



to return to work.

6. Mr. Sallstrom told the appellant that as a prerequisite he would have to provide medical certification that he was capable of returning to work.

7. No such certification was provided to DILHR.

8. The respondent never took action to discharge or remove the appellant, inasmuch as the respondent's position was that the appellant's employment was terminated as of April 12, 1976, by virtue of his disability retirement and by operation of Chapter 41, Wis. Stats. The appellant received in July 1976 a letter dated July 29, 1976, from the Assistant Administrator of the Administrative Division, who had been his immediate supervisor. This letter, appellant's Exhibit 5, contained the following statement:

"Correspondence dated April 26 from our Personnel Bureau informed us that your permanent disability would be considered as a termination notice. Attached also is the State of Wisconsin Termination Report submitted April 30, 1976, which indicates the reason for termination as permanent disability.

We have been advised as a result of the indicated actions that reinstatement rights do not apply. As I further advised you, we do not at present have vacancies for which you can be considered. Consequently, I am returning your application since you may wish to submit it to the State Bureau of Personnel."

9. The appellant has never been reinstated by DILHR or offered any sort of appointment since his request, although DILHR has filled 31 MIS4 positions from the period of July 1, 1975, to January, 1980.

10. By letter dated August 27, 1979, to the DILHR Personnel Director, appellant's Exhibit 1, appellant's attorney stated that the appellant wished to exercise his mandatory reinstatement rights and return to work.

11. By letter dated September 4, 1979, to the appellant's attorney,

appellant's Exhibit 2, the DILHR Personnel Director states that the appellant "was terminated from our department via a medical retirement on April 12, 1976, and that inasmuch as s.230.31, Wis. Stats., provides for reinstatement for a three year period from the date of separation, the appellant had no reinstatement rights and in order to obtain employment would have to apply via the normal civil service procedures."

12. In an appeal letter filed with this Commission on September 10, 1979, the appellant appealed DILHR's "refusal. . .to grant and honor my three years mandatory reinstatement rights."

13. Subsequent to his employment with DILHR, the appellant was employed by DOA from February 15, 1978, until his resignation on July 4, 1978, as a Management Information Specialist 3 in the Bureau of Program Management.<sup>1</sup>

#### CONCLUSIONS OF LAW

1. Since the appellant did not file a timely appeal of the decision of the respondent to treat his receipt of a disability annuity as a termination of state service, notice of which was communicated to him not later than July, 1976, the Commission lacks the authority to review the legality of that decision.

2. The decision of the respondent to deny appellant mandatory reinstatement, as set forth in appellant's Exhibit 2, was neither illegal nor an abuse of discretion.

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<sup>1</sup>It appears to be undisputed that the appellant has a three year period of permissive reinstatement eligibility from July 4, 1978.

OPINION

The appellant's arguments that he did have mandatory reinstatement rights ultimately rest on the hypothesis that he was not separated from service in April, 1976. The respondent's denial of mandatory appeal rights in 1979 was tied directly to the 1976 determination.

The respondent's determination that appellant's "disability retirement" constituted a separation from or termination of service was communicated reasonably clearly to the appellant in July, 1976, via appellant's Exhibit 5. There was no lack of finality to the decision, nor was there any expressed in this letter.

The respondent argued in his post-hearing brief that the Commission lacks jurisdiction to review the treatment of a disability annuity as a separation from state service, because it is not an appealable transaction under s.230.44, Wis. Stats. The appellant contended that this argument is foreclosed by respondent's failure to raise it at an earlier date.

Jurisdictional issues can be raised at any time. The Commission disagrees with the ground advanced by respondent inasmuch as DILHR's decision to treat the disability retirement as a separation from service could be considered a constructive discharge and appealable pursuant to s.230.44(1)(c), Wis. Stats. However, it is of the opinion that under the circumstances of this case the failure of the appellant to have taken a timely appeal in 1976, see ss.16.03(4)(d) and 16.05(2), Wis. Stats., (1975), precludes him from now attacking the respondent's determination in that year that he had separated from service.

