

* * * * *

MARY L. SMITH, *

Appellant, *

v. *

Secretary, DEPARTMENT OF *

HEALTH AND SOCIAL SERVICES, *

Respondent. *

Case No. 88-0063-PC *

* * * * *

INTERIM
DECISION
AND
ORDER

On February 15, 1991, respondent filed a Motion to Compel Discovery. Neither of the parties requested a hearing on such Motion but were permitted to file briefs. The briefing schedule was completed on or around April 21, 1991.

The following facts appear to be undisputed and are made solely for the purpose of deciding the subject Motion to Compel Discovery (hereinafter Motion):

1. In an Interim Decision and Order in the instant case dated February 9, 1989, the Commission determined that there had not been just cause for appellant's termination in view of the fact that respondent had not complied with the requirements of §230.37(2), Stats. Section 230.37(2), Stats , provides as follows:

(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.

The Commission's conclusion that appellant was "physically or mentally incapable of or unfit for the efficient and effective performance of the duties of her position" within the meaning of §230.37(2), Stats., was based on the opinion of appellant's physician, Dr. Omana Vattakattcherry, that appellant was not "able to carry out her current job in a long-term fashion."

2. In this Interim Decision and Order, the Commission stated that appellant was entitled to reinstatement with back pay and benefits, less appropriate mitigation; ordered that respondent's action terminating appellant from employment be rejected and the matter remanded to respondent for action in accordance with the decision; and retained jurisdiction over the case for the limited purpose of resolving any dispute over remedy.

3. The Commission convened a status conference on September 26, 1989, to determine what action had been taken by the parties to reach agreement on a remedy, consistent with the Commission's February 9, 1989, Interim Decision and Order. The parties agreed to exchange certain information relating to potential remedies and to participate in another status conference on October 30, 1989.

4. In a letter to appellant dated September 28, 1989, respondent stated as follows, in pertinent part:

. . . In order for the department to proceed, it is necessary for you to provide evidence that you are able to work and in what capacity. To assist you in doing this, I have enclosed a medical release form for you to give to your doctor. In addition, I will need the name of your doctor so that the department can direct a letter to him or her, requesting information about your health from the time of the termination to the present.

5. As of the date and time of the status conference convened by the Commission on October 30, 1989, the appellant had not provided the requested information nor signed the medical release form referenced in respondent's letter of September 28, 1989. At the status conference, the parties agreed as follows:

1. Respondent would immediately write a letter to the appellant's doctor outlining the specific questions they have concerning appellant's medical condition and ability to work. This letter, along with a cover letter to appellant, would be sent directly to the appellant

2. Appellant will promptly forward the letter to her doctor and request a response to the questions, which is to be sent as soon as possible to the respondent to the attention of Ms. Anderson.

3. A status conference call has been set for 9:00 a.m. on November 15, 1989.

6. Due to the fact that a dispute arose subsequent to the October 30, 1989, status conference regarding the pre-emptive effect on the instant case of a decision reached in a workers compensation case filed by appellant, the matter of the remedy in the instant case was held in abeyance until the Commission issued a Decision and Order relating to the pre-emption issue on February 7, 1990.

7. A status conference was convened by the Commission on February 20, 1990, and the parties agreed to the following:

1. By March 2, 1990, respondent will: a) send a letter to appellant's doctors (with a copy to the appellant) listing specific questions they have concerning appellant's medical condition and employability, and b) send interrogatories to appellant regarding wages earned, supplemental or wage replacement payments received, and other work/wage related matters between the date of appellant's termination and the present.

2. All information requested and/or provided is to be in written form.

3. Respondent will develop a proposed remedy which will be sent to the Commission and the appellant. Appellant will have ten days to provide a written response to the proposal to the Commission with a copy to the respondent. Based on the proposed remedy and subsequent written comments, a determination will be made on what actions, if any, are necessary.

4. A status conference call is set for 10:00 a.m. on April 3, 1990, to determine progress toward finalizing this matter.

8. In a letter to appellant dated March 2, 1990, counsel for respondent stated as follows, in pertinent part:

Enclosed is a copy of the letter which was sent to your doctor. Also enclosed is a medical release form which you must sign and give to your doctor. The department expects a direct response from your doctor. . . .

