

## PERSONNEL COMMISSION

JILL D. TEWS,

Appellant/  
Complainant,

v.

Chairperson, PUBLIC SERVICE  
COMMISSION,

Respondent.

Case Nos. 89-0150-PC  
89-0141-PC-ER

## DECISION AND ORDER

### Nature of the Case

These cases are based on the discharge of appellant/complainant from her position as an Auditor Specialist 3. On November 22, 1989, appellant/complainant filed an appeal of such discharge with the Commission and on December 13, 1989, appellant/complainant filed a complaint of discrimination on the basis of handicap with regard to such discharge. Hearing was held before Laurie R. McCallum, Chairperson, on December 20, 21, and 22, 1989, and January 23, 24, 25, and 26, 1990. The briefing schedule was completed on May 9, 1990.

### Findings of Fact

1. Effective July 9, 1984, appellant/complainant was appointed to a position classified as an Auditor 1 in respondent's Accounts and Finance Division. Appellant/complainant was hired for this position based at least in part on the fact that she had a B.S. degree in Business Administration with a major in accounting and on the fact that she had worked as an auditor and/or accountant in the public and private sectors since at least 1976. Appellant/complainant

completed a handicap self-identification form upon appointment to this position which indicated that she considered herself to have a handicap of cerebral palsy on her right side which affected her right hand, her right foot, her vision, and her speech. Appellant/complainant also indicated on this form that she did not need any changes in her job duties or work area to help her do her job better.

2. In a performance evaluation dated August 30, 1984, Norman Young, Director of the Bureau of Utility Accounts in the Accounts and Finance Division, and appellant/complainant's first line supervisor, rated appellant/complainant's performance as "average" on six of the eight criteria and as "poor" for "quantity of work" and "work habits". "Average" was the middle ranking of the five rankings utilized and "poor" was the fourth ranking.

3. In a performance evaluation dated November 29, 1984, Mr. Young's ratings of appellant/complainant's performance were the same as in the earlier evaluation. In this evaluation, Mr. Young also stated as follows:

Ms. Tews' progress in developing an understanding of utility accounting and auditing has been slower than expected given her scholastic training. She does not always use the information available to her when making fundamental reviews of utility financial statements, i.e., inquiring about an item in the income statement when it is fully explained by detail reported in a supporting schedule. Although her development as regards accounting has been slow, she demonstrates a willingness to learn and has made some progress in acquiring knowledge of public utility accounting. However, as regards auditing, it is too early to judge this person's potential to achieve the overall objective level of Auditor 4. There is additional auditing field work scheduled which will provide information regarding Ms. Tews' progress and potential for advancement as an auditor.

Appellant/complainant and Mr. Young met on November 29, 1984, to discuss this evaluation. During this meeting, appellant/complainant advised Mr. Young that she had cerebral palsy but did not request a specific

accommodation. Also during this meeting, Mr. Young advised appellant/complainant that, in comparison to other Auditor 1's, her progress had been slow and he was considering extending her probationary period beyond six months.

4. During this period of time, Mr. Young observed that appellant/complainant's cerebral palsy appeared to reduce the manual dexterity of her right hand which in turn affected her ability to key data into a computer.

5. On or around December 27, 1984, appellant/complainant was advised that her probationary period was being extended three months, i.e., until April 8, 1985. In a memo dated December 17, 1984, to Sue Christopher, Administrator, Division of Merit Recruitment and Selection, Ness Flores, Chairman of the PSC, requested the extension and stated as follows, in pertinent part:

As is usual practice at the Public Service Commission, Ms. Tews received probationary evaluations after two and four months of employment. The two month evaluation reflects poor to average ratings in the categories covered on the standard probationary report form DER-PERS-19. The four month report shows no improvement. Given her scholastic training, Ms. Tews demonstrates a slower than expected rate of learning. Although she appears to make some effort and performs adequately on routine, cookbook-type auditing assignments, we question her ability to effectively handle more complex assignments requiring professionally sound, defensible judgment and independence of action. We are also concerned with the reliability and accuracy of her work based on reviews of completed work products. However, we have had inadequate opportunity to fully assess her performance on repetitive assignments and, thus, need the extended time in which to do so.

. . . Additional auditing field work has been scheduled which we expect will provide information regarding Ms. Tews' progress and potential for advancement. . . . The objective level of the Auditor classification progression series at the PSC is Auditor 4.

5. In an evaluation of appellant/complainant's performance dated January 7, 1985, Mr. Young's ratings were the same as in the previous

evaluations except that he rated her "work habits" as "average." In this evaluation, Mr. Young also stated, in pertinent part:

Ms. Tews' development as an auditor continues to show some progress and her work habits have improved. Given the slow but continuing development, it is anticipated that her performance will continue to improve. Therefore, it is recommended that this employee's probationary period be extended to allow additional time to assess her continued development.

6. In a performance evaluation dated March 11, 1985, Mr. Young rated appellant/complainant's performance as "average" on all performance criteria and stated that she was performing at an acceptable Auditor 1 level.

7. On or around March 29, 1985, appellant/complainant was advised that she had satisfactorily completed her probationary period and had achieved permanent status in class as an Auditor 1.

8. On or around September 29, 1985, appellant/complainant was reclassified to the Auditor 2 level based on her satisfactory performance as an Auditor 1. Up until this point in time, appellant/complainant had been assigned to the Compliance Audit Team and had been responsible for the billing and collection and accounts receivable segments of compliance audits of class C and D utilities.

9. Some time during December of 1985, appellant/complainant was transferred to the Municipal Audit Team. This was part of the usual progression for Auditors at the PSC. The members of this team conduct audits arising from municipal utility rate increase requests. These audits are more technical than compliance audits, involve larger utilities (classes A and B) which renders them more complex than compliance audits, and require the identification of trends and the development of projections which is a higher level auditing function than that which is involved in a compliance audit. It is important that these audits be completed in as little time as practicable since it

cost the utility being audited money each day that their rate request is delayed. New members of this team are first assigned to conduct the revenue part of the audit which is the least difficult part. The other parts are the expense part and the rate base part. The normal progression for an Auditor is to work on the revenue part for their first rate case audit, the revenue and rate base parts for their second rate case audit, the expense part for the third and fourth rate case audits, and to be able to work on any part for their fifth rate case on.

10. As a part of each municipal rate case audit, the individual assigned overall responsibility, i.e., the auditor in charge, for the audit would evaluate the parts of the audit conducted by others. In an evaluation dated July 29, 1986, Bruce Manthey, the auditor in charge, rated appellant/complainant's performance in regard to the revenue part of the West Bend Water utility audit as "average" (the middle rating on a five-point scale) in all categories except "Timely performance of audit plan" and "Monitoring audit progress in relation to time budget" which he rated as "needs improvement" (the fourth rating on the five-point scale). This was appellant/complainant's first assignment as a member of the Municipal Audit Team and Mr. Manthey's evaluation took this into account.

11. In an evaluation dated August 25, 1986, Christopher Larson, the auditor in charge, rated appellant/complainant's performance in regard to the revenue part of the Cudahy Water utility audit as "average" in all categories except "Timely performance of audit plan", "Monitoring audit progress in relation to time budget", and "Use of time on job" which he rated as "needs improvement" and "Indicated knowledge of system of accounts, commission rules and regulations, statutes, etc." which he rated as "above average." His written comments indicated that:

Jill encountered some problems in adhering to time constraints. Although some of this was a result of major discrepancies in the utility's reported and supportive data, additional time was also spent following up on items of immaterial dollar amount. Jill did a good analysis of industrial consumption and revenues, overcoming significant problems with utility data.

