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EUGENE HANEY,

Petitioner,

DEC 02 1996

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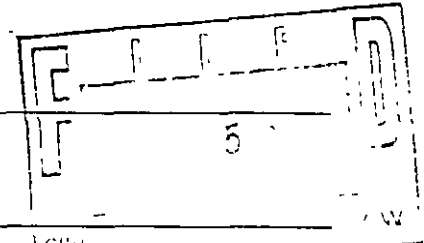
vs.

PERSONNEL COMMISSION

Case No 95-CV-0867

WISCONSIN PERSONNEL COMMISSION,

Respondent.



MEMORANDUM AND ORDER

Eugene Haney petitions this court under §227.53 Stats., for review of the Final Decision and Order of the Wisconsin Personnel Commission dated March 9, 1995. For the reasons set forth below, the decision of the agency is affirmed.

STATEMENT OF FACTS

Petitioner Eugene Haney was employed as an Auditor Senior in the Department of Transportation's (DOT) Bureau of Accounting and Auditing, Division of Business Management, from 1987 to 1994. His general responsibility was to conduct assigned field audits of entities that contracted with or wished to contract with DOT. Mr. Haney's immediate supervisor since 1989 was Donald Dorn, who reported to Dennis Schultz, who was supervised by Jane Czesinski.

Mr. Haney's 1988-89 performance evaluation reflected that his general performance did not meet normal standards, specifically in the areas of quantity and quality of work produced, unwillingness to accept supervision of lead auditors, and management's receipt of complaints from auditees. In October, 1989, Czesinski and Dorn decided to send Mr. Haney for a medical

examination because Mr. Haney claimed, on a number of occasions, to have performed audits that he did not in fact do, accused management of trying to discredit his work by destroying the evidence of those audits and used excessive sick leave.

Mr. Haney initially refused to attend this examination and was suspended for three days. After the suspension, Mr. Haney was again ordered to attend the medical examination, which he did. In December, 1989, Cephus Childs, then Employee Assistance Officer, informed Schultz and Dorn that all tests showed normal on Mr. Haney's examination. Mr. Childs did not provide a copy of the examination results and DOT has been unable to locate any results that he may have received.

Mr. Haney's 1989-90 performance evaluation reflected that his performance had improved and his general performance met normal standards. Mr. Haney was instructed to continue on his performance improvement plan. Mr. Haney's 1990-91 performance evaluation reflected that his general performance met normal standards, however, he was encouraged to continue improving the quality of his work.

In January, 1992, DOT instituted a new policy that auditors were to copy to floppy diskette all files relating to the audit and leave these disks in the audit file. Mr. Haney's supervisors asked him to comply with this policy, but he did not follow it until December, 1992.

In February, 1992, Carol Simon, a DOT employee with a work area adjacent to Mr. Haney's, complained to her supervisors that Mr. Haney was using sexually explicit language which she believed was directed at her because he would only use the language when he knew that she was present. In May, 1992, Simon complained to her supervisors that Mr. Haney was rubbing his genitals when he talked to her. In August, 1992, Simon wrote a complaint to her

superiors about Mr. Haney's behavior. In response, Demetri Fisher (DOT's Affirmative Action Equal Employment Opportunity Officer), Czeshinski and Schultz decided to move Mr. Haney's office so that he was no longer adjacent to Simon. Mr. Haney was not directly confronted about his behavior. After her office was moved, Simon had no further complaints about Mr Haney.

Mr. Haney's 1991-92 performance evaluation reflected that his general performance met normal standards, and that he was encouraged to continue improving.

On October 5, 1993, DOT received a complaint about Mr. Haney from Marilyn Berkvam, the director of the Shawano County Office on Aging. Mr. Haney had conducted an audit of her agency in December of 1992. During the course of the audit, Ms. Berkvam suggested to Mr Haney that DOT should train agencies on how to keep their books. Mr Haney responded that he had been to her agency two years prior and that he had instructed her on how to keep the books at that time. Ms. Berkvam denied to Mr Haney that he had ever been to their office before. Mr. Haney then accused Ms. Berkvam of hiding something and a loud discussion followed. Several of Ms. Berkvam's employees and clients were present during this discussion.