Finally, enclosed is the Respondent's First Set of Interrogatories

9. The letter to appellant's physician, Dr. Vattakattcherry, which was enclosed in this March 2, 1990, letter to appellant, was dated March 1, 1990;

summarized the status of the instant case; referenced the medical release form which had been sent to appellant; enclosed copies of appellant's position description, organization chart, and performance planning and development reports during her employment by respondent as a Social Services Collection Specialist 1; and requested that Dr. Vattakatcherry provide answers to the following questions:

In your letter of February 17, 1988 you stated:

I do not feel that she will be able to carry out her current job in a long-term fashion and it is in the best interest of both the client and state that she be placed in a job that requires reduced cognitive demands.

Ms. Smith also requested an indefinite leave of absence based on your recommendation. In light of your statement in your letter of February 17, 1988, the department requests that you respond to the following questions:

1. When did Ms. Smith first contact you? What was the reason for her contacting you? What was your initial diagnosis of her condition? When did she begin treatment?

2. How long was Ms. Smith under your care? What did her treatment plan consist of? Did she participate in the plan? How long did she participate in the plan? Did she complete the plan? When? What was your diagnosis and prognosis at the time she stopped? What were your recommendations for follow-up or aftercare?

The following additional questions are more specific to the performance of her assigned duties and responsibilities and please respond accordingly:

3. In January, 1988 was Ms. Smith capable of performing the duties and responsibilities of her position?

4. If not, what medical condition (physical or mental) caused the incapability?

5. Given the diagnosis under your response to question 4, what was the prognosis for recovery by Ms. Smith so that she would be able to return to work?

6. If she were capable of returning to work, were there any restrictions on such return?

7. Is Ms. Smith currently capable of performing the duties and responsibilities of the position?

8. If not, what is her current medical condition (physical or mental) which affects her ability to return to work?

9. Given the diagnosis under your response to question 8, what is the prognosis for recovery by Ms. Smith so that she would be able to return to work as a Social Services Collection Specialist 1? What is the anticipated duration of such recovery?

10. If she can return to work, what, if any, restrictions are there on such return?

11. If Ms. Smith's medical condition or conditions make her incapable of performing the duties and responsibilities of a Social Services Collection Specialist 1, what type of job duties do you think she could successfully perform?

12. In what type of job setting do you believe that Ms. Smith would be able to perform the duties described in your answer to question 11?

13. If Ms. Smith's condition makes her unsuitable for work, what is her prognosis for recovery (with and without treatment and medication)? What is the anticipated duration of her recovery?

14. If Ms. Smith is currently able to return to a Social Services Collection Specialist 1 position, at what time between February, 1988 and now did she recover sufficiently to return to work? Would such return have been predicated on any restrictions? If yes, what are those restrictions?

Dr. Vattakattcherry did, as a result of a release signed by appellant, provide an answer to these questions to respondent in a letter dated March 12, 1990.

10. In a letter to respondent dated March 31, 1990, appellant indicated that she did not intend to answer respondent's First Set of Interrogatories based on her opinion that they were "invalid and irrelevant." In response to this letter, respondent filed a Motion to Compel Discovery on April 12, 1990.

11. In a status conference convened by the Commission on April 30, 1990, the parties agreed as follows:

1. Appellant indicated she would respond by May 31, 1990, to the interrogatories either directly or by submitting documents which contained the requested information.

2. Respondent will send by May 10, 1990, information on selected jobs (position description/performance planning documents) to appellant's physician and ask that they be evaluated as to appellant's suitability to perform them.

12. On or around June 5, 1990, appellant filed a response to respondent's First Set of Interrogatories.

13. In a letter to Dr. Vattakattcherry dated May 2, 1990, respondent stated as follows, in pertinent part:

This is a follow-up to your letter of March 12, 1990 in which you provided certain medical information about Mary Smith in response to my letter of March 1, 1990. You stated that in your opinion Ms. Smith "is not able to function in her previous job which she reports was very time limiting and she had to travel quite a bit." However, you also stated that Ms. Smith should be able to perform a job "that is much less demanding cognitively." The purpose of this letter is to solicit your medical opinion of Ms. Smith's ability to perform certain jobs which have been identified as meeting the above limitations.