12. In an evaluation dated December 15, 1986, Mr. Larson rated appellant/complainant's performance in regard to the revenue part of the Green Bay Water utility audit as "average" in all categories except that he rated "Workpapers--headings, legibility, auditor's initials and dates", "Workpapers--Notes, comments, tick-mark explanations", "Presentation of facts, problems and recommendations", and "Indicated knowledge of system of accounts, commission rules and regulations, statutes, etc." as "above average". His written comments indicated that:

Jill did a good job on the revenues portion of the audit. Good analysis was made, especially with large industrial customers. Billing test and voucher test were very comprehensive. However, more independent judgment should be used in considering discrepancies found/items to be followed up on. Consideration should also be given to materiality versus time spent on an item.

13. In an evaluation dated October 3, 1986, Douglas Sorge, the auditor in charge, rated appellant/complainant's performance in regard to the revenue part of the Wausau Water utility audit as "average" in all categories except that he rated ""Conclusion to program objective," "Timely performance of audit plan," "Monitoring audit progress in relation to time budget," and "Use of time on job" as "needs improvement." Mr. Sorge's written comments on the evaluation indicate that he prepared an individual time budget for Ms. Tews' part of the audit as well as an individual audit guide. These comments also indicate:

This was Jill's 3rd rate case in which she worked on Revenues herself. She did a good analysis of the major revenue categories but seemed to spend additional time on areas of minor revenue categories and bill testing. She had problems in maintaining the time budget in that too much time was spend on one area with the result that time available for other areas would be insufficient. It was pointed out to Jill that we were not doing a compliance audit and the time constraint didn't allow for excessive time to be spent

on minor items; that she should be aware of the time budget and change her procedures as necessary to complete the field work.

The normal time needed to complete appellant/complainant's part of this audit was three days. It took appellant/complainant six days.

14. In an evaluation dated November 20, 1986, Mr. Sorge rated appellant/complainant's performance in regard to the revenue part of the Two Rivers Water utility audit as "average" in all categories except that he rated "Workpapers-General--headings, legibility, auditor's initials and dates" and "Workpapers--Organization--Notes, comments, tick-mark explanations" as "above average" and "Proper modification of audit program when required", "Timely performance of audit plan", "Monitoring audit progress in relation to time budget," and "Use of time on job" as "needs improvement." Mr. Sorge's written comments state that:

This was Jill's 5th rate case in which she worked on Revenues. This utility's records regarding customer count, number of meters, etc. were inadequate. This caused Jill problems in determining how to proceed to obtain adequate data to project customer growth, etc. Jill should be able to realize at this point in her work what data is needed and what in her audit approach will have to be changed to get the relevant data when the utility's records are not satisfactory. I also appeared that Jill was spending excessive time in some areas. She should be aware of the time budget and adapt her procedures as necessary to complete the field work as well as completing the office work in a timely manner.

15. Mr. Sorge was aware at the time that he reviewed appellant/complainant's work that she had cerebral palsy and that her cerebral palsy reduced the dexterity of her right hand. During this same period of time, most of appellant/complainant's computer data input responsibilities were performed by other auditors as a result of this reduced dexterity. Other than computer data input, no other aspect of appellant/complainant's audit responsibilities were physically arduous or required manual dexterity to adequately perform.

16. In an evaluation dated December 12, 1987, Mr. Manthey rated appellant/complainant's performance in regard to the revenue part of the LaCrosse Water utility audit as "average" in all categories except that he rated "Workpapers--General--Headings, legibility, auditor's initials and dates" as "above average" and "'Conclusion to program objective," "Timely performance of audit plan," "Monitoring audit progress in relation to time budget", Audit Adjustments--Presentation of facts, problems and recommendations," "Adequate support for adjustments," "All proper adjustments made," "Initiative and resourcefulness," and "Use of time on job" as "needs improvement."

Mr. Manthey's written comments stated, in pertinent part:

Even though time budgets have not officially been maintained, Jill should have reasonable knowledge of the time to complete tasks in the revenue section. Time in relationship of actual to budget is near impossible to compare due to the large number of hours charged to training in addition to being charged to the docket.

Recommendations changed from Jill's drafts significantly in some instances.

Workpaper review indicated several errors. Greater care in analysis is needed.

[Jill] depends on in-charge auditors too much for advice that should in many instances be general knowledge on revenue after this many rate cases.

Jill appears to be allocating a significant amount of time to "training" after doing a number of rate cases to date on the Revenue Section. Much of the same logic should have helped to complete the revenues and should not need to be considered training. Hopefully, Jill will soon be able to maintain a more independent working level on revenues so she may proceed to gaining experience in other phases of the rate case, i.e., Expenses, Rate Base and Capital Charge.

17. On February 4, 1987, appellant/complainant advised Mr. Young that, in addition to her physical problems, she was having mental and emotional problems and had seen a psychiatrist; that she was diagnosed as having an alcohol abuse problem and had been attending Alcoholics Anonymous; that she



had been having problems with her son and with another personal relationship; and that she was having financial problems. Appellant/complainant also advised Mr. Young that she would try not to allow these problems to affect her work.

18. On March 16, 1987, Mr. Sorge and Mr. Manthey met with Mr. Young and indicated to him that they didn't feel that appellant/complainant's work performance was adequate, i.e., that she worked too slowly and that she required frequent retraining.

19. In a performance evaluation dated June 4, 1987, Mr. Young indicated that, for the period from June of 1986 through May of 1987, appellant/complainant had a positive attitude about her work and expressed concern and interest in increasing her accounting and auditing skills to advance as an auditor. However, Mr. Young also indicated in this evaluation, in pertinent part, that:

Jill's progress as an Auditor 2 has not been satisfactory. Although she appears to have sufficient basic knowledge of the Uniform System of Accounts, her skills as an auditor have not progressed. She regularly takes more time than scheduled to complete her segment of the audit. Further, she has not shown the capacity to progress to a new area of the rate case audit. The team or lead auditor has indicated that instruction is not retained; that basic instruction and training is required to be repeated in successive audits.

Also, workpapers have too many deficiencies and errors.

It will be necessary for Jill to improve in these areas. The frequency of workpaper error and repeat instruction will have to decrease. Time schedules will have to be met.

Overall, Jill will have to develop better audit skills including higher level of independence.

Jill should concentrate on being more objective or goal oriented relative to her portion of the audit. These specific objectives and goals should be in terms of the required result and the time frame expected to accomplish the job.

Although various goal setting and scheduling plans have been tried with Jill, there has been no appreciable improvement in meeting expected completion schedules.

20. On July 7, 1987, appellant/complainant, her psychiatrist, and Conrad Oleson, Administrator of respondent's Accounts and Finance Division, met to discuss appellant/complainant's work. All three agreed that it would be advisable for appellant/complainant to voluntarily demote to an Audit Specialist 3 position in the Bureau of Accounting and Financial Reports, Accounts and Finance Division, which would allow appellant/complainant to use her training and experience in the performance of less demanding duties and responsibilities. Appellant/complainant's psychiatrist was of the opinion that this action would serve to reduce the stress that appellant/complainant was experiencing as a result of both her personal and professional lives.