After receipt of the complaint from Ms. Berkvam, Dorn met with Mr Haney and requested that he write an apology to Ms. Berkvam. Mr. Haney denied that he had acted improperly, stated that Ms. Berkvam was lying and that she was "some kind of sick in the head " Mr. Haney again asserted that he had been to their agency in 1989 and that the recent encounter there was just a continuation of the problem that had previously existed. Mr. Haney did write an apology to Ms. Berkvam.

Czeshinski, Dorn, Schultz and Fisher discussed with Cynthia Morehouse, DOT's Director

of the Bureau of Human Resources, whether Mr. Haney should be disciplined for his actions involving Ms. Berkvam. Morehouse and Fisher recommended that Mr. Haney be sent for a medical examination so that DOT could determine whether there was a medical reason for Mr. Haney's behavior.

In a letter dated October 28, 1993, Czeshinski directed Mr. Haney to attend an independent medical examination under sec. 230 37(2), Stats. Czeshinski informed Mr. Haney that the decision was based on his behavior during the incident involving Ms. Berkvam, his continuing claims to have audited places that he in fact had not audited, his excessive use of sick leave, his paranoia regarding the files of the audits he works on and his working relationships with other staff members and the management of the audit staff.

Mr. Haney did not attend the medical examination. On November 17, 1993, an investigatory meeting and a pre-disciplinary meeting were conducted between Mr. Haney, Czeshinski and Dorn to discuss his failure to appear for the examination. Mr. Haney confirmed that he received the order to attend, but that he did not do so. Czeshinski recommended that Mr. Haney be suspended for three days for violating DOT's insubordination work rule when he failed to attend a medical examination that he had been directed to attend. Morehouse and James Van Sistine, the Administrator of the Division of Business Management, concurred in Czeshinski's recommendation.

In a letter dated November 23, 1993, Czeshinski again directed Mr. Haney to attend a medical examination under sec. 230.37(2), Stats. In a letter dated November 26, 1993, Mr. Haney responded to Czeshinski's order, stating that she did not provide support for the items mentioned in her initial order and that he would not submit to the examination at any time.

On December 6, 1993, an investigatory meeting and a pre-disciplinary meeting were conducted between Mr. Haney, Michael Plaisted, Mr. Haney's union representative, Czeshinski and Dorn to discuss Mr. Haney's failure to appear and the second scheduled medical examination. Mr. Haney confirmed that he received the order to attend the examination, but that he did not attend. During one of the meetings, Mr. Plaisted provided a copy of what he identified as a copy of the 1989 medical report on Mr. Haney.

Czeshinski recommended that Mr. Haney be suspended for seven days for violating DOT's insubordination work rule when he failed to attend a medical examination that he had been directed to attend. Morehouse and Van Sistine concurred.

In a letter dated December 8, 1993, Czeshinski again directed Mr. Haney to attend a medical examination under sec. 230.37(2), Stats. In a letter dated December 9, 1993, Czeshinski provided specific examples of her concerns about Mr. Haney's behavior that prompted her demand that he receive a psychological examination. In a letter dated December 21, 1993, Mr. Haney indicated that he would not attend the December 22, 1993 examination. Mr. Haney did not attend the December 22, 1993, medical examination.

On December 22, 1993, an investigatory meeting and a pre-disciplinary meeting were conducted between Mr. Haney, Plaisted, Czeshinski and Dorn to discuss Mr. Haney's failure to appear at the medical examination. Mr. Haney confirmed that he was ordered to attend the medical examination but that he did not attend the examination. Following the meetings, Czeshinski met with Van Sistine, Morehouse and others. Morehouse, Van Sistine and Terry Mulcahy, DOT's Deputy Secretary reviewed and concurred with Czeshinski's recommendation that Mr. Haney be terminated. In a letter dated January 11, 1994, Mr. Haney was terminated.

by Czesinski for violating DOT's insubordination work rule when he failed to attend the medical examination that he had been directed to attend.

Mr. Haney appealed DOT's termination to the Wisconsin Personnel Commission pursuant to sec. 230.44(1)(c), Stats. A hearing was held in front of an Administrative Law Judge on March 30, 1994. The hearing examiner found that DOT had the burden to prove by the preponderance of the evidence that it had just cause to suspend Mr. Haney for three days, to suspend Mr. Haney for seven days, and to terminate Mr. Haney. The hearing examiner found that DOT met this burden of proof as to the three day suspension, but not as to the seven day suspension or the termination. The hearing examiner also found that the predisciplinary process did not violate Mr. Haney's procedural due process rights.

