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RALPH J. [REDACTED]

Appellant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 91-0220-PC

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RULING
ON
PETITION
FOR
REHEARING

This matter is before the Commission on respondent's petition for rehearing pursuant to §227.49, Stats., filed November 9, 1992, following the entry of an interim decision and order on October 16, 1992.¹ The Commission will address respondent's contentions in the order in which they are raised.

Respondent argues that the Commission erroneously concluded that respondent lacked the authority under §230.37(2), Stats., to suspend appellant indefinitely. Respondent contends that the employer has the implicit authority under §230.37(2) to take the actions necessary to conduct an examination, and that since appellant "failed to submit to an exam to the extent necessary to accomplish the purpose of the statute," the suspension was implicitly authorized. The Commission agrees that the employer has the authority to require an examination. However, in this case, it is erroneous to state that appellant failed to submit to an examination. Appellant did submit to examinations by both Dr. Hummel and Mr. Hanusa; what he did not do was to agree to the particular course of treatment that respondent demanded.

Respondent also argues that the Commission erred in its determination that appellant's condition did not constitute an "infirmity" under §230.37(2):

While it is true that Dr. Hummel testified that the MMPI-2 administered to the petitioner [sic] "resulted in a profile that is within relatively normal limits, suggesting that most of his difficulties are not as prominent as in psychiatric patients," this does not imply that the petitioner's condition was not an "infirmity." The petitioner had a

¹ Since the Commission mailed this decision to the parties on October 19, 1992, the petition, filed on November 9, 1992, a Monday, is timely, contrary to appellant's assertion.

diagnosable condition under the DSM III-R, which both Dr. Hummel and Mr. Hanusa concluded was treatable.

Dr. Hummel testified that appellant's "personality overall is what would be called generally well within the normal range. There are some characteristics about his personality, however, that contribute to some of these difficulties that were mentioned at work." Dr. Hummel described these personality characteristics as: "the ability to become easily irritable, to be argumentative, and ... to at times externalize or transfer blame for situations on to other people." Mr. Hanusa testified that he "wouldn't say there's a psychiatric syndrome in play here, but there certainly are behavioral features that are causing him some difficulties." (emphasis added) While Dr. Hummel did identify a diagnosable condition of an "adjustment disorder with disturbance of emotions and conduct," this was not mentioned in his initial written report of October 28, 1991, to Ms. Anderson (Respondent's Exhibit 3), in the "Results of Psychological Inventories" section or elsewhere. This condition was not mentioned until Ms. Anderson specifically inquired whether "Mr. Jacobsen has a diagnosable condition, using the Diagnostic & Statistical Manual III-R?" (letter to Dr. Hummel dated November 8, 1991, Respondent's Exhibit 4) It appears that appellant's diagnosable condition is subsumed within the overall diagnosis to which Dr. Hummel testified:

His personality overall is what would be called generally well within the normal range. There are some characteristics about his personality, however, that contribute to some of these difficulties that were mentioned at work. These features included the ability to become easily irritable, to be argumentative, and ... to at times externalize or transfer blame for situations on to other people.

Based on this record, it cannot be found that appellant's psychological condition falls within the parameters of §230.37(2): "mentally incapable of or unfit for the efficient and effective performance of duties of his or her position by reason of infirmities due to age, disabilities or otherwise. It does not follow from the fact that appellant's psychological profile included a diagnosable condition that he has a condition involving an "infirmity" or a "disability."

Respondent also argues that this case should be distinguished from Daley v. Koch, 829 F. 2d 212, 215, 51 FEP Cases 1077, 1079 (2d Cir. 1989), because appellant "was given a 'diagnosis of a particular psychological disease or

mental disorder; and, thus, it cannot be analogized to Daley v. Koch as being 'commonplace.'" However, appellant was not diagnosed as having "a particular psychological disease or mental disorder." Mr. Hanusa testified that he "wouldn't say there's a psychiatric syndrome in play here, but there certainly are behavioral features that are causing him some difficulty." (emphasis added) As noted above, Dr. Hummel testified that appellant's "personality overall is what would be called generally well within the normal range." These opinions are totally inconsistent with a diagnosis of a psychological disease or mental disorder. Based on the record before this Commission, which also includes the testimony of Dr. Weiss that appellant was within normal limits, there is no way it can be concluded that appellant's personality characteristics are related to "any particular psychological disease or disorder" as respondent contends