21. Appellant/complainant's duties and responsibilities as an Audit Specialist 3 primarily included performing analytical reviews of the annual financial reports filed by Class C and D utilities to determine compliance with the Uniform System of Accounts and rules, regulations and orders of the Public Service Commission. The performance standards for such position were provided to appellant/complainant at the time of her appointment and were as follows: determine accuracy and completeness of annual report; determine from report if utility is complying with the prescribed Uniform System of Accounts and other regulations and orders of the PSC; prepare draft correspondence for supervisory review which will correct and/or instruct for reporting/accounting differences; and complete review within the budgeted time at least 90% of the time. The PSC was required to complete 600 analytical reviews annually. These reviews were assigned randomly to Audit Specialists. Tom Kortas, a team leader with the Compliance audit Team, developed time budgets for completion of analytical reviews of a single annual report: four

hours for a single department utility, e.g., water; 6 hours for a two department utility, e.g., water and sewer; and 8 hours for a three department utility, e.g., water, sewer, and electric. The first analytical reviews were done in 1988 and covered annual reports filed by utilities for the previous five years. Thereafter, the analytical reviews only covered one annual report. The first reviews were done of Class C utilities. By the time the Audit Specialists began working on Class D utilities, it was possible to get the data needed for the review off the PSC main frame and the Audit Specialists did not need to do any keying of data themselves. The PSC has a step-by-step guideline for completing analytical reviews. Appellant/complainant's first-line supervisor was Fred Halverson, Director of the Bureau of Accounting and Financial Reports.

22. Mr. Halverson met with appellant/complainant on November 5, 1987, to discuss the fact that appellant/complainant had used all the sick leave that she had earned. Mr. Halverson agreed to allow complainant to take leave without pay in order to continue treatment with her psychiatrist. They also discussed appellant/complainant's work performance and Mr. Halverson indicated that he had a concern about the length of time it was taking appellant/complainant to complete analytical reviews. Mr. Halverson recognized at this time that the computer keying and typing required of appellant/complainant were problems for her but would not be a part of her duties once she began her next assignment of reviewing the annual reports of telephone utilities.

23. Mr. Kortas assisted appellant/complainant in completing her first analytical review of a telephone utility in order to give her guidance as to how much time she should spend on each part of the review.

24. On November 17, 1987, Mr. Kortas and Mr. Halverson met with appellant/complainant to discuss her work performance. The first analytical

review of a telephone utility which appellant/complainant had completed independently (Bruce Telephone Co.) had taken her more than 20 hours to complete. The budgeted time to complete such a review was four hours.

Appellant/complainant was advised by Mr. Halverson that this was unsatisfactory. Mr. Halverson's notes of the meeting also indicate, in pertinent part:

Tom and I are uncertain to what extent (if any) Jill's physical condition contributes to the problem. Because of her cerebral palsy she has more difficulty than most in doing tasks requiring manual dexterity. However, except for the keying involved in writing letters, very little of the assignment puts a premium on manual dexterity. Therefore we feel that Jill should be able to materially reduce the time she is taking to do each review. Elaine Engelke has reduced her time to the four to six hour range and she began doing telephone reviews at the same time as Jill.

Our plan for improving the situation calls for Tom Kortas to spend more time with her this week. Our goal is to reduce the time per review down to eight hours by a week from today.

In a discussion between Tom and myself after Jill left the meeting he expressed the concern that she is not recording all of her time on the time analysis page. This bothers him not only from the standpoint that the recorded time is in error but he also wonders about the quality of the work she is doing.

25. Mr. Halverson and Mr. Kortas met with appellant/complainant again some time after November 19, 1987, but prior to December 1, 1987, to discuss her work performance. They noted that appellant/complainant had spent 9.75 hours on her last analytical review of a telephone utility (Mt. Horeb) and that she attributed the improvement to asking questions sooner and to recognizing that the answers to some questions are not in the utility's annual report and she shouldn't waste her time looking there for the answer. Mr. Halverson advised appellant/complainant that she should not waste time on accounts which haven't changed more than 2% and that she should try not to let her mind wander or to waste time between reviews. Mr. Halverson's written notes from the meeting also state, in pertinent part:

Work time reported as 07. Jill is reporting break and meeting time under that code. She had 11.75 hours reported as 07 in the week of 11/15. Some of the wasted time mentioned above is obviously being included in 07. I told her that it is OK to put her half hour break in 07 especially during the period she is doing analytical reviews.

We set a goal of completing analytical reviews in six hours. We will meet again on December 1, 1987, at 1:00 p.m. to continue work review.

26. On December 1, 1987, Mr. Halverson and Mr. Kortas again met with appellant/complainant to discuss her work performance. Mr. Halverson's notes of such meeting state, in pertinent part:

In our meeting last week, we had set a goal of having Jill reduce her time to do an analytical review to 6 hours each. Jill has done two at 7.75 hours each. We have instructed Jill to send her letters to typing pool rather than using VW3 and typing it herself.

We will meet again December 8, 1987, to further review. We still are aiming for 6 hours.

27. On December 8, 1987, Mr. Halverson and Mr. Kortas again met with appellant/complainant to discuss her work performance. Mr. Halverson's notes of such meeting indicate that appellant/complainant's time for completing analytical reviews had actually increased, i.e., she spent 13+ hours completing the analytical review of the Luck utility and 22.5 hours completing the analytical review of the Lakeshore utility. Such notes also indicate that appellant/complainant felt that sending her letters to the word processing center for typing rather than doing it herself was faster.

28. On December 22, 1987, Mr. Halverson and Mr. Kortas again met with appellant/complainant to discuss her work performance. Mr. Halverson's notes of such meeting indicate that appellant/complainant took 22+ hours to complete the analytical review of Northeast Telephone (the annual report was in "bad shape" and required more time as a result), took 13 hours to complete the analytical review of Hillsboro Telephone, and took 6.5 hours so far on the analytical review of Valders Telephone with an estimated 2+ additional hours

needed for completion. These notes further indicate that appellant/complainant was still taking about twice as long as Elaine Engelke to complete an analytical review and that appellant/complainant would sit in Mr. Kortas' office on December 23, 28, 29, and 30 in order to have Mr. Kortas work intensively with appellant/complainant to assist her in reducing her time for completing an analytical review to 6 hours.

29. On January 12, 1988, Mr. Halverson and Mr. Kortas again met with appellant/complainant to discuss her work performance. Mr. Halverson's notes from such meeting state, in pertinent part:

She is still in the 10 to 12 hour range versus 4 to 8 for Elaine. The letter takes Jill 3 to 4 hours versus 1.5 for Elaine. Jill was instructed to work on reducing the time spent with distractions and to focus in more on her work. Tom and I feel there are still gains to be made particularly in the letter writing portion of the work which makes use of "canned" phrases and sentences for much of their content. We will meet again 1/27/88.

30. On January 29, 1988, appellant/complainant requested permission to attend a training session entitled "Perceptive Communications" in order to "improve employee's interpersonal relations by enhancing her communications skills and helping her to understand her impact on others and to be able to adapt it for more effective communication in particular job situations." Mr. Halverson approved such request on February 1, 1988.

31. In an evaluation of appellant/complainant's work performance dated June 2, 1988, Mr. Halverson stated as follows, in pertinent part:

During the approximately nine months that the employe has been in the bureau she has spent most of her time reviewing the annual reports of telephone utilities and class C municipal utilities. Employe's progress has not been satisfactory. Budgeted time to perform an analytical review of telephone utility reports is four hours. Employe started out taking more than 20 hours to complete a review. With the help of periodic meetings with myself and intensive one-on-one coaching with the lead auditor, her time per report was reduced to 8-12 hour range. This is still not satisfactory.

Employee continues to take too long to complete the annual report reviews assigned to her. It is the observation of both the lead auditor and her supervisor that she is not using her time effectively. She is an outgoing person and spends too much time talking to other staff about items not related to her job. As a person who has worked as a compliance auditor she tends to delve more deeply into some of the annual report problems than is required in an analytical review.

We also talked about her management of leave time. She is currently down to about four hours of sick leave and only about 40 hours of other leave time with more than seven months of the year remaining. Last year she ran out of leave time and had to go off payroll when taking emergency leave. She was reminded that she was hired as a full-time employee and that she was expected to be at work all scheduled hours except for earned leave time.