In a decision dated March 9, 1995, the State Personnel Commission adopted the proposed decision with significant modification. The Commission found that the Department had met their burden of proof with respect to all of the discipline imposed and that the predisciplinary process did not violate Mr. Haney's procedural due process rights. One commissioner dissented. In response to the Commission's decision, Mr. Haney petitioned the court for judicial review under sec. 227.53, Stats.

STANDARD OF REVIEW

According to §227.52, Stats., administrative decisions which adversely affect the substantial interests of any person are subject to review as provided in the chapter on administrative procedure. The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels

a particular action, or it shall remand the case for further action under a correct interpretation of the provision of law. Sec. 227.57(5), Stats.

Under §227.57(3), Stats., the court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion. That is, if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to "great weight." Kelly Co. Inc v Marquardt, 172 Wis. 2d 234, 244, 493 N.W.2d 68 (1992)(citation omitted). If the agency decision is "very nearly" one of first impression, it is entitled to a mid-level standard of review, that is, "due weight" or "great bearing." Id. *De novo* review is applied when the case is clearly one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented. Id. at 245 (citation omitted)

An agency's factual findings must be supported by substantial evidence found in the record Sec 227.56(6), Stats. Substantial evidence is the "quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion " Robertson Transport Co. v Public Serv. Comm., 39 Wis. 2d 653, 658, 159 N.W 2d 636 (1968). It is not required that the evidence be subject to no other reasonable, equally plausible interpretations. Hamilton v ILHR Dept. 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980)

In Wisconsin, the scope of judicial review in a certiorari action extends to the question of whether the administrative action complained of violated the guaranties of due process found in the state and federal constitution. Krisen v Nehls, 767 F 2d 344, 348 (7th Cir. 1985)(citation omitted). Furthermore, the reviewing court shall reverse or remand if it finds that the agency's

exercise of discretion is in violation of a constitutional or statutory provision. Sec. 227.57(8), Stats.

DISCUSSION

In this case, the administrative agency's determination is entitled to great weight because the agency has experience, technical competence, and specialized knowledge in the interpretation and application of the statute. Sec. 230.37(2), Stats , has been in effect for a very long time and surely the agency has had significant opportunity to interpret and apply the statute.

According to sec. 230.37(2), Stats :

When an employe 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 employe to a position which requires less arduous duties, if necessary demote the employe, place the employe on a part-time service basis and at a part-time rate of pay or as a last resort, dismiss the employe from the service. The appointing authority may require the employe to submit to a medical or physical examination to determine fitness to continue in service..

Therefore, once an appointing authority has determined that an employee has become physically or mentally incapable or unfit for employment, the appointing authority may require the employee to submit to a medical examination to determine the employee's fitness to continue employment.

The court agrees that in order to uphold an employer's decision to discipline or terminate an employe for failure to attend a medical or physical examination ordered by the employer, the court must find that the employer is making a reasonable request of the employe. That is, the court would not uphold such discipline or termination if it found that the employer was using the request for a medical or physical exam as a means of achieving a devious end, such as

harassment or a purely personal desire for information about the employee.

In this case, Jane Czeshinski believed that certain incidences of behavior exhibited by Mr. Haney raised the issue of Mr. Haney's fitness for employment. Specifically, she was concerned by Mr. Haney's insistence that he had conducted audits in places where he had not actually gone, and while she had tolerated this behavior when Mr. Haney's representations were confined to the immediate office environment, she became alarmed when Mr. Haney made a false representation of a prior audit to Ms. Berkvam. Furthermore, not only did Mr. Haney make the false representation to Ms. Berkvam, but he argued with her when she raised the possibility that he had not been to her office prior to the present occasion

Mr. Haney argues that he could have been disciplined instead of ordered to have a medical examination for his conduct involving Ms. Berkvam. This is true. However, the record indicates that several persons were involved in the decision to order the medical evaluation in lieu of discipline, including Mr. Fisher, the Affirmative Action Equal Employment Opportunity Officer. Mr. Fisher testified that based on the information that was provided to him, he agreed with the decision to suspend and eventually fire Mr. Haney. In addition, Mr. Fisher considered himself to be advocating on Mr. Haney's behalf when he requested a medical examination instead of disciplinary action to address Mr. Haney's behavior. In fact, Mr. Fisher stated that he "kinda felt like [he] was injecting and pushing the idea of [Mr. Haney] getting a medical evaluation." (Return, p. 146). Mr. Fisher stated that they were pursuing a medical evaluation because they wanted to gather all of the information available regarding Mr. Haney before they proceeded with adverse action, such as discipline. (Return, p. 148).

