we have well-established jurisdiction over such actions. Specifically, § 230.44(1)(c), Stats., provides that employees with permanent status in class:

> … may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission … if the appeal alleges that the decision was not based on just cause.

Chapter 230, Stats., also does not define "suspension" as that term is used at § 230.44(1)(c), Stats. Nevertheless, we have little difficulty concluding as others have that a forced, unpaid administrative leave, even one prompted by fitness-for-duty concerns, constitutes a suspension that is reviewable under § 230.44(1)(c), Stats. *See, e.g., Jacobsen, supra*. As we have indicated before, one purpose of the civil service system is to provide meaningful review of the adverse employment actions enumerated in § 230.44(1)(c), Stats. *Walsh v. Department of Corrections*, Dec. No. 35041 (WERC, 6/2014). DOC's action of suspending Bainbridge does not escape review under the just cause standard simply because it was an action authorized by § 230.37(2), Stats. The same would be true for a permanent medical separation imposed pursuant to that provision, which also would be subject to review as a "discharge" under § 230.44(1)(c), Stats. Were that not the case, such adverse employment actions would be unreviewable, and we do not believe the legislature intended to create such a loophole.

Having determined that § 230.44(1)(c), Stats., constitutes the jurisdictional basis for reviewing this matter, the question as to the burden of proof remains. As established, § 230.44(1)(c), Stats., provides for a "just cause" standard. The just cause analysis set forth in *Safransky v. Personnel Board*, 62 Wis.2d 464 (1974), applies to disciplinary actions. The just cause analysis is different, however, when we review layoff decisions. *Walsh v. Department of Corrections*, Dec. No. 35041 (WERC, 6/2014), citing *Weaver v. Personnel Board*, 71 Wis.2d 46, 51, 237 N.W.2d 183 (1976). As we have held in the past, it would not be appropriate to apply disciplinary analysis to a case where the challenged action was taken for medical reasons. *Id.*, *Anderson v. Department of Safety and Professional Services*, Dec. No. 34656-A (Scott with final authority, 3/2014).

Rather, § 230.37(2), Stats., contains its own, unique framework under which DOC's action must be evaluated. To prove just cause, the following must be demonstrated:

1. That the employee suffered from an infirmity;

2. That the infirmity caused the employee to be incapable or unfit for the efficient and effective performance of the duties of the position held by the employee; and

3. That the employer could not transfer, demote, or place the employee in a part-time position and that as a last resort, the employer had no alternative but to separate the employee.

Further, because this is a type of just cause analysis, we conclude that it is the employer that bears the burden to prove these elements. *Id*.

Merits

Bainbridge, recognizing her own infirmity, voluntarily requested and was granted a medical leave during which she sought treatment by a psychiatrist and a psychologist. Prior to that time, her supervisor, Dr. Raymond Wood, had restricted her therapeutic contacts with inmates due to her pattern of erratic behavior.

While on leave, Warden Clements informed Bainbridge, by letter dated April 9, 2012, that it would be necessary before she returned to work to be evaluated by an independent physician in order to determine her fitness for duty. The evaluation was scheduled for May 1, 2012.

On April 18, 2012, her own psychologist released her to return to work for four hours per day for two days, April 23 and 24, 2012. He re-evaluated her on April 24, 2012, and released her to return to work without restrictions on April 25, 2012.

On May 1, 2012, Bainbridge had her independent medical evaluation performed by Dr. Donald Feinsilver, a psychiatrist. Dr. Feinsilver concluded that Bainbridge should not be going back to work in any capacity. He was aware however that Bainbridge had returned to work and was performing paperwork reviews. His recommendation was that she could continue doing that work but that if it proved impractical "she should be given medical leave for two months." DOC placed Bainbridge on medical leave following receipt of the report.

The examiner concluded that the Feinsilver report was "uncorroborated hearsay" and therefore under *Williams v. Housing Authority of the City of Milwaukee*, 2010 WI App. 14, ¶ 14, 323 Wis.2d 179, 779 N.W.2d 185, it could not form the basis for DOC's actions. We disagree. As the court noted in *Gehin v. Wisconsin Group Insurance Board*, 2005 WI App. 16,

¶ 104, 278 Wis.2d 111, 157, 692 N.W.2d 572, corroboration of hearsay is not always required in administrative proceedings:

> For example the parties may stipulate to some or all of the facts or to the submission of and reliance upon the contents of written hearsay reports.

Here the parties did stipulate to the admission of the final page of the Feinsilver report which contained his recommendation.

We note also that the Feinsilver report is not uncorroborated. Additional evidence was received describing Bainbridge's erratic behavior and she placed herself on a month long leave due to psychiatric issues. That evidence does go to the question of whether Bainbridge should have been returned, on May 1, 2012, to her regular duties. DOC was understandably cautious about having Bainbridge begin treating inmate patients. It chose to err on the side of caution. The examiner was troubled by the fact that he did not have a complete understanding of the basis for Feinsilver's conclusions. While under other circumstances that might be significant, here we are judging the reasonableness of DOC's decision to continue Bainbridge's leave. Clearly, DOC relying on all the evidence was justified in reaching the decision that it did.

Signed at the City of Madison, Wisconsin, this 14th day of April 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

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James J. Daley, Commissioner