After completing in-process class C analytical reviews, employee will be assigned to reviewing class D reports (the smallest and least complicated of the various report types.) She has been requested to keep on task and to limit the amount of conversation with other staff that is not related her to make certain that she understands exactly what is wanted in an analytical review. Our immediate goal for the next 60 days is to get her to complete her reviews consistently with six to eight hours. Our longer term goal is to reduce that time to four hours by December 1, 1988.

32. On August 19, 1988, Mr. Halverson met with appellant/complainant to discuss her work performance. Mr. Halverson indicates in his notes of such meeting that appellant/complainant's last analytical review of a class D utility took 22.5 hours but that the annual report presented many problems; that appellant/complainant's other analytical reviews took 6.25 to 15 hours to complete; that Mr. Kortas had worked with her to try to improve her work methods; that her "frame of mind" seemed to be good and that she continued to be willing to try the things that Mr. Kortas and Mr. Halverson suggested to improve her productivity.

33. On September 2, 1988, Mr. Halverson met with appellant/complainant to discuss her work performance. His notes of such meeting indicate that Mr. Kortas had again spent a considerable amount of time working with appellant/complainant to "see where she may be wasting

her time;" that, for the 12 class D analytical reviews that appellant/complainant had completed as of that date, she had averaged 14.25 hours per review; that she had averaged about 15 hours per review for the first 6 and about 12.25 for the second 6; that, as a basis for comparison, Gail Maly (another Audit Specialist) had averaged about 5.5 hours per analytical review for 33 utilities and Dorothy Powers had averaged about 15 hours for 5 utilities.

34. On September 16 and September 30, 1988, Mr. Halverson met with appellant/complainant to discuss her work performance. Mr. Halverson noted that, although the quality of appellant/complainant's analytical reviews was good, she had not shown any significant improvement in the time she took to complete such reviews. In the meeting of September 30, Mr. Halverson noted that appellant/complainant had averaged about 13 hours per analytical review for the last 7 reviews and the last 2 had taken 14 hours and ten hours respectively. He also noted that appellant/complainant advised him that she had been taking an antidepressant drug since 1985 and that she remained cheerful and willing to cooperate and keep trying to do better.

35. On December 12, 1990, Mr. Halverson met with appellant/complainant to discuss the semi-annual evaluation of her work performance. Mr. Halverson's notes of such meeting indicate that the quality of appellant/complainant's work remained good but that the time for her to complete an analytical review appeared to have leveled off at the eight to nine hour range which was unsatisfactory; that they had set a goal of reducing this time to six to eight hours for the balance of the class D analytical reviews; that appellant/complainant had done a better job of managing her leave time that year; and that appellant/complainant's physical problems remained and contributed to her work performance, i.e., she had been gaining weight again and



this bothered her and had an effect on her ability to move around, and she was taking prescription drugs which may also have had an effect on her performance.

36. On February 7, 1989, Mr. Halverson met with appellant/complainant to discuss her work performance. His notes of such meeting indicate that appellant/complainant's time for completing analytical reviews had remained steady in the 10 to 12 hour range with one done in 6.75 hours; the the quality of her work remained good; that Mr. Kortas had spent an exceptional amount of time with appellant/complainant; that there was no reason to believe that appellant/complainant was deliberately "goofing off" but there was no question that her work habits were a significant factor in her performance; and that he had informed appellant/complainant that her performance was unsatisfactory.

37. In a memo to Mr. Oleson dated April 27, 1989, Mr. Halverson stated, in pertinent part, as follows in regard to appellant/complainant's work performance as an Audit Specialist 3:

During her first nine months as an Audit Specialist she was assigned the task of performing analytical reviews of Class C municipal utility and telephone annual reports. She started out taking more than 20 hours to do a review. The budget time was four to six hours depending upon the report. The team leader was assigned to spend some additional time with her to observe what she was doing and to be more readily available to answer any questions she might have. Her bureau director also met with her frequently during this period. Her times came down to around the 12-hour average. This was still unsatisfactory (others were doing similar work in 4 to 8 hours). Nevertheless, she had improved and I was cautiously optimistic that she could make further improvement.

\* \* \* \* \*

For the 52 Class D annual reports that she reviewed during 1988-89 she averaged 12.1 hours per review versus an average of 5.8 hours for all other persons doing review work and 4.5 hours for the fastest reviewers. This is, of course, unsatisfactory and she was advised that it was unsatisfactory during the frequent meet-

ings with me and during her annual evaluation on April 5, 1989. We had a very candid meeting at that time. She was asked what additional steps she thought should be taken to improve her work performance. She said that setting daily goals and even more frequent review of her work might help keep her on task. She recognizes that her work habits are a primary reason for her inability to achieve satisfactory performance. She had no other suggestion to offer.

Ms. Tews was advised that we could not continue to retain her as an Audit Specialist unless she could perform at a satisfactory level. She agreed that the bureau director and the team leader had worked hard with her to achieve better performance. She was informed that I felt that I had no option other than to recommend termination of employment if her work does not improve to a satisfactory level in six months (October 6, 1989).

Because of her physical and emotional problems; because she does have adequate knowledge to do the work and because I believe she sincerely wants to do a good job, I have "gone the extra mile" with this employee. My reasons for finally arriving at a decision to recommend termination are (1) she seems to have reached a plateau beyond which she is not improving; and (2) co-workers with lower classifications and less experience are performing at a level that is greater than that of Ms. Tews.

In order that she have every opportunity to achieve satisfactory performance during the next six months, I will set up even more frequent reviews of her work and I am considering moving her desk into the same office with her lead worker so that he can be readily available to help her.

38. In a memo to Mr. Oleson dated May 8, 1989, Mr. Halverson provided the following information, in pertinent part:

1) Tom Kortas spent a whole week working with Jill on two separate occasions. In each case he sat at an adjacent desk where he could observe what she was doing, make suggestions as needed and be readily available to answer questions. The dates of these weeks were:

May 23-27, 1988

July 18-22, 1988

He has also spent many additional hours working with Jill and making suggestions as to how she might work more efficiently.

2) In addition I met with Jill on the following dates to review how she was progressing and to provide encouragement as we worked together to help her improve her productivity.

August 5, 1988  
August 19, 1988  
September 2, 1988  
September 16, 1988  
September 30, 1988  
October 28, 1988  
November 11, 1988  
December 12, 1988  
January 20, 1989  
February 7, 1989

During the two weeks that Mr. Kortas spent in one-on-one training sessions with appellant/complainant, this was the focus of his duties. Respondent did not find it necessary to provide this type of training to any other Audit Specialist.

39. In a performance evaluation signed by appellant/complainant and Mr. Halverson on April 28, 1989, Mr. Halverson indicated that, for the period from 8/30/88 through 6/30/89, appellant/complainant's performance had been unsatisfactory and that:

Employee's major assignment during the past year has been to perform analytical reviews of class D Municipal Reports. Employee's progress has not been satisfactory. Her average time for performing a review is 12.1 hours versus 5.8 hours for all other employees performing the same work.

40. On June 21, 1989, Mr. Halverson met with appellant/complainant to discuss her work performance. Mr. Halverson's notes of such meeting lists certain analytical reviews that appellant/complainant had completed and averages the time that appellant/complainant had spent on such reviews. Such average was 5.75 hours. Mr. Halverson's notes also indicate that appellant/complainant had a meeting scheduled at a sleep disorders clinic the next Thursday and that appellant/complainant had a meeting scheduled with a Vocational Rehabilitation counselor for July 10.