In light of Czeshinski's and Schultz's concerns about Mr. Haney's behavior and Mr.

Fisher's advocacy for a medical examination, the court finds that DOT's request for a medical examination was a reasonable order.

Mr. Haney argues that he received a medical examination in 1989, the results of which were normal, and therefore, the request for another examination in 1993 was superfluous in that it was precipitated by the same conduct that was the cause of the 1989 order. The court finds that there are significant differences between the incidents leading up to the 1989 examination and the 1993 request for an examination, and, as the Personnel Commission noted, "[i]t is not like nothing happened in the intervening four years." (Decision, p. 11) The court finds particularly persuasive Jane Czeshinski's concern about Mr. Haney's confrontation with Ms. Berkvam about whether he had previously audited their agency. While Mr. Haney's "memory lapses" that occurred within the office were considered problematic, they appear relatively harmless in comparison to Mr. Haney's confrontation with Ms. Berkvam. Clearly, the continuation or possible escalation of instances of behavior such as the confrontation with Ms. Berkvam would affect Mr. Haney's ability to effectively perform his job.

The Personnel Commission found that under the circumstances, DOT had no choice but to terminate Mr. Haney upon his refusal to undergo the medical examination. The court agrees for two reasons. First of all, as the Personnel Commission noted, the purpose of the examination is to determine fitness to continue in service. If an employee, by his own action, prevents his employer from determining such fitness, then the employer is left with little choice but to terminate employment. Secondly, if the employer makes a reasonable request for the employee to attend the medical examination and the employee refuses, the employer must possess the power to enforce their order. If this court were to allow an employee to reject an

employer's reasonable order for a medical examination, it would practically ensure that subsequent employees, when faced with such an order, would feel free to reject it, knowing that the employer has no teeth with which to back their request.

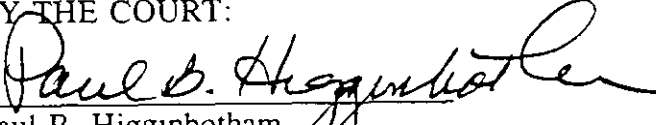
Finally, Mr. Haney argues that sec. 230.37(2) must be read to require a balancing of the appointing authority's interest served by the order to submit to a medical examination and the employee's constitutionally protected privacy rights. The court believes that whatever "balancing" is required is significantly addressed by requiring that DOT's order for the medical examination be reasonable. The court has reviewed the cases cited by Mr. Haney, Daury v Smith, 842 F.2d 9 (1st Cir. 1988), and Flynn v Sandahl, 58 F.3d 283 (7th Cir. 1995), and finds that there is no language in either decision which indicates that the court is required to balance the public interest in obtaining the medical examination versus the employee's right to privacy. It is important to note, however, that both cases did determine that the public interests at issue outweighed the particular individual's right to privacy, with the Flynn court going so far as to say, "[w]e need not decide whether the order requiring a psychiatric examination violated Flynn's right to privacy, because even if it did, we agree with the First Circuit that this right must give way to considerations of the public interest." Flynn, 58 F 3d at 290. While there is no test as to which public interests are sufficient to require the surrender of the individual's right, surely, as in this case, where a department of the state is sending an employee out of the office and into the public realm in order to evaluate the various agencies which deal with that department, there is a legitimate public interest in assuring that the individual is mentally capable and fit for employment, for both reasons of security and of efficiency.

CONCLUSION

The court finds that DOT's order that Mr. Haney attend a medical examination was reasonable. The court also finds that DOT's discipline and eventual termination of Mr. Haney for his failure to attend the medical examination was reasonable. The court does not find that Mr. Haney's right to privacy was violated by DOT's action. The agency decision to uphold Mr. Haney's discipline and termination is affirmed.

Dated this 15th day of Feb., 1996

BY THE COURT:


Paul B Higginbotham
Circuit Court - Branch 17

CC: Court File
Aty Jeffrey P Sweetland
Aty DAVID C Rice
Aty Jennifer Sloan Lattis