In a related vein, respondent analogizes to the WFEA and argues that: "[i]n diagnosing the petitioner as having a treatable condition under the DSM-III, even though the condition did not reach the degree exhibited in a psychiatric patient, Dr. Hummel determined that the respondent [sic] had an impairment under this definition [contained in La Crosse Police Comm. v. LIRC, 139 Wis. 2d 740, 407 N.W. 2d 510 (1987)]." Dr. Hummel testified that appellant's condition was within normal limits. He did not testify that appellant's diagnosable condition on one axis of the MMPI-2 amounted to an "impairment," and the record does not support such a finding.

In its decision, the Commission discussed the policy implications of a holding that the kinds of personality characteristics exhibited by appellant would be subject to the coverage of §230.37(2). In its petition for rehearing, respondent contends that its approach to this case does not raise the spectre of an employee being subject to removal or discharge under §230.37(2) for what would normally involve relatively minor discipline under a progressive disciplinary process, because:

[A]pplication of sec. 230.37(2) requires an objective medical determination that the employee is "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 a diagnosed, treatable personality disorder.

This contention distorts the record and the testimony of respondent's experts. Dr. Hummel testified that appellant's "personality overall is what would be called generally well within the normal range. There are some characteristics about his personality, however, that contribute to some of these difficulties that were mentioned at work." Mr. Hanusa testified as follows:

- Q From your interaction with Mr. [REDACTED], is it your opinion that he has psychiatric or behavioral problems that could adversely affect his relationship with coworkers in the workplace?
- A. I think he has difficulty with anger, I think he has interpersonal behavioral difficulties which put him into a position to come across in a way that's hostile and irritable and puts a strain on working relationships. I did an independent diagnosis and then read Dr. Hummel's report, and interestingly we came up with the same diagnosis of conduct disorder with a mixture of emotions and behaviors.... So I wouldn't say there's a psychiatric syndrome in play here, but there certainly are behavioral features that are causing him some difficulty.

Based on this record, appellant's psychological condition cannot be found to fit within the parameters of §230.37(2). An interpretation of this subsection that would lead to a different result would have a tendency to blur the distinction between an employee who actually has a psychological "infirmity" or "disability" which prevents him or her from performing adequately, and an employee who simply has identifiable personality characteristics which interfere with his or her ability to perform successfully.

Respondent further asserts that implicit in the opinions of Dr. Hummel and Mr. Hanusa is the determination that appellant was incapable of modifying his behavior. The Commission cannot agree that the record supports a finding to this effect. As noted in the original decision, respondent's experts never addressed the fact that appellant had conducted himself for a number of years without engaging in the kind of behavior that caused his suspension. Nor did they address the fact that appellant had never been subjected to formal discipline, and never had the opportunity to attempt to correct his behavior in the context of the progressive discipline process. In this connection, respondent asserts in its petition that: "Dr. Hummel has recently advised the respondent explicitly that he does not believe that the petitioner is capable of responding to progressive discipline and that he would

testify to this effect."² This assertion simply underscores the deficiency of the record in this area.

ORDER

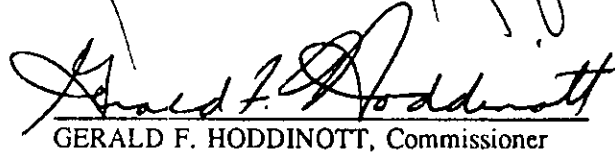
Respondent's petition for rehearing, filed November 9, 1992, is denied.

Dated: December 9, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:rcr


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

² It does not appear that respondent is requesting that the record be reopened for additional testimony. In any event, respondent has made no showing that such testimony involves. "[t]he discovery of new evidence ... which could not have been previously discovered by due diligence." §227.49(3)(c), Stats.