Enclosed are position descriptions, performance standards, and a short descriptive paragraph of the qualifications and physical requirements of the following jobs:

1. Word Processing Operator 2--Confidential
2. Data Entry Operator 2--Leadworker
3. Clerical Assistant 2
4. Stock Clerk 2; and
5. Clerical Assistant 2-Confidential (part-time-55%)

14. In a prehearing conference convened by the Commission on October 2, 1990, the parties agreed to a hearing on the issue of remedy on October 30, 1990.

15. On or around October 4, 1990, respondent caused to be issued a subpoena duces tecum for Dr. Vattakattcherry to appear at the hearing scheduled for October 30, 1990, and to bring appellant's medical records with her. Dr. Vattakattcherry subsequently advised counsel for respondent that she would appear but would bring only her own medical notes because the clinic with which she was associated, the Curative Rehabilitation Center, would not release any other medical records to her without a signed release from the appellant. Dr. Vattakattcherry had advised counsel for respondent that she had used these other records in her treatment and diagnosis of appellant. Counsel for respondent contacted the Curative Rehabilitation Center and was advised by their records custodian that a certified copy of these other records would be provided only upon the receipt of a signed medical release from the appellant. As a result, counsel for respondent prepared a release form and arranged for its service on appellant by Dane County Legal Notice on October 19, 1990. Appellant refused to sign the release form. As a result of this, the Commission's hearing examiner postponed the hearing scheduled for

October 30, 1990, and instructed the parties to appear, however, at the date and time at which the hearing had been scheduled for purposes of discussing the discovery dispute relating to the release of appellant's medical records.

16. At the status conference held on October 30, 1990, the appellant agreed to consult with Dr. Vattakattcherry on or before November 7, 1990, to assist appellant in deciding whether to sign the form to release the clinic's medical records relating to her diagnosis and treatment by Dr. Vattakattcherry. A status conference was scheduled for November 8, 1990, to discuss this release as well as the release requested by respondent for certain records maintained by the Division of Vocational Rehabilitation relating to their assessments of appellant. The hearing examiner advised the parties that any such records would be subject to a protective order issued by the hearing examiner. The hearing examiner issued such protective order on November 15, 1990.

17. At a status conference convened by the Commission on November 15, 1990, the parties agreed to a hearing on February 13, 1991, and appellant agreed to sign a release for those medical records relied upon by Dr. Vattakattcherry in her treatment and diagnosis of appellant.

18. In a letter to appellant dated February 5, 1991, and hand-delivered to appellant's home, respondent stated as follows, in pertinent part:

Enclosed are two release forms. The first is directed to Curative Rehabilitation Center. The records which are specified for release were identified through my discussions with Dr. Amana Vattakattcherry and Ms. Pat Pruden, Medical Records Supervisor.

...

The second release is directed to the Wisconsin Division of Vocational Rehabilitation. I have issued a subpoena for the records and for your counsellor to appear at the hearing on February 13, 1991. You will need to sign the release before the counsellor will give substantive testimony.

I am arranging for this letter and the attached releases to be hand-delivered to your home. I have enclosed an addressed and stamped envelope for you to return the signed releases promptly.

Both releases provided for the subject records to be released to the Commission.

19. Appellant refused to sign the releases forwarded to her by respondent in its correspondence of February 5, 1991. As a result, the hearing examiner postponed the hearing in this matter indefinitely and, on February 15, 1991, respondent filed the subject Motion to Compel Discovery

of the records identified in respondent's correspondence to appellant of February 5, 1991, and the release forms enclosed with this correspondence.