41. In a letter dated June 27, 1989, and received by Mr. Halverson on July 5, 1989, David T. Watts, M.D., an Assistant Professor of General Internal Medicine at the University of Wisconsin Hospital and Clinics, stated as follows, in pertinent part:

I have been asked by Jill Tews to provide information concerning her medical condition relevant to job performance. Specifically, Ms. Tews has a diagnosis of sleep apnea, a condition in which oxygen levels fall during the night interfering with normal sleep and causing daytime sleepiness. This tendency toward daytime sleepiness is involuntary and can significantly interfere with a person's employment performance. The nature and severity of Ms. Tews' condition is such that her daytime performance would likely be very significantly affected.

With appropriate treatment, it is expected that this condition can be corrected. This would eliminate the daytime sleepiness, as well as its attendant negative effects on performance.

42. Dr. Watts first diagnosed appellant/complainant's sleep apnea on or around May 17, 1989, and concluded that she had a very severe case resulting in daytime somnolence and depression. Treatment involving the use of a C-PAP machine by appellant/complainant during sleeping hours was begun immediately. Respondent was aware that such treatment had begun and was ongoing. Appellant/complainant was re-tested on June 29, 1989. This test demonstrated that appellant/complainant's sleep patterns were then within a normal range. It was Dr. Watt's opinion that appellant/complainant should no longer have been experiencing sleepiness during the day or other symptoms of sleep apnea on or after June 29, 1989.

43. On July 6, 1989, Mr. Halverson met with appellant/complainant to discuss her work performance. Mr. Halverson's notes of such meeting indicate that appellant/complainant's average time for completing an analytical review was 9.46 hours; that, by comparison, Terry Thurmer, another Audit Specialist, was averaging 3.5 hours; and that appellant/complainant was advised that her work continued to be unsatisfactory and that she would have

to get her average time per analytical review down to the 4 to 4.5 hour range in order for her performance to be considered satisfactory.

44. Mr. Halverson met with appellant/complainant again on July 20, 1989, and August 3, 1989, to discuss her work performance. Mr. Halverson's notes of the August 3 meeting indicate that appellant/complainant had averaged more than 9 hours per analytical review during the last two weeks and some of these analytical reviews were not yet complete; that appellant/complainant had been advised that her work performance was not satisfactory; and that appellant/complainant had told Mr. Halverson that she was still getting used to using the C-PAP machine.

45. In a memo to appellant/complainant of September 8, 1989, Mr. Halverson stated as follows, in pertinent part:

In our meeting of August 25, 1989, we discussed your recent work performance and talked about how you were feeling. . . . Your feeling was that you were more alert and that the time required to do your work was improving. When we reviewed the time taken to complete recent analytical reviews, however, there did not appear to be any significant improvement. You said that the most recent reviews were not a good sample because they included several class C reports that had not been done last year and had more than the normal amount of errors.

After our meeting I talked with your lead worker, Carroll Kilby, and he agreed with you that your most recent reviews did have an abnormally high degree of problems and were not a good basis for measuring your performance. I have therefore decided to do the following:

1) Extend the six month review period, which had been established at your annual performance evaluation, by four weeks to November 4, 1989. This will provide us with additional time to evaluate your work, particularly that work which has been done since you have been using the machine.

2) Beginning Tuesday, September 5, 1989, and continuing for a period of at least four weeks, we will be assigning you, as much as we can, class D reports to review. This should provide a better basis for me to measure your work. Be certain to give the reviews to Carroll immediately upon completion so that times are recorded promptly. As a reminder to you, budgeted time for re-

viewing a single department utility is four hours and it is six hours for a joint utility.

3) During this period we will meet on the following dates at 1:00 p.m. to discuss your work.

September 12, 1989  
September 19, 1989  
September 26, 1989  
October 2, 1989

You are encouraged to stop in and see me at any time if problems develop or if you want to talk about your progress.

4) Also keep in mind the things we have talked about over the past couple of years such as keeping on task and reducing the amount of "social" conversation. I know that you have made progress in dealing with those problems and I encourage you to continue that effort.

46. On October 10, 1989, Mr. Halverson and Mr. Kilby met with appellant/complainant to discuss her work performance. Mr. Halverson's notes of such meeting indicate the following, in pertinent part:

Jill was informed that I had summarized the time for 1988 Class D analytical reviews to date and although some progress had been made she still had not reached a satisfactory level of performance. For 18 single department utilities, for which I had times, she averaged about 5.86 hours per review. This was still far above the budgeted time established in prior years when reviews took longer because reports had not been reviewed in some time and we were having to deal with more errors in prior years. Terry Thurmer, an Audit Specialist 1 with less than six months experience is averaging 3.41 hours per review. . . . The quality of work for both employees is rated as satisfactory. To the best of my knowledge there was no significant difference in the average number of problems in the reports reviewed by those employees.

Jill was given the facts of her performance as outlined above. She was told that during the past quarter (7/1/89 through 9/30/89) she had completed 10 reviews and had 14 in process as of 9/30/89. During the same period Terry completed 42 reviews and had 40 in process. Jill's only assignment during that period was analytical reviews. Terry has concurrent assignments of reviewing monthly financial reports and providing staff with monthly memos on utility rates of return.

Jill was told again (as she has been several times in the past) that I believed that she was making an honest effort to do her best but that the level of her performance was not satisfactory, particularly at the Audit Specialist 3 level. I told her that I had not investigated the possibility but if she were willing to accept a de-

motion I would see if we might be able to consider her current level of output as marginally satisfactory at a lower pay grade. . . .

47. Some time prior to October 16, 1989, William McGrath, a Vocational Rehabilitation Counselor 3 with the Division of Vocational Rehabilitation of the Wisconsin Department of Health and Social Services, completed an assessment of appellant/complainant for purposes of developing a vocational rehabilitation plan for appellant/complainant. Mr. McGrath considered information provided by appellant/complainant and by her treating physicians in completing this assessment. Mr. McGrath concluded in his assessment that appellant/complainant had two disabilities affecting her work performance: cerebral palsy and sleep apnea. Mr. McGrath also concluded that appellant/complainant had a very mild form of cerebral palsy which affected the speed and dexterity with which she performed physical tasks but which did not have an effect on her cognitive functions or her ability to manage her time and that her sleep apnea affected her concentration and the speed with which she completed tasks. Finally, Mr. McGrath concluded that appellant/complainant, as a result of her cerebral palsy, was particularly sensitive to stress and that a great deal of stress was being caused by pressure by respondent for appellant/complainant to meet time budgets for completion of analytical reviews.

48. Mr. McGrath met with appellant/complainant and Mr. Halverson at the PSC on October 16, 1989. He was under the impression as a result of this meeting that appellant/complainant's production had improved as a result of her successful treatment for sleep apnea. Mr. McGrath concluded from this that her production should continue to improve as she continued her treatment for sleep apnea and that DVR could assist her in this improvement by providing a job coach. A job coach would observe appellant/complainant performing her work, try to isolate tasks, and devise means for

appellant/complainant to improve her efficiency in the completion of such tasks. The tasks upon which the job coach would focus would not be tasks requiring the application of professional knowledge but would be tasks such as talking on the telephone, etc. The job coach would not be familiar with the specific accounting and/or auditing requirements of appellant/complainant's position but would have experience working with clients who have cerebral palsy, other muscle problems, or other brain dysfunctions.

49. On October 20, 1989, a meeting was held to discuss appellant/complainant's work performance. Present at this meeting were Charles Thompson, Chairman of the PSC; Cheryl Pofahl, Executive Assistant to the Chairman of the PSC; Lynn Murawski, Personnel Director of the PSC; Mr. Oleson; and Mr. Halverson. Those present at the meeting discussed the possibility of locating another position for appellant/complainant at the PSC. However, it was concluded that appellant/complainant would not be capable of performing the duties of an Audit Specialist 2 since the productivity requirements were the same as for the position she then occupied; that an Audit Specialist 1 position would not be appropriate since these positions are intended as training positions and appellant/complainant had already had extensive training; and that she would not be capable of performing the word processing duties and other duties which required manual dexterity of lower level positions. A decision was made by the Chairman to terminate appellant/complainant.