A separation from service, be it by discharge, resignation, or "disability "

retirement," has certain effects on the rights and interests of the separated employe. It cuts off wages and fringe benefits. It has a direct effect on reinstatement rights. For example, an employe who has separated from service "without misconduct or delinquency" is eligible for permissive reinstatement for a three year period. See s.Pers 16.03(4), Wis. Adm. Code. If an employe ostensibly was discharged for misconduct in 1978 and applied for reinstatement in 1980, presumably he or she would be denied reinstatement. Could the employe then appeal the denial of reinstatement and in the course of that appeal attack the discharge for failure to have complied with s.230.34, Wis. Stats., and contend that, therefore, he or she must be considered to have been separated from service without misconduct and, therefore, eligible for reinstatement? To permit this would be to render meaningless the limitation on appeals now imposed by s.230.44(3), Wis. Stats., and the same principle applies in this case.

Once it has been determined that the respondent's decision to treat the April 12, 1976, effective date of the disability annuity as the effective date of termination of employment is unreviewable in this proceeding, it follows that the respondent's refusal to mandatorily reinstate the appellant was not illegal or an abuse of discretion.

No further discussion of the parties' legal arguments is necessary. However, because there is a dispute as to the authority of the Commission to review DILHR's 1976 decision, because the parties have tried and briefed all issues, and because there are issues of interest for the civil service,

the following is entered as dictum.<sup>2</sup>

DICTION

The parties have argued at length about the appellant's employment status on and after April 12, 1976. Before that time it is undisputed that he was a DILHR employe on medical leave of absence. The respondent takes the position that as a result of his receipt of a disability annuity, with an effective date of April 12, 1976, he terminated his employment and ceased being an employe as of that date. The appellant takes the position that s.41.13, Wis. Stats., which provides for disability benefits, does not require or effect termination from state employment as a condition of receiving benefits, that the appellant never resigned or was discharged, and that therefore he remained a state employe.

Section 41.01(1), Wis. Stats., provides in part as follows:

"The purpose of this fund is to provide for the payments of annuities and other benefits to employes... thereby enabling such employes to provide for themselves and their dependents in case of old age, disability and death, and thereby effecting economy and efficiency in the public service by furnishing an orderly means whereby employes who become aged or otherwise incapacitated may, without hardship or prejudice, be retired from active service." (emphasis added).

Section 41.13(2)(a)1., Wis. Stats., provides in part as follows:

(a) The following described persons shall be entitled to disability annuities, beginning on the dates hereinafter specified:

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<sup>2</sup> This is being issued as a Proposed Decision and Order subject to Commission review. In the event the Commission disagrees with the conclusion in the preceding paragraph it could address the merits contained in this Dictum without the necessity of a remand to the Hearing Examiner to prepare a Proposed Decision on the merits.

1. ...any other participating employe who has not attained age 65 and is totally disabled, whether mentally or physically, by a disability which is likely to be permanent... the participating employer shall certify to the board that the participating employe is unable to continue in employment because of a total disability of such a nature as to reasonably prevent performance of the duties of any position and as a consequence is not entitled to any earnings from such employer. For the purposes of this subsection a participant shall, within the limitations of s.41.07(1)(b), be considered to be a participating employe on leave of absence, notwithstanding the fact that no formal leave of absence is in effect, if no other employment has intervned since service for the participating employe and if the termination of active service for the participating employer was due to such disability." (emphasis added).

Section 41.01(1) does not require that "employes who become aged or otherwise incapacitated. . .be retired from active service;" it uses the word "may." As to employes how "become aged," there is another section which governs retirement, see s.41.11(1):

"COMPULSORY RETIREMENT. Any participating employe, except an officer elected by the vote of the people, who has reached his normal retirement date on the effective date for his employer shall be retired at the end of his first calendar quarter year as a participating employe and any participating employe, except an officer elected by the vote of the people, who reaches his normal retirement date shall be retired at the end of the calendar quarter year in which such date occurs, unless, in either case, his employment is continued by his employer or appointing authority."

This requires retirement in the absence of action by the employer or appointing authority. See 67 Opinions of the Attorney General 120 (1978).