Section PC 4.03, Wis. Adm. Code, provides that parties to Commission proceedings may obtain discovery as provided by Chapter 804, Stats. Section 804.01(2)(a), Stats., states as follows in relation to the scope of such discovery:

(2) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with the provisions of this chapter, the scope of discovery is as follows:

(a) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Appellant's actions and claims in regard to the instant matter place her physical and mental condition squarely at issue. Appellant's claim to reinstatement and back pay is premised on her allegation that, although her condition, physical and/or mental, at the time of her termination, prevented her from performing the duties and responsibilities of the position that she held at that time, her condition did not prevent her from performing the duties and responsibilities of other available positions within DHSS at that time or thereafter. In order to defend this claim, respondent has requested information, through the discovery process, relating to appellant's physical and/or mental condition at the time of her termination and thereafter. This information is certainly relevant and discoverable pursuant to §804.01(2)(a), Stats., and appellant has asserted no privilege nor provided any convincing rationale why the subject Motion should not be granted. It would defy reason to prevent respondent from discovering information relating to appellant's physical and/or mental condition at times relevant to this action when the determination of the appropriate remedy in this case necessarily rests on an examination of such condition at those times.

In her brief in response to the Motion, appellant states that, "If the Respondent would like medical information from other doctors besides the Appellant's prime physician a subpoena can be issued to those doctors." Appellant doesn't explain how this would resolve the dispute under

consideration here or why this approach to obtaining information relating to her condition is preferable to the records request advanced by respondent. Moreover, if the records requested by respondent which are the subject of this Motion include records prepared by physicians or health or rehabilitation professionals other than Dr. Vattakattcherry, appellant's primary physician, and relate to appellant's physical or mental condition at times relevant to this action or were relied upon by Dr. Vattakattcherry in her diagnosis or treatment of appellant, appellant has not shown that such records are not relevant and discoverable within the meaning of §804.01(2)(a), Stats.

Appellant also states in such brief that, "Also if respondent only needs medical records to substantiate the doctors testimony why can't the doctor bring them but not release them as part of the court records." Respondent has a discovery right to such records for a broader purpose than just to substantiate Dr. Vattakattcherry's testimony and respondent has not indicated an intent to use the requested records for such a limited purpose. Such records may be used to prepare a defense to or a rebuttal to Dr. Vattakattcherry's testimony, for example. For that reason, respondent has a right to utilize such records to prepare its case before hearing, not simply to present its case at hearing. In addition, a protective order has already been issued by the hearing examiner in this case and explained to the appellant. This order makes it very clear the limited purpose for which such records may be used and the limited circulation such records may have.

Finally, in her brief, appellant states that "I understand the need for the Respondent to know certain medical information but I feel that it can be obtained without the Appellant releasing her medical history. So I'm requesting the Commission to find another option that would be satisfactory to both parties." The record in this matter reflects that the Commission has spent considerable time and effort over the last two years in an attempt to find an option satisfactory to both parties and has met with only partial success. In addition, the Commission now has before it a Motion to Compel Discovery which it must finally decide in accordance with the applicable statutes and administrative rules and not in some informal way.

The Commission concludes, based on the foregoing, that respondent's Motion is meritorious and should be granted. The Commission concludes further that respondent's request for attorney's fees and costs pursuant to §804.12(1)(c), Stats., is premature in that it was advanced prior to the granting of the subject Motion by the Commission and prior to opportunity for hearing


by the parties. Respondent is free to renew its request after the issuance of this Ruling and the Commission will proceed at that time to process such request in accordance with the provisions of §804.12(1)(c), Stats.

Order

The subject Motion to Compel Discovery is granted. Appellant is ordered to take, within 20 days of the date of this order, whatever action is necessary to provide the information requested by respondent in its February 5, 1991, discovery request, including, but not limited to, signing the release forms prepared by respondent on or around February 5, 1991, relating to records maintained by the Curative Rehabilitation Center and the Division of Vocational Rehabilitation. Any records subject to this Order will be maintained in accordance with the Protective Order issued by the hearing examiner on November 15, 1990.

Dated: May 1, 1991

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:lrn:dah


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

Mary Smith
1519 Simpson Street, #312
Madison, WI 53713

Gerald Whitburn
Secretary, DHSS
P.O. Box 7850
Madison, WI 53707