50. In a letter dated November 8, 1989, Chairman Thompson notified appellant/complainant of her termination effective December 31, 1989, for failure to achieve satisfactory job performance as an Audit Specialist 3.



51. Since 1986, appellant/complainant had coded 1155.9 hours as training hours; Elaine Engelke 49.0 hours; Gail Maly 397.2 hours; and Terry Thurmer 52.0 hours.

52. The following is a summary of analytical review work done by Audit Specialists for 1988 annual reports of both one and two department utilities:

<u>Month</u>	<u>Tews</u>		<u>Engelke</u>		<u>Thurmer</u>	
	<u>No.</u>	<u>Avg. Time</u>	<u>No.</u>	<u>Avg. Time</u>	<u>No.</u>	<u>Avg. Time</u>
May '89	1	7.75	0	0	0	0
June '89	9	5.58	0	0	26	3.84
July '89	4	5.56	0	0	11	3.50
August '89	7	8.46	0	0	20	4.50
Sept. '89	9	8.03	0	0	24	4.15
Oct. '89	9	7.22	0	0	23	2.85
Nov. '89	0	0	15	4.03	29	3.32
Dec. '89	0	0	9	3.11	9	3.12

Terry Thurmer was hired to work as an Audit Specialist 1 by respondent effective May 8, 1989. Elaine Engelke was hired to work as an Audit Specialist 1 by respondent in 1984 and was reclassified to the Audit Specialist 2 level in 1985.

53. The following is a summary of analytical review work done by Audit Specialists for 1988 Class D annual reports for single department utilities:

<u>Month</u>	<u>Tews</u>		<u>Engelke</u>		<u>Thurmer</u>	
	<u>No.</u>	<u>Avg. Time</u>	<u>No.</u>	<u>Avg. Time</u>	<u>No.</u>	<u>Avg. Time</u>
May '89	1	7.75	0	0	0	0
June '89	6	5.50	0	0	22	3.63
July '89	3	4.58	0	0	10	3.40
August '89	0	0	0	0	12	3.29
Sept. '89	4	6.25	0	0	17	3.24
Oct. '89	8	7.06	0	0	19	2.58
Nov. '89	0	0	10	4.20	24	3.33
Dec. '89	0	0	9	3.11	8	3.13

54. The following is a summary of analytical review work done by Audit Specialists for 1988 Class D annual reports for two department utilities:

<u>Month</u>	<u>Tews</u>		<u>Engelke</u>		<u>Thurmer</u>	
	<u>No.</u>	<u>Avg. Time</u>	<u>No.</u>	<u>Avg. Time</u>	<u>No.</u>	<u>Avg. Time</u>
May '89	0	0	0	0	0	0
June '89	3	5.75	0	0	4	5.00
July '89	1	8.50	0	0	1	4.50
August '89	0	0	0	0	4	4.88
Sept. '89	2	9.63	0	0	0	0
Oct. '89	1	8.50	0	0	4	4.13
Nov. '89	0	0	5	3.70	5	3.30
Dec. '89	0	0	0	0	1	3.00

55. The following is a summary of analytical review work done by Audit Specialists for 1988 Class C annual reports for single department utilities:

<u>Month</u>	<u>Tews</u>		<u>Engelke</u>		<u>Thurmer</u>	
	<u>No.</u>	<u>Avg. Time</u>	<u>No.</u>	<u>Avg. Time</u>	<u>No.</u>	<u>Avg. Time</u>
May '89	0	0	0	0	0	0
June '89	0	0	0	0	0	0
July '89	0	0	0	0	0	0
August '89	4	7.44	0	0	3	7.67
Sept. '89	1	12.75	0	0	3	6.17
Oct. '89	0	0	0	0	0	0
Nov. '89	0	0	0	0	0	0
Dec. '89	0	0	0	0	0	0

56. The following is a summary of analytical review work done by Audit Specialists for 1988 Class C annual reports for two department utilities:

<u>Month</u>	<u>Tews</u>		<u>Engelke</u>		<u>Thurmer</u>	
	<u>No.</u>	<u>Avg. Time</u>	<u>No.</u>	<u>Avg. Time</u>	<u>No.</u>	<u>Avg. Time</u>
May '89	0	0	0	0	0	0
June '89	0	0	0	0	0	0
July '89	0	0	0	0	0	0
August '89	3	9.83	0	0	1	8.00
Sept. '89	2	7.63	0	0	4	6.50
Oct. '89	0	0	0	0	0	0
Nov. '89	0	0	0	0	0	0
Dec. '89	0	0	0	0	0	0

57. The following is a summary of analytical review work done by Audit Specialists for all 1987 annual reports for one and two department utilities:

<u>Month</u>	<u>Tews</u>		<u>Engelke</u>		<u>Maly</u>	
	<u>No.</u>	<u>Avg. Time</u>	<u>No.</u>	<u>Avg. Time</u>	<u>No.</u>	<u>Avg. Time</u>
May '88	0	0	0	0	0	0
June '88	3	25.92	0	0	10	5.90
July '88	7	32.86	13	3.50	2	5.88
August '88	5	25.20	39	3.24	25	5.20
Sept. '88	9	15.86	29	3.69	28	4.97
Oct. '88	4	9.88	3	4.83	9	3.78
Nov. '88	0	0	0	0	3	4.09
Dec. '88	11	11.18	14	4.07	20	3.96
Jan. '89	8	10.78	8	4.62	21	4.04
Feb. '89	14	11.46	36	4.77	20	3.98
Mar. '89	4	29.13	11	6.59	3	5.25

Gail Maly began work as an Audit Specialist 2 for respondent effective March 28, 1988.

58. Carroll Kilby, an Auditor with the Bureau of Accounting and Financial Reports, was appellant/complainant's lead worker from June of 1989 until her termination and they shared the same office during that period of time in order for Mr. Kilby to give appellant/complainant additional assistance. It was Mr. Kilby's opinion that appellant/complainant asked many more questions than the other Audit Specialists for which he served as a lead worker and frequently would ask the same question repeatedly.

59. Appellant/complainant filed a timely appeal with the Commission of her termination and a timely complaint of discrimination based on her termination.

#### Conclusions of Law

1. The Commission has jurisdiction over this appeal (Case No. 89-0150-PC) pursuant to §230.44(1)(c), Stats.
2. Respondent has the burden to prove that there was just cause for the subject discharge of appellant and that such action was not excessive.
3. Respondent has sustained this burden of proof.

4. The Commission has jurisdiction over this complaint of discrimination pursuant to §230.45(1)(b), Stats.

5. Complainant has the burden to prove that respondent discriminated against her on the basis of handicap in discharging her.

6. Complainant has failed to sustain this burden of proof.

### Decision

Handicap Discrimination The first question to be resolved in this regard is whether appellant/complainant is handicapped within the meaning of the Fair Employment Act. The definition of handicap is set forth at §111.21(8), Stats., as follows:

- (8) "Handicapped individual" means an individual who:
  - (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work:
  - (b) Has a record of such an impairment; or
  - (c) Is perceived as having such an impairment.