As to employes who became "otherwise incapacitated," there is no provision in Chapter 41 requiring their separation from service, s.41.13(2)(a)1. does require that:

"The participating employer shall certify to the board that the participating employe is unable to continue in employment because of a total disability of such nature as to

reasonably prevent performance of the duties of any position and as a consequence is not entitled to any earnings from such employer." (emphasis added).

This language may be inconsistent with certain kinds of "employment" status, but it is not consistent with appellant's status at the time the disability annuity was granted, that of leave of absence. See s.Pers 18.01, Wis. Adm. Code:

"Leave of absence means absence from employment with the approval of the appointing authority in accordance with the appropriate statutory provision or rule." (emphasis added).

The next sentence in s.41.13(2)(a)1. apparently contemplates the possibility that an employe might be on such a leave:

"For the purposes of this subsection a participant shall, within the limitations of s.41.07(1)(b), be considered to be a participating employe on leave of absence, notwithstanding the fact that no formal leave of absence is in effect, if no other employment has intervened since service for the participating employer and if the termination of active service for the participating employer was due to such a disability." (emphasis added).

Thus it would be the opinion of the Commission, if the transaction were reviewable, that the appellant's application for, and the subsequent grant of, a disability annuity did not operate to terminate appellant's employment in a leave of absence status.

Section Pers 18.05(2), Wis. Adm. Code, provides in part:

"RIGHTS UPON RETURN FROM LEAVE OF ABSENCE. A properly executed leave of absence without pay shall accord the employe the right to be returned to his or her position or one of like nature on the expiration thereof or sooner if agreeable to the appointing authority..."

Section Pers 16.03(8), Wis. Adm. Code, provides:

"If an employe does not return from an approved leave of absence, his/her 3 year reinstatement eligibility period shall begin on the day following expiration of the leave."



Reinstatement prior to the expiration of leave of absence was discretionary with the respondent. An employe is entitled to mandatory reinstatement on the expiration of a leave of absence (in the case of the appellant, the expiration date was September 1, 1976). In the opinion of the Commission, again assuming the original decision regarding his separation were reviewable, the appellant would have been entitled to reinstatement as of that date. It could not be argued successfully that he failed to return as of September 1, 1976, because he previously had indicated to the agency that he wanted to return to work and he had been told he could not.

As a further part of this Dictum, the Commission notes its opinion that if it were determined that the appellant had not returned to work on the expiration of his leave of absence and was not entitled to mandatory reinstatement on September 1, 1976, the ensuing three year period of reinstatement eligibility would be permissive. Section Pers 18.05(2), Wis. Adm. Code, refers to a right to reinstatement upon the expiration of the leave. This language is inconsistent with the appellant's construction of s.Pers 16.03(8) that the three year reinstatement period referred to therein, if the employe does not return from the leave, is also mandatory.

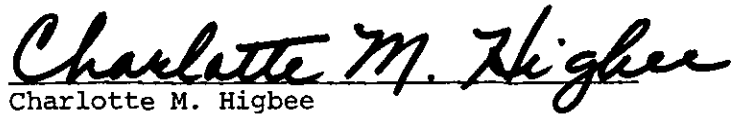
Finally, the Commission recommends to each agency that it provide explicit notice, to employes processing applications for disability annuities, of the exact position of the agency with respect to the effect of the disability annuity on the employe's employment status.

ORDER

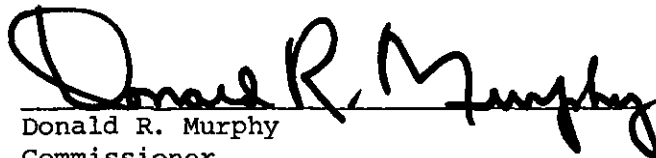
The decision of the respondent, set forth in appellant's Exhibit 2,  
denying appellant mandatory reinstatement, is affirmed and this appeal  
is dismissed.

Dated August 19, 1980

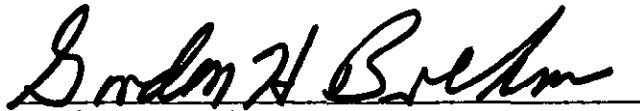
STATE PERSONNEL COMMISSION



Charlotte M. Higbee  
Commissioner



Donald R. Murphy  
Commissioner



Gordon H. Brehm  
Commissioner