The Wisconsin Supreme Court provided an analytical framework for applying this definition of handicap in LaCrosse Police Comm. v. LIRC, 139 Wis. 2d 740 (1987). The court held that to establish that a particular physical condition constitutes a handicap, the complainant must first show there is an impairment by showing there is "a real or perceived lessening, deterioration, or damage to a normal bodily function or bodily condition, including absence of such function or condition." Appellant/complainant asserts that, for purposes of these proceedings, her handicap consists of cerebral palsy and sleep apnea. The record shows in this regard that appellant/complainant has a mild form of cerebral palsy which limits the dexterity of her right hand and foot and which has an effect on her vision and speech; and a severe case of sleep apnea which

causes daytime drowsiness and depression. The Commission concludes that these effects of appellant/complainant's cerebral palsy and sleep apnea represent a lessening, deterioration, or damage to a normal bodily function or bodily condition and, as a result, appellant/complainant's cerebral palsy and sleep apnea constitute impairments within the meaning of the Fair Employment Act. The second element (as applicable to the facts under consideration here) requires that appellant/complainant establish that the impairment "limits the capacity to work" at the particular job in question. Appellant/complainant's cerebral palsy limits appellant/complainant's ability to perform the physical aspects of her position, i.e., to key data into the computer, to use the word processing system to generate letters to utilities, and to efficiently operate a calculator while turning the pages of the annual report she is auditing. These are not substantial limitations vis a vis the duties and responsibilities of appellant/complainant's position, but they are limitations nonetheless. Appellant/complainant's sleep apnea affects her concentration, memory, and the speed and efficiency with which she performs the duties and responsibilities of her position. Although these symptoms were under control and not having an impact on appellant/complainant's ability to do her job at least as of June 26, 1989, they represent limitations vis a vis the duties and responsibilities of appellant/complainant's position nonetheless since appellant/complainant's sleep apnea has not been cured but is simply under control as a result of continuing treatment of the symptoms. The Commission concludes that appellant/complainant is handicapped within the meaning of the Fair Employment Act as a result of her cerebral palsy and her sleep apnea.

The next inquiry is whether respondent discriminated against appellant/complainant on the basis of her handicap in discharging her. To sustain her burden in this regard, appellant/complainant must show a causal

connection between her handicap and her discharge. Respondent offered as the basis for its discharge of appellant/complainant her alleged failure to meet the performance standards for her Audit Specialist 3 position, i.e., appellant/complainant's alleged failure to complete analytical reviews within the periods of time budgeted for completion.

The record shows that appellant/complainant consistently failed to meet the performance standards for her position in that she consistently failed to complete analytical reviews within the time budgeted for completion. Even in June and July of 1989, when appellant/complainant came closest to meeting the time budgets, she was still 37.5% over budget on the average for single department Class D utilities in June and 14.5% over budget in July; and slightly under budget for two-department Class D utilities in June but 42% over budget in July. In addition, in these two months, appellant/complainant completed 13 analytical reviews while a new reviewer completed 37. Finally, appellant/complainant's improvement was short-lived because she was 56% over budget on the average for single department Class D utilities in September and 76.5% over budget in October; 60.5% over budget for two-department Class D utilities in September and 40% over budget in October; 86% over budget for single department Class C utilities in August and 219% in September; and 64% over budget for two-department Class C utilities in August and 27% over budget in September. Finally, in those months in 1989 in which Terry Thurmer (a new and relatively inexperienced reviewer) and appellant/complainant were assigned to conduct analytical reviews, appellant/complainant completed 38 reviews in an average time of 6.97 hours per review while Ms. Thurmer completed 142 reviews in an average time of 3.65 hours. In those months in 1989 in which both appellant/complainant and Ms. Thurmer completed reviews (for some reason, appellant/complainant did

not complete any reviews in November or December), appellant/complainant completed 38 reviews in an average time of 6.97 hours per reviews while Ms. Thurmer completed 104 reviews in an average time of 3.77 hours per review.

Appellant/complainant contends that she did meet the performance standards for her position since her performance showed improvement up until the date of her termination. However, simply showing improvement is not dispositive of the question under consideration here unless the improvement shown results in satisfaction of the performance standards for the position. In addition, as shown in the paragraph above, appellant/complainant did not show consistent improvement up until the date of termination, i.e., her productivity actually declined after July of 1989 and actually ceased during November and December of 1989.

Appellant further contends that her performance satisfied the performance standards of her position since the quality of her work was consistently good. There is no question that none of her supervisors had a problem with the quality of appellant/complainant's work. However, quality was not the only component of the performance standards for appellant/complainant's position. Such standards also included a productivity component which was clearly enunciated in the materials provided to appellant/complainant upon her voluntary demotion to the Audit Specialist 3 position.

Appellant further contends that the productivity standard, i.e., the standard based on meeting time budgets for analytical reviews, was not uniformly applied. In this regard, appellant alleges that no other employee of the PSC was discharged for failing to meet time budgets for analytical reviews or was subject to such intense scrutiny. However, the record does not show that any other reviewer consistently failed to meet these time budgets. The only evi-

dence in this regard is that an Auditor named Dorothy Powers failed to meet these time budgets during a two-week period of time in August and September of 1988. However, the record also shows that Ms. Powers' primary responsibility was not the conduct of analytical reviews and that the statistics relating to Ms. Powers' performance in this regard are very limited, i.e., cannot sustain a finding that Ms. Powers consistently failed to meet time budgets for analytical reviews. Appellant/complainant also contends that the time budgets were not realistic. However, this is not convincing in view of the fact that even new and relatively inexperienced reviewers were able to meet these time budgets soon after being hired. In addition, these time budgets were developed by Mr. Kortas, a very experienced auditor who based the budgets on past experience. Appellant/complainant further contends that these time budgets were meant to be a goal, not a requirement. It is undisputed that respondent didn't expect every reviewer to meet the time budget on each analytical review since some annual reports presented more problems than others. However, it is also clear from the record that respondent expected the performance of the reviewers, on the average, to meet these time budgets and that this expectation was clearly communicated to appellant/complainant. If this were not the case, the time budgets would be meaningless. In addition, the establishment of these time budgets is consistent with the PSC's charge to conduct analytical reviews of 600 annual reports each year, i.e., failure of reviewers to consistently meet these time budgets would result in the failure of the PSC to complete these 600 reviews. Finally, appellant/complainant argues that she was unable to meet time budgets for certain reviews because the annual reports presented an unusual number of problems. However, since reviews are assigned randomly, there has been no showing that appellant/complainant's reviews presented



more problems than any other reviewer's or more than were anticipated when the time budgets were established.

Discrimination under the Fair Employment Act also includes the failure of an employer to provide reasonable accommodation for a handicap. The only accommodation specifically requested by appellant/complainant was that related to the use of a DVR job coach. In isolation, this would appear to be a reasonable accommodation. However, in the context of the facts before us, the Commission concludes that respondent acted reasonably in denying this request for accommodation. Respondent had already tried this approach several times with appellant/complainant and any resulting improvement in her performance had not been substantial nor sustained nor enough to satisfy the performance standards for her position. The "coaching" provided to appellant/complainant by respondent was done by experienced, professional auditors familiar with the steps and techniques necessary to perform analytical reviews. The job coach DVR proposed to provide would not focus on the cognitive aspects of appellant/complainant's position, but the physical aspects. Since the physical aspects of appellant/complainant's position were minimal and most had been assumed by other staff, and since the coaching technique had not been successful when applied to appellant/complainant's performance in the past, it was reasonable for respondent to conclude that there was little likelihood that DVR's proposal would solve appellant/complainant's performance problems and, as a result, it was reasonable for respondent to conclude that DVR's proposal did not represent a reasonable accommodation for appellant/complainant's handicap.

Respondent, through appellant/complainant's handicap self-identification form and through discussion with and observation of appellant/complainant, was aware that appellant/complainant's cerebral

palsy affected her ability to use her right hand and to move around. There was no significant movement involved in performing analytical reviews.

However, respondent did accommodate appellant/complainant's limitation on the use of her right hand by assigning others to perform appellant/complainant's data entry duties while she was an Auditor and by allowing appellant/complainant to have her letters prepared by respondent's word processing unit while she was an Audit Specialist 3.

Appellant/complainant acknowledged that the use of the word processing unit was helpful and faster. The only other physical aspect of appellant/complainant's position with which she testified she had problems as a result of her cerebral palsy was her ability to turn pages while operating a calculator. Appellant/complainant did not request or propose an accommodation for this problem.

Appellant/complainant also contends in this regard that a reasonable accommodation for her handicaps should have included modifying the performing standards applied to appellant/complainant's performance in the Audit Specialist 3 position, i.e., lengthening the time budgets applied to her completion of analytical reviews. Appellant/complainant cites no authority for this contention. Commission precedent in regard to this issue leads to the opposite conclusion. In Rau v. UW-Milwaukee, Case No. 85-0050-PC-ER (2/5/87) and Harris v. DHSS, Case Nos. 84-0109-PC-ER, 85-0115-PC-ER (2/11/88), the Commission held that an employer is not required to create a new job by permanently assigning a handicapped employee's work to other staff as an accommodation. That is what appellant/complainant is asserting here--that respondent should have created a different position for appellant/complainant by reducing the number of analytical reviews she was required to complete. This in turn would have the effect of increasing the

number of analytical reviews required to be completed by other reviewers since there was a finite number of reviewers available to do this work. The Commission concludes that respondent was not required to make such an accommodation for appellant/complainant's handicaps.

Appellant/complainant finally contends in this regard that a reasonable accommodation of her handicaps should have included offering appellant/complainant a different position, specifically an Auditor position on the Compliance team or an Audit Specialist 1 or 2 position. Such an accommodation is not required under the Fair Employment Act.<sup>1</sup> In the Harris decision cited above, the Commission stated, in pertinent part, that:

. . . the employer is not required to create a new job or transfer an employee to a completely different position as an accommodation, . . .

Section 230.37(2), Stats., requires that such a transfer or demotion may be required "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."

Appellant/complainant has failed to make such a showing here.

Appellant/complainant has shown that she has some physical limitations as a result of her handicap of cerebral palsy and had some cognitive limitations as a result of her handicap of sleep apnea which are now under control. In view of the duties and responsibilities of her Audit Specialist 3 position, these disabilities are certainly not enough to render appellant/complainant

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<sup>1</sup> Neither party cited McMullen v. LIRC, 148 Wis. 2d 270, 275-276, 434 N.W. 2d 830(1988), which effectively overrules Harris by holding that the duty of accommodation can include a transfer if it is determined to be a "reasonable" accommodation following a case-by-case analysis of the specific facts. However, as discussed below, transfer was not a viable option in this case. (The Commission adds this footnote to the proposed decision.)

physically or mentally incapable of or unfit for the efficient and effective performance of the duties of this position. Finally, the record shows that respondent did consider this as an option but rejected it since appellant/complainant had not satisfactorily progressed through the training phases of her Auditor position; since appellant/complainant had already received extensive training and it would thus not be appropriate to place her in a position in the trainee Audit Specialist 1 classification; and since the performance standards for an Audit Specialist 2 position were the same as for an Audit Specialist 3 position and appellant/complainant had failed to meet the performance standards for her Audit Specialist 3 position.

Appellant/complainant did not successfully rebut any of these assertions by respondent. The Commission concludes that appellant/complainant has failed to prove that respondent discriminated against her by failing to provide reasonable accommodations for her handicaps.

#### Just Cause

The underlying questions in an appeal of a discharge are:

(1) whether the greater weight of credible evidence shows that appellant committed the conduct alleged by respondent in its letter of discharge;

(2) whether the greater weight of credible evidence shows that such chargeable conduct, if true, constitutes just cause for the imposition of discipline, and;

(3) whether the imposed discipline was excessive.

(Mitchell v. DNR, Case No. 83-0228-PC (8/30/84))

The conduct of appellant/complainant which formed the basis for her discharge was her alleged failure to meet the performance standards for her position. The Commission has already concluded above that

appellant/complainant consistently failed to meet these performance standards and that these performance standards were reasonable and uniformly applied.

Appellant/complainant takes issue with certain other language in her discharge letter. However, this language does not describe conduct allegedly engaged in by appellant/complainant which formed the basis for her discharge and is, therefore, not relevant to our discussion here.

In determining whether certain conduct constitutes just cause for discharge, the Commission has followed the test set forth by the Wisconsin Supreme Court in Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974), i.e., whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair the performance of the duties of the position or the efficiency of the group with which the employee works. It is axiomatic that failure to meet the performance standards for a position, as has been shown here, impairs the performance of the duties of appellant/complainant's position. In addition, the record here shows that one of the charges of the PSC is to conduct analytical reviews of the annual reports of 600 utilities each year and that the PSC has a finite number of resources to devote to carrying out this charge. The failure of a reviewer to complete the standard number of analytical reviews during the year certainly affects the efficiency of respondent's operation and could actually prevent the PSC from fulfilling its charge to complete these 600 reviews in a year's time. As a result, the Commission concludes that appellant/complainant's failure to complete the standard number of analytical reviews had a tendency to impair the efficiency of the group with which she worked.

The final question is whether the action taken , i.e., appellant/complainant's discharge, was excessive. The Commission finds that

respondent had explored and exhausted many alternatives in attempting to help appellant/complainant succeed in her position. The amount of time and effort invested by respondent, i.e., the time appellant/complainant was permitted to allot to training, the amount of time spent by Mr. Halverson in meeting with and counseling appellant/complainant, the amount of time spent by Mr. Kortas in intensive training sessions, the amount of time spent by other lead workers in guiding appellant/complainant's work, was considerable. Respondent's primary responsibility was not to appellant/complainant but to the public it serves and respondent finally concluded, after a considerable investment of its resources, that the public interest would not be served by allowing appellant/complainant to continue in a position the performance standards of which she had failed to meet on a consistent and continuing basis. The Commission finds that this conclusion is sustained by the record. Respondent did explore alternatives to discharge but concluded that none of these was viable. As discussed above, the Commission finds that this conclusion is sustained by the record. In addition, as the Commission concluded above, the record does not show that appellant/complainant's failure to meet the performance standards of her position was the result of manifestations of her handicapping conditions, i.e., the cerebral palsy was shown to have an effect only on the physical aspects of her position which were not only very limited but primarily carried out by others; and even after the effects of the sleep apnea were minimized or eliminated, appellant/complainant was unable to meet these standards. Finally, the Commission finds the fact situation under consideration here parallel to certain other cases in which the Commission has sustained a discharge, particularly Buchanan v. DOR, Case No. 81-289-PC (12/2/82); Ruff v. State Investment Board, Case Nos. 80-105,160,222-PC (8/6/81), Aff'd by Dane County Circuit Court, Ruff v. State Pers. Comm., 81-CV-4455, (7/23/82),

aff'd by Court of Appeals District IV, 82-1572 (11/8/83); Fauber v. DOR, Case No. 82-138-PC (8/21/84), aff'd by Milwaukee County Circuit Court, Fauber v. State Pers. Comm., 649-551 (10/8/85). The Commission concludes that the action taken by respondent is not excessive in view of the record in this matter and Commission precedent.

Order

The action of respondent in discharging appellant/complainant is affirmed and these cases are dismissed.

Dated: June 29, 1990      STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM:gdt/2

  
GERALD F. HODDINOTT, Commissioner

Donald R. Murphy did not take part in the consideration of this matter.

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